

**REPORT OF THE CRIMINAL LAW RAPPORTEUR FOR THE  
LEGAL PROTECTION OF CHILDREN**

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## **Foreword**

In my capacity as Criminal Law Rapporteur for the Legal Protection of Children, I have the honour of submitting this Report to the Dáil and Seanad for consideration and debate on the subject of statutory rape and cognate offences.

I am indebted to Dr Karen Brennan of Queen's University, Belfast, for research assistance in the preparation of the Report; and to my colleagues, Professor Paul O'Connor and Mr John O'Dowd, for helpful comments on an earlier draft.

The opinions expressed in the Report are those of the author.

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14 December 2007

### ***A. Introduction and Summary***

1.01 This Report deals with key aspects of the criminal law relating to sexual offences against children. The Report is divided into five sections as follows:

- introduction and summary (paras 1.01-1.03);
- the legal regime governing statutory rape under the Criminal Law Amendment Act 1935 (paras 2.01-2.20);
- the effect of the decision of the Supreme Court in *CC v Ireland* [2006] IESC 33, together with an analysis of the reasoning in that case (paras 3.01-3.64);
- a description and assessment of the legislative response to the *CC* case (paras 4.01-4.28);
- and conclusions and recommendations as to how the law in this area might be improved (paras 5.01-5.06).

1.02 **The principal conclusion of the Report is that:**

*strict liability should be reinstated as the cornerstone of the criminal law governing statutory rape.*

1.03 **The principal recommendation of the Report is that:**

- *the Constitution should be amended to permit this to happen; but that a legal regime built on the principle of strict liability should be structured so that experimental sexual behaviour between children of comparable age should be excluded from the ambit of a newly configured offence of statutory rape.*

## ***B. Statutory Rape under the Criminal Law Amendment Act 1935***

- 2.01 The Criminal Law Amendment Act 1935 created two separate offences in respect of sexual intercourse with a girl under the age of seventeen. Both offences described sexual intercourse as unlawful carnal knowledge, but were commonly known as statutory rape.
- 2.02 Section 1 of the 1935 Act made it an offence for a male to have sexual intercourse with a girl under the age of fifteen. The offence was punishable by up to life imprisonment.
- 2.03 Section 2 made it an offence to have sexual intercourse with a girl under seventeen. The offence was punishable by up to five years' imprisonment for a first offence and up to ten years' imprisonment for a subsequent offence.
- 2.04 The exclusive concern of the legislature in sections 1 and 2 was the protection of young girls; the Act was silent on the issue of the sexual exploitation of underage boys by mature females. Thus a woman who had sexual intercourse with a boy under fifteen could have been convicted of sexual assault as consent is no defence to that offence: Criminal Law Amendment Act 1935, section 14. But she would have committed no offence if the boy was over fifteen since male consent became fully operational at that age.
- 2.05 The policy underlying the offence of statutory rape was 'to protect young girls, not alone against lustful men, but against themselves': *Attorney General (Shaughnessy) v. Ryan* [1960] IR 181.
- 2.06 Accordingly, consent was no defence to a charge under either section of the 1935 Act.
- 2.07 Nor was it a defence that the girl looked over seventeen, or that the defendant believed, even on reasonable grounds, that she was over the age of consent: *Coleman v. Ireland* [2004] IEHC 288; *CC v Ireland* [2005] IESC 48.

- 2.08 Consequently, the fact that the defendant may have been misled by the girl's appearance, or may have had other grounds for believing that she was over the age of consent, was relevant only to sentence but did not affect his liability: *People (Attorney General) v. Kearns* [1949] IR 385.
- 2.09 In short, the offence of statutory rape was complete once it was proved that the defendant had had sexual intercourse with a girl who was *in fact* underage: *People (Attorney General) v. O'Connor* [1949] Ir Jur Rep 25.
- 2.10 Nor did it matter that the defendant was more or less the same age as the victim, or even that the defendant and victim were boyfriend and girlfriend. If the girl was underage, the boy was guilty of the offence even in a case where the girl had instigated the sexual contact between them.
- 2.11 To that extent the offence of statutory rape as defined in the 1935 Act might be regarded as over-inclusive. Insofar as the rationale for the offence was the protection of young girls from sexual exploitation by older males, it is arguable that the legislature ought to have limited the scope of the offence accordingly.
- 2.12 By the same token, it may be thought that any newly-constituted offence of statutory rape should not comprehend cases in which sexual intercourse is free of any element of exploitation.
- 2.13 On the other hand, if the rationale for the offence of statutory rape is more broadly defined as including the paternalistic goal of protecting young girls 'against themselves', this objection falls away. On this approach, the issue is whether there are legitimate objective reasons for imposing strict liability even in the absence of an element of exploitation.
- 2.14 This approach has been endorsed by the United States Supreme Court. In *Michael M v. Superior Court of Sonoma County* (1981) 450 US 464, the appellant objected to a

provision broadly similar to section 1 of the 1935 Act on the grounds that its failure to provide for the sexual exploitation of young boys was discriminatory. But the Supreme Court found that the risk of pregnancy was an objective justification for treating young girls differently, and upheld the constitutionality of the provision on these grounds.

- 2.15 As already indicated (above at para. 2.04), the broader version of the rationale was expressly adopted in this jurisdiction in *Attorney General (Shaughnessy) v. Ryan* [1960] IR 181).
- 2.16 The weakness of this approach is that it failed to distinguish between two categories of defendant who deserve to be treated differently on moral grounds: older male predators who fully merit the stigma of conviction and punishment for a serious criminal offence, and young boyfriends of sexually active underage girls who clearly do not.
- 2.17 In practice this weakness was ameliorated by the relatively low risk of prosecution in cases where the element of sexual exploitation was missing (in the nature of things, such cases would have been hampered by a lack of witness evidence); and by the imposition of an appropriately light sentence in the event that the defendant was prosecuted and convicted.
- 2.18 However, there was always a real possibility that a successful prosecution could be brought even in a case where the element of exploitation was missing.
- 2.19 Given that the actus reus of the offence of statutory rape under the 1935 Act was cut-and-dried – sexual intercourse with an underage female – the defendant was either guilty or not guilty of the offence as charged. Unlike many other criminal offences – such as assault and theft, for example - there was no harm continuum on which the prosecution authorities could rely as a basis for invoking the *de minimus* rule - in other words, as a basis for not prosecuting in a case where the injury or damage caused by the defendant was deemed to be too trifling to merit prosecution in the public interest.

- 2.20 In the final section of this Report a possible solution to this difficulty will be canvassed – to cater for the prospect of the Constitution being amended to permit the reinstatement of strict liability as the cornerstone of a new offence of statutory rape.

### **C. CC v Ireland**

#### ***Decision and reasoning***

- 3.01 In *CC v Ireland* [2006] IESC 33, the applicant was convicted of statutory rape under section 1(1) of the 1935 Act. The applicant, who was nineteen, had had sexual relations with a fourteen year old girl. The applicant admitted the charges against him, but claimed that the girl had lied about her age – saying she was sixteen – and had initiated the contact between them after their first encounter, when no intercourse had taken place.
- 3.02 The gravamen of the applicant’s complaint in the Supreme Court was that the unavailability of a defence of mistake of fact as to the girl’s age was inconsistent with the right to a trial in due course of law as enshrined in Article 38 of the Constitution (and as guaranteed by Article 6 of the European Convention on Human Rights and Fundamental Freedoms).
- 3.03 Counsel for the applicant also contended that the absence of a defence of mistake of fact to a charge under section 1(1) of the 1935 Act amounted to the punishment of the morally innocent and, consequently, constituted a failure to vindicate the applicant’s personal rights as enshrined in Article 40.3.1 and 2 and Article 40.4 of the Constitution.
- 3.04 Unanimously allowing the appeal, the Supreme Court granted a declaration that section 1(1) of the 1935 Act was unconstitutional on the grounds set out by the applicant, and quashed his original conviction.
- 3.05 Delivering the judgment of the Supreme Court, Hardiman J said that section 1(1) of the 1935 Act was being struck down

because it afforded the applicant ‘absolutely no defence once the actus reus is established, no matter how extreme the circumstances’, and because its application in the instant case entailed the stigma of conviction and punishment for a serious criminal offence of a morally innocent person: ‘I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or the dignity of the individual or as meeting the obligation imposed on the State by Article 40.3.1 of the Constitution.’

### ***Strict liability and punishing the morally innocent***

- 3.06 The logic of the reasoning supporting the decision of the Supreme Court in *CC v Ireland* is debatable. Contrary to the view repeatedly articulated by the Court in the course of its judgment, the doctrine of strict liability does *not* involve the punishment of morally innocent defendants.
- 3.07 On the contrary, the doctrine of strict liability is based on the invariable requirement that there must be something that the defendant should have done to comply with the law in the circumstances before criminal liability can be imposed: *Hobbs v Winchester Corporation* [1910] 2 KB 471; *Alphacell Ltd v Woodward* [1972] AC 824.
- 3.08 Accordingly, where the defendant was not in a position to comply with the law’s requirements, or was otherwise powerless to prevent the commission of the offence, he has a good defence notwithstanding that the charge against him is one of strict liability: *Reynolds v GH Austin & Sons Ltd* [1951] 2 QB 135; *Lim Chin Aik v R* [1960] AC 161 PC.
- 3.09 Similarly, the doctrine of strict liability does not override the fundamental requirement that the accused’s conduct must be voluntary; nor does it exclude the possibility that one of the general defences may be available to him: McAuley and McCutcheon, *Criminal Liability* (Dublin, 2000), Chap. 2.3, 2.4 and 7.1.



- 3.10 Admittedly, strict liability offences do not require proof of ordinary mens rea in the form of intention or subjective recklessness. Consequently, it is no defence to a charge of strict liability to say that one did not intend the prohibited result, or that one did not consider the risk of bringing it about.
- 3.11 The rationale for this state of affairs is simple. Strict liability is normally imposed to protect the public interest in situations where the law would be effectively unenforceable if proof of intention or subjective recklessness were required.
- 3.12 Thus strict liability is usually imposed in the context of statutory regimes dealing with what have come to be known as public welfare offences: *Morissette v United States* [1952] 342 US 242 at 246 – in other words, with the legal protection of public health, hygiene, safety and morals: *Sweet v Parsley* [1970] AC 132 at 163.
- 3.13 Similarly, it is true that strict liability is routinely imposed in the absence of negligence on the defendant's part. Consequently, it is no defence to a charge of strict liability that an ordinary person might have acted as the defendant did in the circumstances: *Hobbs v Winchester Corporation* [1910] 2 KB 471; *Alphacell Ltd v Woodward* [1972] AC 824.
- 3.14 Again the rationale is straightforward: the public interest would be frustrated if a defendant could wash his hands of an inherently risky venture simply on the basis that he had taken reasonable steps to ensure its safety: *Alphacell Ltd v Woodward* [1972] AC 82.
- 3.15 However, this does *not* mean that strict liability can be imposed in the absence of fault. As the jurisprudence cited in the preceding paragraphs illustrates, it simply means that the moral or fault element in strict liability offences is more stringent than ordinary mens rea.
- 3.16 In a nutshell, this higher or stricter standard of fault may be described as follows: a defendant who embarks on a course of conduct which is inherently dangerous or risky with respect to

the occurrence of a prohibited result must take the consequences if things go wrong: *Alphacell Ltd v Woodward* [1972] AC 82.

- 3.17 Thus in *Alphacell* the conviction of a riparian company for polluting the local river was upheld notwithstanding that it was accepted that the company was not negligent. Although the company had taken reasonable steps to ensure that effluent from its plant did not enter the river, the fact remained that pollutants had entered the river as a direct result of a manufacturing process for which the company was responsible.

### ***Strict liability and serious crime***

- 3.18 Nor is it true that strict liability is incompatible with conviction and punishment for serious crime - defined as an offence capable of attracting a substantial custodial sentence, or, even more stringently, a term of life imprisonment.
- 3.19 In both the common law and civil law traditions strict liability has long been a core component of the law of murder. For example, in Irish law the mental element in murder is defined as an intention to kill or cause serious injury: Criminal Justice Act 1964, section 4.
- 3.20 In the result, a person may be found guilty of murder (and, if convicted, sentenced to a mandatory term of life imprisonment) once it is established that he intended to cause serious injury to his victim, notwithstanding that he had no intention to kill and that the injury he inflicted would not normally be regarded as life-threatening: Law Reform Commission, *Report on Homicide: Murder and Involuntary Manslaughter* (LRC R 2008), forthcoming; *People (DPP) v. Kirwan* [2005] IECCA 136 (discussing the meaning of the term 'serious harm' in section 1 of the Non-Fatal Offences Against the Person Act 1997).
- 3.21 Known as the doctrine of implied malice, this has traditionally been the criminal law's way of saying: 'Avoid the risk of

seriously wrongful other-directed conduct which may result in death - even where it is not obviously life-threatening. If you engage in such conduct and cause the death of another person, you will be convicted of murder on the grounds that your behaviour is no less culpable than that of the intentional killer’.

- 3.22 Strict liability is also a feature of the crime of manslaughter, which in modern legal systems is typically regarded as the second most serious offence in the criminal calendar after murder; and is punishable by up to life imprisonment at the discretion of the court.
- 3.23 Thus on a charge of unlawful act manslaughter, it is enough for the prosecution to show that the accused committed an unlawful act which caused the victim’s death; and that the unlawful act was dangerous in the minimal sense that it was likely to cause some harm to the victim, though not necessarily serious harm: *R v Church* [1965] 2 All ER 72.
- 3.24 In the result, a single push or shove which results in death is enough to convict a person of manslaughter in Irish law, notwithstanding that a reasonable person would not have foreseen death or even serious injury in the circumstances.
- 3.25 In the common law tradition reliance on strict liability in the law of homicide has attracted widespread criticism. In the context of the law of murder, it has been suggested that the element of strict or constructive liability could and should be removed by defining ‘serious injury’ as ‘life-threatening injury’: for discussion, see Law Reform Commission, *Report on Homicide: Murder and Involuntary Manslaughter* (LRC R 2008), forthcoming.
- 3.26 Similarly, it has been suggested that the scope of unlawful act manslaughter should be confined to acts which are unlawful and likely to endanger life, thereby making this form of involuntary manslaughter turn on a finding of negligence with respect to the victim’s death: for discussion, see Law Reform Commission, *Consultation Paper on Involuntary Manslaughter* (LRC CP 44-2007), Chap. 2.

- 3.27 Be that as it may, in most common law jurisdictions including Ireland, it remains the case that a person may be convicted of murder on the basis of an intention to cause serious injury, defined as including injuries not normally regarded as life-threatening; and of manslaughter where even serious injury (not to mention death) was both an unforeseen and unforeseeable consequence of his actions.
- 3.28 Thus where the mental element in murder includes an intention to cause serious injury thus defined, it follows that it is no defence for an accused to say that he did not realise, either through ignorance or mistake, that the injury was life-threatening, or that a reasonable person would not have regarded it as life-threatening.
- 3.29 By parity of reasoning, on a charge of unlawful act manslaughter it is no defence to say that the blow which caused the victim's death would not normally be regarded as likely to result in serious injury or death, or that the defendant, either through ignorance or mistake, failed to appreciate that his actions were likely to cause injury of any kind.
- 3.30 In short, lack of mens rea - even in the attenuated sense of negligence - as to a crucial element of actus reus is no defence in either case.
- 3.31 Nor has commentary on the employment of strict liability in homicide been all one way. On the contrary, since the division of homicide into murder and manslaughter in the sixteenth century, the use of constructive malice in the law of homicide, and in some offences against the person, has been resolutely defended on policy grounds.
- 3.32 Broadly speaking, the argument has been that strict or constructive liability in the form of 'short-measure mens rea' is the most effective means of affording adequate protection to the key interests of life and bodily integrity within the framework of the criminal law: McAuley and McCutcheon, *Criminal Liability* (2000), Chap.1.6, 6.9, 6.10.

### *Strict liability and statutory rape*

- 3.33 Interestingly, the Supreme Court does not appear to have been invited to consider, and did not itself consider, the operation of the doctrine of strict liability in the context of the offences of murder and manslaughter.
- 3.34 Had this matter been given a proper airing, it is open to question whether the Court may have been more circumspect in its assessment of the propriety of strict liability in the context of statutory rape.
- 3.35 To be fair to the Court, its silence on the issue of strict liability in homicide may have been because it was assumed by both counsel and the Court that implied malice and unlawful act manslaughter are instances of *constructive*, as opposed to strict, liability. In other words, it may have been assumed that strict liability offences are *sui generis* because, unlike those of constructive liability, they lack any element of culpable wrongdoing from which liability for the prohibited outcome may be derived.
- 3.36 Hardiman J's treatment of counsel for the State's analogy between the offences of dangerous driving causing death and statutory rape supports this interpretation. When counsel appeared to suggest that a person could be convicted of dangerous driving causing death without any prior culpable wrongdoing on his part, Hardiman J correctly rejected this proposition on the grounds that it had no basis in the authorities.
- 3.37 But the learned judge then went on to say that this was precisely the problem with statutory rape: 'What, precisely, is the difference between the present measure and the dangerous driving hypothesis? At bottom it is this: one person's rights would be negated because he took the risk of driving, while another person's rights are negated because he took the risk of having sexual intercourse. I do not believe that a legally significant distinction can be drawn on that basis since the act

of consensual intercourse is, like the act of driving...*prima facie* lawful': *CC v Ireland* [2006] IESC 33 at 51.

- 3.38 But this conclusion only follows *ex hypothesi*. If we choose to define the defendant's behaviour in a *CC*-type case as 'having consensual sexual intercourse', then there is certainly no basis for saying that his actions were *prima facie* unlawful, and Hardiman J's conclusion that criminal punishment in these circumstances would be arbitrary and unjust seems quite natural.
- 3.39 In other words, conviction in these circumstances seems egregiously wrong because we cannot point to a piece of prior culpable wrongdoing which caused the prohibited outcome and which, by analogy with a single punch in involuntary manslaughter, can be used as a basis for the ascription of strict liability in respect of the prohibited outcome.
- 3.40 But if we follow the logic of the legislative prohibition contained in section 1(1) of the 1935 Act, things look different. Since section 1(1) makes it an offence to have sexual intercourse with a girl under fifteen, and bearing in mind that the victim saw fit to lie to the defendant about her real age, it seems more realistic to describe the defendant's behaviour as 'having sex with a girl *who might be underage*.'
- 3.41 On this analysis, the defendant can fairly be said to have engaged in an inherently risky activity which might turn out to be unlawful. He embarked on a course of conduct which was inherently dangerous or risky with respect to the occurrence of the prohibited result.
- 3.42 The risks in question were succinctly identified by McLachlan J in her dissenting judgment in *Hess and Nguyen v. The Queen* [1990] 2 SCR 906: 'the girl may lie as to her age or even produce false identification, a not uncommon practice in the world of juvenile prostitution.'

- 3.43 Admittedly, this approach seems harsh where the defendant believes, on reasonable ground, that his victim was *not* underage.
- 3.44 But it does not involve the punishment of the morally innocent. Viewed objectively, having sex with a young girl who might turn out to be underage is blameworthy conduct, and in that sense is the functional equivalent of a blow or a push in unlawful act manslaughter, or a serious blow in implied malice murder. In other words, it supplies the element of prior fault from which liability for the prohibited outcome can be constructed.
- 3.45 This point can perhaps be made with greater force if we focus on the popular paradigm of statutory rape: the older male predator who seeks to rely on the defence of mistake as a way of escaping liability. In a case of this kind, it seems inconceivable that we would consider defining the defendant's behaviour in morally neutral terms, as 'having consensual sexual intercourse'. Indeed, to do so would be to collude with the self-justifying rhetoric frequently resorted to by defendants of this kind.
- 3.46 Plainly this was not the intention of the Supreme Court in *CC*. However, it is at least arguable that the reasoning in *CC* was over-determined by the assumption that the defendant's behaviour was morally neutral – in other words, by focusing on the fact that the sexual encounter between the defendant and the victim was consensual and appears to have been initiated by the victim, rather than on the risk involved in having sex with a very young girl.

### ***The Constitution and the criminal law***

- 3.47 Nothing in the foregoing remarks should be taken as a criticism of the Supreme Court's exercise of its constitutional jurisdiction in respect of the criminal law.

- 3.48 The argument is rather that if that jurisdiction is to be exercised effectively it should be based on a suitably nuanced analysis of the fundamental doctrines of the criminal law.
- 3.49 Considered as a body of legal doctrine, the criminal law is over eight hundred years old. Its fundamental doctrines, principles and policies have all been tested in the crucible of long experience.
- 3.50 One of the fundamental doctrines of the criminal law is that the prosecution must normally prove mens rea in the form of intention or subjective recklessness. However, mens rea thus defined is not an invariable requirement even in respect of serious crime. As already indicated, even in the case of the two most serious crimes in the criminal calendar, significantly lower levels of culpability will sometimes be enough to secure a conviction.
- 3.51 It is therefore a mistake to approach mens rea as a top-down criterion to be applied without exception to offences generally. It has never operated in this way. On the contrary, as the history of criminal liability in the common law tradition illustrates, the doctrine of mens rea evolved as a bottom-up idea which always accommodated the peculiar requirements of particular offences: McAuley and McCutcheon, *Criminal Liability* (2000), Chap. 1.
- 3.52 From the Tudors onwards, mens rea has functioned as an inductive, flexible concept which, while serving as convenient short-hand for the essential features of criminal responsibility, was always applied without prejudice to the exigencies of particular patterns of wrongdoing such as murder, manslaughter, and statutory rape.
- 3.53 Unfortunately, nothing of this is reflected in *CC*, where, following the pattern of the applicant's submissions, the burden of the Court's reasoning was that failure to provide for a defence of mistake of fact to a serious criminal charge was anomalous and unjust and should be discountenanced as an unacceptable deviation from the normal pattern of mens rea.



- 3.54 To some extent this state of affairs is an inevitable by-product of constitutional scrutiny of the criminal law. Compared to the criminal law, constitutional jurisprudence is a relatively new body of knowledge. Moreover, given its intellectual roots in the Enlightenment and its dominant focus on fundamental rights, constitutional reasoning tends to deal in universals where the criminal law is more interested in particulars, albeit as seen through the lens of general principle.
- 3.55 Be that as it may, given the power vested in the Supreme Court to strike down criminal legislation found to be incompatible with the provisions of the Constitution, it seems entirely right that its decisions should be informed by a proper understanding of the deep structure of the principles and policies of the criminal law.
- 3.56 Accordingly, it may be considered to be a defect in the current arrangements for the judicial review of the constitutionality of legislation that, even where fundamental issues of principle are at stake, cases receive relatively little attention before the Supreme Court has finally determined them, either from the legal profession and legal scholars, from other relevant sources of expertise, or from public opinion more generally.
- 3.57 The reactions which a decision provokes from those quarters may well give the court pause for thought at a point when – at least in the case of a finding of unconstitutionality – it is too late to undo what has been decided.
- 3.58 Submissions made by any *amicus curiae* granted leave by the court are one possible remedy for this lack of feedback on the strength of the arguments for and against a finding of unconstitutionality.
- 3.59 However, as matters stand, the effect of such submissions is merely to amplify the argument before the court from a particular perspective; there is no opportunity for impartial analysis designed to alert a wider body of expertise and

opinion to the issue or issues at stake in the impending judgment.

- 3.60 A more radical solution would be to emulate the practice of the French *Conseil d'État* and the European Court of Justice by which a *rapporteur* (a judicial officer – in the former case the *Commissaire du gouvernement*, in the latter the Advocate General) publicly presents a reasoned recommendation to the court as to how the case should be decided.
- 3.61 In effect a draft judgment, this opinion is, of course, in no way binding on the court. However, a formal proposal for an opinion and recommendation of this kind, delivered in open court, would be far more effective than existing arrangements – the arguments of counsel and hints given by questions from the bench during oral argument – as a means of putting on notice those whose contributions to an informed public debate on the issues might be of assistance to the court.
- 3.62 Under this system the Supreme Court could of course give leave to reopen the argument after the report had been received from the 'Advocate General'. However, even in the absence of such further argument, at least in some cases public and/or expert discussion of the proposed decision may be of assistance to the court in reaching a final decision.
- 3.63 Interestingly, in many recent Indian cases the *amicus curiae* – in that system senior counsel in private practice, appointed by the Supreme Court impartially to assist it in relation to the case, and therefore in reality more like an Advocate General – has played just such a role: by publicly recommending in open court what appears to him or her to be the appropriate orders.
- 3.64 Again, a system designed along these lines would give clearer notice both to the general public and appropriate centres of expertise of the possible outcome of an important case than current arrangements do.

#### ***D. The Legislative Response to CC***

##### ***The key provisions of the Criminal Law (Sexual Offences) Act 2006***

- 4.01 The core of the legislative response to the Supreme Court's decision in *CC* was to enact the Criminal Law (Sexual Offences) Act 2006.
- 4.02 Broadly speaking, the 2006 Act does two things: it replaces the old offences of statutory rape under the 1935 Act with two new offences of defilement of a child under 15 (section 2(1)) and defilement of a child under 17 (section 3), respectively; and it introduces a defence of mistake of fact as to the victim's age in respect of both offences, in sections 2(3) and section 3(5), respectively.
- 4.03 The new offences of defilement criminalise a wider range of sexual conduct than the old offences of statutory rape.
- 4.04 The latter were confined to sexual intercourse *stricto sensu*, and could only be committed by males against female victims: see above, paras 2.01-2.05
- 4.05 In contrast, the new offences are gender neutral in respect of both offenders and victims.
- 4.06 Moreover, they comprehend acts of buggery, the penetration of the mouth and anus by the penis and by other objects, as well as various forms of aggravated sexual assault: Criminal Law (Sexual Offences) Act 2006, section 1(a), (b).
- 4.07 In the nature of things, the 2006 Act provides for a defence of mistake of fact as to the victim's age in respect of both offences of defilement.
- 4.08 The defendant is entitled to a defence of mistake on these grounds if he establishes on the balance of probabilities that he

honestly believed his victim had attained the relevant age at the time of the alleged offence: Criminal Law (Sexual Offences) Act 2006, sections 2(3) and 4(5).

- 4.09 The question of whether the defendant honestly believed his victim had attained the relevant age is to be judged subjectively, although the Act specifically provides – in section 2(4) and 2(6), respectively - that ‘the court shall have regard to the presence or absence of reasonable grounds’ for the alleged belief when deciding this issue.

### *An assessment of the 2006 Act*

- 4.10 Three key criticisms may be made of the regime of protection established by the 2006 Act.
- 4.11 The first is that the new offences appear to be over-inclusive in respect of the range of conduct criminalised. As already indicated, the actus reus of both offences includes a wide range of sexual activity above and beyond sexual intercourse.
- 4.12 Although this strategy was doubtless adopted in pursuit of the laudable aim of maximising the protection of young children from sexual exploitation by predatory adults, it may result in the unnecessary criminalisation of other children.
- 4.13 For example, sexual activity between children has long been widespread, and is known to involve boys and girls as young as 12. Moreover, it is known to include various forms of heavy petting and oral sex: J. R. Spencer, ‘Child and Family Offences’ [2004] Crim LR 347 at 354 and 360.
- 4.14 Where activity of this kind can fairly be described as regrettable but nevertheless ‘consensual’ sexual experimentation between children, it seems entirely inappropriate that it could result in prosecution and conviction for a serious criminal offence.
- 4.15 Nor is it right that we should have to rely on prosecutorial discretion as the only effective means of avoiding such an

outcome. Where a particular activity does not fit the pattern of wrongdoing contemplated by the legislature, it should not have been criminalised in the first place.

- 4.16 Secondly, the inclusion of various forms of non-standard rape - including anal rape and rape by implements – and aggravated sexual assault in what is now in effect an omnibus offence of sexual defilement, arguably compromises one of the core functions of the criminal law: namely, the proper discrimination and labelling of criminal conduct according to its essential character: for discussion, see Expert Group on the Codification of the Criminal Law, *Codifying the Criminal Law* (Dublin, 2004), para 1.103 et seq.
- 4.17 The non-standard rape and sexual assault of young children are undoubtedly serious offences and deserve to be treated as such.
- 4.18 However, they should not be lumped together with offences whose primary focus is and should remain on inappropriate sexual relations with young children, and especially – because of their particular vulnerability – young girls.
- 4.19 In other words, the division and classification of sexual offences should not be allowed to obscure the core issue in statutory rape: the sexual exploitation of young children by mature adults in circumstances where consent may have been given in the context of prostitution, or obtained in the context of abuse of trust by a predatory adult, where there may be an economic incentive for children to exaggerate their real age, and where, in the case of young girls, society has a legitimate interest in reducing the individual and social costs of teenage pregnancy.
- 4.20 The argument is not that these offences are more or less serious than the other forms of rape and aggravated sexual assault comprehended by the new offences of defilement of children established by sections 2 and 3 of the 2006 Act. It is rather that the principle of proper labelling requires that offences which are *sui generis* deserve to be classified and punished as discrete entities in their own right.

- 4.21 Deviation from this principle blunts the communicative function of the criminal law by blurring, and in some instances collapsing, the moral distinctions which, even for purely pragmatic reasons, should be clearly reflected in the criminal calendar.
- 4.22 In other words, in view of their communicative and deterrent functions, the law's commandments or conduct rules should be clear and distinct, and omnibus offences are not, by definition, conducive to this outcome.
- 4.23 Thirdly, although the legislature was constrained to provide for a defence of mistake of fact as to the victim's age on a charge of defilement, it is to be regretted that it saw fit to tether the new defence to the doctrine that mistakes need only be honest in order to excuse: above, para 4.09.
- 4.24 In *CC* the Supreme Court left open the question of how the defence of mistake should be configured in the context of a new offence of statutory rape; and it seems unlikely that the legislature could have been unaware of the fact that a requirement of reasonable belief would have afforded a higher level of protection to victims than the subjective criterion described above.
- 4.25 The decision to opt for the subjective approach was doubtless made in the interests of consistency: the subjective criterion, as mediated by the need to have regard to the presence or absence of reasonable grounds, first made its appearance in section 2(2) of the Criminal Law (Rape) Act 1981, which effectively codified the controversial rule in *DPP v Morgan* [1976] AC 182; and was subsequently adopted by the legislature as the test for mistaken belief in the context of the use of defensive force in section 1(2) of the Non-Fatal Offences Against the Person Act 1997.
- 4.26 Be that as it may, the subjective test as laid down by the House of Lords in *Morgan* has now been abandoned in English law. By virtue of sections 1-4 of the Sexual Offences Act 2003, a

defendant's belief that his victim was consenting to sexual intercourse, including non-standard intercourse of the kind described above, must now be based on reasonable grounds in order to excuse.

- 4.27 As Ashworth has argued, '[e]ven if *Morgan* is defensible as a case on general principles, it is unacceptable as a rape decision. There are certain situations in which the risk of doing a serious wrong is so obvious that it would be right for the law to impose a duty to take care to ascertain the facts before proceeding': *Principles of Criminal Law* (5<sup>th</sup> edn, 2006) at 351.
- 4.28 Although it took a generation to undo its effects, it is now accepted that the rule in *Morgan* was derived from an unduly prescriptive conception of mens rea. Like the reasoning in *CC*, the *Morgan ratio* proceeded on the assumption that the doctrine of mens rea leads, as a matter of inexorable logic, to a one-size-fits-all approach to the basic structure of serious criminal offences; whereas, as the preceding sections of this Report illustrate, the doctrine has traditionally allowed for the exigencies of particular patterns of wrongdoing when fixing the proper limits of criminal responsibility.

### ***E. Conclusions and Recommendations***

- 5.01 **Recommendation:** *It is submitted that the criticisms of the Criminal Law (Sexual Offences) Act 2006 raised in the preceding section should be addressed in the context of a comprehensive review of the law relating to sexual offences – initially by the Law Reform Commission as part of its Third Programme of Law Reform (LRC-2007); and subsequently by the Department of Justice, Equality and Law Reform.*
- 5.02 **Recommendation:** *In the course of that review consideration should be given to returning to the original conception of statutory rape based on sexual intercourse between adults and children.*
- 5.03 **Recommendation:** *Save where the defendant is more than two years older than, or is a person in authority over, the victim,*

*sexual experimentation between children should be excluded from the ambit of any offence of statutory rape thus configured.*

5.04      **Recommendation:** *By parity of reasoning, save where the defendant is more than two years older than, or is a person in authority over, the victim, sexual experimentation between children not involving the infliction of injury should otherwise be decriminalised.*

5.05      **Recommendation:** *A Constitutional referendum should be held to remove the impediment created by the Supreme Court's decision in CC in respect of the use of strict liability in the context of statutory rape.*

5.06      **Recommendation:** *In the event that the constitutional impediment created by the Supreme Court's decision in CC has been removed, any new offence of statutory rape should be based on the principle of strict liability as to the victim's age (and, it goes without saying, consent).*

5.07      **Recommendation:** *In the event that the aforementioned constitutional impediment has not been removed, the defence of mistake of fact as to the victim's age in an offence of statutory rape should include the requirement that it is for the defendant to prove on the balance of probabilities that his belief as to age was honestly held and reasonably based.*