Advice of the Ombudsman for Children in relation to the Criminal Law (Sexual Offences) Bill 2006
June 1

1. Introduction

The Criminal Law (Sexual Offences) Bill 2006 was referred to the Ombudsman for Children today, 1 June 2006. It is understood that the Bill is to pass all legislative stages and be enacted tomorrow.

Section 7(4) of the Ombudsman for Children Act, 2002 provides that I shall, at the request of a Minister, give advice on any matter relating to the rights and welfare of children, including the probable effect on children of the implementation of any proposals for legislation.

This document sets out my advice in relation to the Criminal Law (Sexual Offences) Bill 2006. This advice is grounded in and guided by the UN Convention on the Rights of the Child.

Section 2  Defilement of a child under 15 years of age

2.1 I welcome the extension of protection to both genders.

2.3 I recommend that express provision be made that the burden of proof lies with the defendant. I recommend that the standard of proof upon the defendant in this Section and Section 3 be expressly stated to be on the balance of probabilities.

2.4 I recommend the insertion of the words 'the court shall' in place of the words 'it falls to the court'. This will make it clear that the court must always apply an objective test.

Recommendation for additional sections under Sections 2 and 3:

No prosecution of children under 17 years except with consent of the DPP
I recommend that a section incorporating Section 3 (8) (a) into Section 2 be inserted to provide the same protection limiting prosecution of children under 17 as set out in Section 3.

Advocacy
A provision should be inserted allowing for the appointment of a social worker or suitably qualified person to support the child throughout the process. This should also be extended to Section 3.
Lacuna between Section 2 and Section 3
It would be possible for a person whose defence under Section 2 was successful but who none the less had sexual intercourse with a child under 17 to be cleared of any offence under the Act. Provision must be made for such persons to be prosecuted under Section 3 where their defence under Section 2 is successful.

Section 3  Defilement of a child under the age of 17 years

I recommend that Section 3(8)(a) - and its extension to Section 2 which I have recommended - be amended as follows: No proceedings against a child under the age of 17 years for an offence under this section shall be commenced save with the consent of the DPP who shall make his decision based on the best interest of both children. The decision of the DPP shall be made public.

Section 5  Act by female child under 17 years of age

This provision is on the face of it discriminatory, Article 2 of the UN Convention on the Rights of the Child prohibits discrimination except where there is a reasonable ground and justification for the discrimination. I would query whether such reasonable grounds or justification exist.

Should my recommendation relating to the extension of Section 3 (8)(a) to Section 2 be taken on board I consider this section to be superfluous.
Explanatory note to Ombudsman for Children’s Advice on the Criminal Law (Sexual Offences) Bill 2006.

1 June 2006

My advice is in relation to this specific bill. It is without prejudice to a wider discussion of the issues it raises at a later stage.

My advice is grounded in and guided by the UN Convention on the rights of the child.

The principal areas of the concern I have identified are as follows.

1. **Best interests of the child**

   Article 3 of the UN Convention on the Rights of the Child (CRC) states that, in all actions concerning children, the best interests of the child shall be a primary consideration.

   The best interests of the child principle is not incorporated into the Bill in respect of the way it treats children under 17 years who engage in sexual intercourse. Within the confines of the scheme of the bill, I have recommended that no prosecutions for offences under the Bill be brought against children under 17, save with the consent of the DPP making his decision in the best interest of both children. While I recognise that the DPP does not normally give reasons for his decisions, I consider that in this case he should, in order to ensure that the best interest of the child are at the heart of decisions taken in this respect.

   I have recommended that the provision that no child be prosecuted under Section 3 of the Act (concerning children aged 15-17), save with the consent of the DPP, should be extended to Section 2 of the Act (concerning children under the age of 15). The aim of the Bill should be to prevent adults exploiting children. Children should not be prosecuted under this bill, unless such a prosecution would be in the best interests of the child.

2. **Protection of children giving evidence – practice and procedure**

   I am concerned that children might be subjected to damaging adversarial procedures under the Bill. For example, questions might be asked of a child about their appearance, sexual history or behaviour. Adequate protection for children involved in court cases is not provided for in the Bill. The provisions of the Criminal Evidence Act, 1992 will apply to child witnesses involved in proceedings under this Bill. However consideration should be given to the
insertion of additional protection for children in the Bill which would be constitutionally sound.

3. **Article 2 of the CRC – non-discrimination**

I welcome the extension of protection under the Bill to both genders in the overall scheme of the Bill. However, the special provision in Section 5 relating to female children is, on the face of it, discriminatory against boys. It is my understanding that this provision has been proposed to prevent the stigmatisation or prosecution of pregnant teenagers. I consider that a provision that no prosecutions be brought against those under 17 years, save with the consent of the DPP acting in the best interests of the child, would guard against the prosecution of teenage mothers solely on the basis of their pregnancy. The prevention of stigmatisation is a matter that should be dealt with outside of the criminal law.

Article 2 of the UNCRC prohibits discrimination, except where there is a legitimate reason for a differentiation between children. I do not consider that such legitimate reasons arise here.

4. **The test relating to the defence of reasonable mistake**

I recommend that the Bill expressly provide that the burden of proof in respect of the defence of reasonable mistake lies squarely with the defendant.

I have also recommended that the Bill clearly state that the court must always apply an objective test when deciding the validity of a defendant’s defence. In other words, the court must always ‘look behind’ a defendant’s assertion that he or she reasonably believed a child to be of a certain age and query the reasonableness of such an assertion.

5. **Advocacy**

A provision should be inserted allowing for the appointment of a social worker or other suitably qualified individual to support the child throughout the process.

6. **Gap in protection**

It appears that there is a lacuna between Section 2 and Section 3. A person whose defence under Section 2 - that they reasonably believed the child to be 16 years of age – would be cleared of an offence under Section 2, notwithstanding the fact that they have admitted to sex with a child under 17 years of age (a crime under Section 3 of the Bill). The Bill should be amended to provide that, in such instances, a prosecution under Section 3 can be brought without any procedural difficulties.