

Irish Centre for Human Rights
National University of Ireland, Galway
University Road
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August 18, 2006

Ms. Mairéad McCabe
Clerk to the Joint Committee on Child Protection
Kildare House
Kildare Street
Dublin 2

Re: Submission to the Joint Committee on Child Protection

Dear Ms. McCabe,

In response to your letter dated 21st July 2006, we have attached for your attention the Irish Centre for Human Rights' submission to the Joint Committee on Child Protection regarding child rights and sexual offences against children.

Respectfully yours,

Elisabeth S. Ahlquist

Jill E. Monnin

INTRODUCTION

Although international human rights law has not dealt specifically with statutory rape, human rights treaties do provide a framework in which the Committee's Orders of Reference can be analyzed. This submission represents the results of the Irish Centre for Human Rights' examination of these treaties and their implications for both the rights of those accused of statutory rape and the protection of children against sexual offences. This paper will examine the international human rights that Ireland, as a State Party, has a duty to preserve. Additionally, it presents a summary of legal trends in statutory rape laws of other jurisdictions, in order to highlight approaches that best reflect human rights principles. As the Committee evaluates Ireland's own approach and policy related to sexual offences against children, it should consider international human rights and seek to achieve a proper balance between fair trial rights for the accused and adequate safeguards for minors under the age of consent.

A BRIEF HISTORY OF STATUTORY RAPE LAWS

English law first codified statutory rape as a criminal offence in 1275 at a time when women were viewed as property and chastity was prized.¹ Modern criminal codes of countries throughout the world now include statutory rape laws, though ages of consent and availability of defenses vary. The Irish Free State enacted the Criminal Law (Amendment) Act, 1935, which remained law in Ireland until the recent Supreme Court decision in *C.C. v. Ireland*.² The Act mirrored the early English law by implementing strict liability, denying the accused a defense of mistake as to the age of the alleged victim. While England and other

¹ See, e.g., Michelle Oberman, Turning Girls into Women: Re-Evaluation Modern Statutory Rape Law, 85 *The Journal of Criminal and Criminology* 15, 24-25 (1994); *C.C. v. Ireland* [2006] 33 IESC ____ (citing *B (A Minor) v. DPP* [2000] 2AC 428).

² *C.C.*, 33 IESC ____.

jurisdictions amended or adopted laws to provide for a mistake of fact defense, Ireland did not.³

The origins of statutory rape laws are rather archaic and unrelated to human rights; and although these laws have shifted from a view of women as property, it is important to recognize that the majority of them maintain an intent to protect young women and society from the consequences of premature sexual activity, primarily teenage pregnancy.⁴ But as this submission will show, international human rights law can play an important role in formulating balanced laws that serve to protect all involved parties.

INTERNATIONAL LEGAL NORMS

Human rights legal norms are derived from a variety of international documents founded on the Universal Declaration of Human Rights (“UDHR”),⁵ the International Covenant on Civil and Political Rights (“ICCPR”),⁶ and the International Covenant on Economic, Social and Cultural Rights (“ICESCR”),⁷ the three primary instruments of human rights.

Rights of the Accused: Defense of Mistake of Fact

The UDHR is central to any discussion of international human rights law and provides for the rights to “life, liberty and security of person.”⁸ Rights associated with a fair trial assure that the defendant’s life and liberty are not arbitrarily restricted. The ICCPR, and

³ See, “Trends of Statutory Rape Law” in this paper.

⁴ See, e.g., *Hess and Nguyen v. The Queen* [1990] 2 SCR 22; C.C., 33 IESC __; Oberman, 25.

⁵ Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948). [hereinafter UDHR]

⁶ International Covenant on Civil and Political Rights, GA res. 2200A (XXI), UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966). [hereinafter ICCPR]

⁷ International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), preamble at 49, UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966). [hereinafter ICESCR]

⁸ UDHR, Art. 3 at 72.

ICESCR recognize, that certain rights “derive from the inherent dignity of the human person,”⁹ making these “equal and inalienable rights of all members of the human family.”

The UDHR,¹⁰ ICCPR,¹¹ and The European Convention on Human Rights,¹² expressly provide for an accused’s right to a presumption of innocence. A presumption of innocence demands that all elements of a crime, specifically *mens rea* (guilty mind) and *actus reus* (guilty act), be proven in order to establish guilt. In *C.C. v. Ireland*, the Court stated that proof of guilt requires proof of *mens rea* guilty mind; therefore, the concept of *mens rea* requires the availability of a defense of an innocent mind, e.g. mistake of fact as to age.¹³ The combination of an accused’s presumption of innocence and a right to defend against “attacks upon his honour and reputation”¹⁴ further underscores the necessary *mens rea* requirement for criminal offenses that are not regulatory in nature and that impose high sentences.¹⁵

The Supreme Court recognized the importance of these rights in *C.C.* when it noted that the Sex Offenders Act, 2001, which implemented a sex offender registry, could have the effect of destroying an offender’s career and reputation following enrollment on the registry.¹⁶ A mistake of fact defense allows an accused the protection of the law against threats to his/her reputation resulting from actions performed without criminal knowledge, intent. Additionally, strict liability offenses, which carry a possibility of life imprisonment,

⁹ See, International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966) [hereinafter ICESCR]; International Covenant on Civil and Political Rights, GA res. 2200A (XXI), preamble at 52-53, UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966). [hereinafter ICCPR]

¹⁰ UDHR, Art. 11(1) at 73.

¹¹ ICCPR, Art. 14(2) at 54.

¹² Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI.195), Art. 6(1)-6(2).

¹³ *C.C.*, 33 IESC ____ (citing *Sherras v. De Rutzen*, [1895] 1 QB 918 at 921).

¹⁴ *Id.*, Art. 12 at 73.

¹⁵ ICCPR, Art. 14(2) at 54.

¹⁶ *C.C.*, 33 IESC ____.

deny the convicted party his/her right to life and liberty, thereby failing to provide “all the guarantees necessary for his defence.”¹⁷

Protection and promulgation of fair trial rights demands the availability of a mistake of fact defense; however, this is but a part of the balance required by international human rights law.

Rights of the Child: Protection from Sexual Abuse and Exploitation

International human rights law gives special recognition to children as holding a unique position in society, entitling them to “special care and assistance” and the right to “social protection.”¹⁸ This blanket right highlights the need for states to actively promote and protect the rights of children within the family, society and state.¹⁹ However, this tri-part relationship demonstrates the autonomous rights of children, outside the umbrella protection of the family, which the state must expressly or impliedly recognize.²⁰ This language is most applicable to the Committee’s Orders of Reference seeking to evaluate the desirability of a constitutional amendment for the protection of the child.²¹

States Parties have a responsibility to “pursue by all appropriate means” children’s right to “a special protection against the physical and moral hazards to which they are

¹⁷ UDHR, Art. 11(1) at 73.

¹⁸ UDHR, Art. 25(2) at 76.

¹⁹ ICCPR, Art. 24(1) at 55.

²⁰ Part I(16)-(17) of the European Social Charter relate to the family as a “fundamental unit of society” and to children’s rights to “social, legal and economic protection, which are expressly or impliedly found in Articles 40 through 43 of the Irish Constitution. *See, e.g.,* European Social Charter, Council of Europe, Turin, 18.X.1961, Part I(7); Ireland, Nat’l Report on the Follow-up to the World Summit for Children 1990-1999, s.C.1.1. at 6, delivered to UNICEF, *available at* http://www.unicef.org/specialsession/how_country/index.html (last visited 18 August 2006).

²¹ Another document for consideration is the African Charter on the Rights and Rights and Welfare of the Child. While not binding on Ireland, it is interesting to note that unlike other treaties included in this discussion, the Charter creates a responsibility for States Parties’ to protect children from “inducement, coercion or encouragement” to “engage in any sexual activity.” Art. 27.1(a) This Charter provides a broad approach, recognizing the need for child protection within the context of social and health concerns plaguing the continent. Such language acknowledges that where a child is induced, coerced or encouraged, his/her consent may not be willful.

exposed.”²² This special protection is the crux of the Convention on the Rights of the Child²³ (“CRC”)—which incorporates principles established in the Geneva Declaration of the Rights of the Child of 1924²⁴ and the 1959 United Nations Declaration of the Rights of the Child.²⁵ The CRC dictates that States Parties recognize, promote, and protect the autonomous rights of the child outside of the family. Rather than providing broad statements concerning child rights, the CRC delineates specific, concrete duties for all States Parties, including “protect[ing] the child from all forms of sexual exploitation and sexual abuse” via measures designed to prevent “the inducement or coercion of a child to engage in any unlawful sexual activity.”²⁶ States must:

take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.²⁷

Human rights law recognizes that children need to be protected from exploitation by adults and authority figures. While moral considerations often influence the construction of statutory rape laws, the primary concern should be protecting children, not from their peers, but from adults in positions of authority over them. A focus on preventing coercion of children by adults should also acknowledge that young people may engage in sexual exploration during their teenage years, and that therefore, sexual activity among youth may be legitimate at some point under the age of majority. Age of consent laws should reflect both principles of protection and autonomy.

²² European Social Charter, Part I(7).

²³ Convention on the Rights of the Child, G.A. Res. 44/25, Annex, at 167, U.N. Doc. A/Res/44/25/Annex (Nov. 20, 1989). [hereinafter CRC]

²⁴ Geneva Declaration of the Rights of the Child, League of Nations, O.J. SPCE. Supp. 21, at 43 (1924).

²⁵ Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at 19 (Nov. 20, 1959). The CRC references the Declaration of the Rights of the Child, which in turn references the Geneva Declaration of 1924.

²⁶ CRC, Art. 24 at 171.

²⁷ *Id.*, Art. 19(1) at 169.

Special consideration should also be given to the rights of male juvenile defendants, who under the current Criminal Law (Sexual Offences) Act, 2006, can be charged with statutory rape.²⁸ It should be noted that s.5 of the Act, protecting females under age 17 from prosecution, may conflict with the recognized principle that all persons, regardless of gender, are equal before the law, and that laws should not discriminate based on gender. Additionally, this section ignores the possibility that young women may initiate sexual encounters with younger individuals. Where juveniles can be charged with a criminal offence, it is important to recognize that they should be accommodated by considering the accused's age in order to promote his/her rehabilitation.²⁹

Children, like defendants, have a right to privacy under human rights legal norms. In the use of children as witnesses in sex offence trials, states should recognize limits to the types of evidence that may be introduced at trial, as well as the depth of questioning allowed during cross-examination, e.g. history of sexual activity clothing, etc. As a central pillar of international human rights law, these fundamental principles should play a role in any consideration of statutory rape laws.

TRENDS IN STATUTORY RAPE LAWS

Comparative analysis of other jurisdictions' statutory rape laws demonstrates the ways in which states have attempted to implement the rights discussed above. The following observations represent general legal trends in Canada,³⁰ England and Wales,³¹ France,³² and Germany's³³ statutory rape laws.

²⁸ Criminal Law (Sexual Offences) Act, 2006 (Act No. 15/2006), ss.3(9)-(10).

²⁹ ICCPR, Art. 14(4) at 54.

³⁰ Canada Criminal Code, R.S.C., ch. C-46, ss.150-51, 53 (1985) (Can.).

³¹ Criminal Law Amendment Act, 1885, 9 & 10 Vict., c. 5 & 9 (Eng.).

³² Code Pen., Art. 227-25—227-27 (Fr.).

³³ Strafgesetzbuch [StGB] [Penal Code] 13 Nov. 1998, Reichsgesetzblatt [RGBI], s.176, 182 (F.R.G.).

Age of Consent

The ages of consent vary from age 14³⁴ to 16.³⁵ This range recognizes that some teenage youth may choose to engage in sexual activities as they mature.

Limited Strict Liability

Those countries that impose strict liability, including England, Canada, and Germany, limit its use to offenses committed against children under a specific age. This upholds the duty imposed by the CRC to avoid the exploitation of children and maintains a policy of protecting pre-pubescent minors during their most formative years when they may not yet comprehend the meaning or consequences of sexual activities. At the same time, it helps to set the lower limit of an age band within which exemptions and defenses can exist.

Defense of Mistake of Fact

The majority of countries provide a defense of mistake of fact, allowing the defendant to prove that he/she had a reasonable belief that the complainant was over the age of consent. This acknowledges the non-regulatory nature of statutory rape, and the necessity of proving all required elements of a crime, especially *mens rea*.

Maximum Sentences

The available range of sentences varies dramatically among jurisdictions. However, only England allows for the possibility of life imprisonment. The severity of punishment generally varies with the age of the child and ranges from monetary fines to ten years imprisonment.

Gender-Neutral Language

All of the statutes use gender-neutral language, referring to “persons” and occasionally to the universal man. This avoids discrimination before the law and acknowledges that women can also be charged with statutory rape.

³⁴ Canada Criminal Code, s.151 (Can.).

³⁵ Criminal Law Amendment Act, Art. 9 (Eng.).

Persons in Authority

In Canada³⁶ and France³⁷ defendants who are persons in authority over children are subject to harsher sentencing in cases of statutory rape. Under Canadian statutory law persons in authority are also criminally liable for sexual activities with youth above the age of consent but below the age of majority.³⁸ While the accused has a mistake of fact defense, this statute seeks to protect youth under the age of 18 from being sexually exploited by authority figures. Additionally, freedom is given to the court to consider a number of factors in order to better enable the state to protect youth from exploitative actions that could be taken by adults over age 18.³⁹

RECOMMENDATIONS

The Centre's general recommendation is that the Oireachtas ensure a *balance* between the accused's fair trial rights, including a right to a mistake of fact defense, and the protection of children. In light of the above discussion, the following are specific ways this balance can be achieved:

- ***Age of Consent:*** International human rights treaties do not explicitly discuss consensual sexual activity involving children. However, they do call for protections against sexual abuse while also recognizing a level of autonomy for children. There is a strong social policy for providing a minimum age below which strict liability applies to protect children in their most formative years. While deciding where to draw the age of consent is difficult, it is important to recognize the autonomy of youth and the reality that they may engage in sexual activity with their peers. By implementing age bands, the state will, however, continue to protect youth under the

³⁶ Canada Criminal Code, s.153.

³⁷ Code Pen., Art. 227-26—22-27 (Fr.).

³⁸ Canada Criminal Code, s.153(1.1).

³⁹ *Id.*, s.153(1.2).

age of majority from sexual coercion and exploitation by older, and more likely, experienced adults—for example by providing more stringent penalties to those who are over 21 and engage in activities with those under 18.

- **Close in Age Exception:** The statutes cited above illustrate the wisdom of implementing age bands, which provide an exemption from prosecution for engaging in sexual activity with others in proximity of age.
- **Definitions:** By defining specific age groups with consistent terminology, e.g. “child”, “youth”, “teen”, etc., the legislature can provide a clearer demarcation for applying age bands. Additionally, such terminology recognizes the different physical, emotional and mental stages between children and youth. In regard to defining sexual acts covered by statutory rape law, consideration should be given to acknowledging various forms of sexual activities, including oral, anal, and vaginal sex. Use of such terms incorporates current medical terminology.
- **Authority Figures:** Persons in authority have the potential to misuse their power, supervision, or responsibility over children. To avoid manipulation, coercion, or exploitation of children, it is important to hold persons in authority accountable. While incest and other sex crime statutes may apply to familial relations, special provisions and higher sentencing for persons in authority will expand liability to other individuals who are “responsible for the education, supervision or welfare of the victim.”⁴⁰
- **Mistake of Fact Defense:** Defendants should be provided with all means necessary to secure a fair trial, including defenses for non-regulatory offenses. In cases of consensual sexual activity with minors below the age of consent, the accused should be able to raise a defense of reasonable belief as to the age of the child. Statutory

⁴⁰ Criminal Law (Sexual Offenses) Act 2006, s.1.

provisions may, however, be used to limit this defense to non-authoritative figures, and persons who took all reasonable precautions to determine the age of the complainant. When drafting the defense, the Oireachtas should also implement protections for the child, particularly in the types and use of evidence during trial. It is important that a child not lose his/her legal protection due to his/her physical maturity.⁴¹

- ***Gender-Neutral Language:*** International law dictates rights for individuals regardless of their gender. Statutory laws should reflect this by using non-gender specific terms.
- ***Gender-Neutral Application of the Law:*** Just as human rights law applies equally to individuals regardless of their gender, it is important that the application of laws is also non-gendered. This reflects the desire that males and females be prosecuted and protected equally under the law.

⁴¹ Law Reform Commission, Report on Child Sexual Abuse, Sept. 1990, § 4.13 at 41.