

**Response by the Northern Ireland Commissioner for Children and Young People (NICCY) to the Northern Ireland Office Consultation on 'Reforming the Law on Sexual Offences in Northern Ireland'**

**1.0 Background**

1.1 The Office of the Northern Ireland Commissioner for Children and Young People (NICCY) was established in November, 2003, with the principal aim of safeguarding and promoting the rights and best interests of children and young people in Northern Ireland.

1.2 One of the functions of NICCY under Articles 7(2) and 7(3) of The Commissioner's Order is to keep under review the adequacy and effectiveness of law, practice and services provided for children and young persons by relevant authorities. This consultation on 'Reforming the Law on Sexual Offences in Northern Ireland' is therefore clearly within our remit.

1.3 The protection of children and young people, particularly from sexual crime which is both physically and psychologically damaging, is a priority issue for NICCY. If the abuse of children is to be seriously tackled then it is clear that the outdated laws on sexual offences require urgent modernisation. We therefore commend the Minister for carrying out the first fundamental strategic review and reform of criminal law on sexual offences within Northern Ireland and warmly welcome the opportunity to respond to this consultation.

**2.0 UNCRC**

2.1 All NICCY's work is based on the United Nations Convention on the Rights of the Child (UNCRC). The UK Government, including Northern Ireland, is a signatory to the Convention and has agreed to uphold the rights of children and young people based on the Convention. This is an important point which needs to be taken into account when reforming the law on sexual offences. NICCY recommends that the underlying principles of the UNCRC should underpin the proposed legislation to ensure that the rights, best interests and welfare of children and young people are upheld and protected.



2.2 NICCY appreciates that there are often complexities when reconciling the rights of children and young people with their welfare and best interests. That said however, NICCY would urge the NIO to review the proposals against the following relevant Articles within the UNCRC:

- Article 3: All actions concerning the child should take full account of his or her best interests;
- Article 12: The child has the right to express an opinion, and to have that opinion taken into account, in any matter or procedure affecting the child, in accordance with his or her age or maturity;
- Article 16: The child has the right to protection from interference with his or her privacy;
- Article 19: The child has the right to be protected from abuse (including sexual abuse), neglect and being harmed by the people looking after them;
- Article 34: The child has the right to be protected from sexual exploitation and sexual abuse;
- Article 35: The government should protect children and young people from being sold or taken out of the country (i.e. trafficking);
- Article 39: The child has the right to get special help to physically and psychologically recover from the effects of abuse.

### **3.0 Comments**

The consultation document effectively presents many of the complex dilemmas facing legislators, prosecutors, educators, parents, children and young people in managing sexual activity and abusive sexual relationships/behaviour with children and young people in Northern Ireland. While a broad range of issues are covered, we will predominantly address those aspects most relevant to children and young people. In particular, you seek views on the following:



### **3.1 Children**

#### **Consultation Points 14-23**

#### **14. Is it accepted that all sexual activity with children under the age of 13 should be illegal and rape and assault offences should be formulated without the need for lack of consent to be proved?**

NICCY supports the proposal that whether or not a child under 13 'consented' to the activity is totally irrelevant to the offence. However in order to afford greater protection to all children, we are not entirely confident that under 13 years is the most suitable cut-off point. Under-age children must be effectively protected from sexual exploitation and we are particularly concerned that consent could be used as a defence by an adult with children and young people of 13 and up to the age of 16. It is also worth noting that in one large recent survey of teenage girls, nine out of 10 (88%) girls regarded being pushed into a sexual experience against their wishes by an adult over 18 as 'sexual abuse'<sup>1</sup>.

It is our view that sexual activity with children aged between 13 and 16 is a serious issue, especially considering that during this period of physical, emotional and sexual development, adolescents may feel confused and therefore more vulnerable to exploitation. NICCY would recommend that this important point is taken into consideration when revising the current legislation.

#### **15. Is it accepted that all sexual activity with children under a specific age be illegal for those over the age of 18? Or should there be an exception in the case of an 18 year old involved in mutually agreed consensual sex with a 15 year old, as set out in consultation point 20?**

With regards to this question, please also refer to our response at Point 20 and note our earlier comments in relation to complexities when reconciling the rights of children and young people with their welfare and best interests. While we agree that it should always be an offence for those over the age of 18 to engage in sexual activity with a child or with a young person who is below the age of consent, NICCY would not necessarily advocate the criminalisation of 17-18 year olds involved in mutually agreed consensual sex with a 15 year old. Prosecutors

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<sup>1</sup> NSPCC/Sugar Magazine Survey, 23 May 2006



must take into account the nature of the consent and respective competencies of each party. The reality is that relationships do take place between young people of these ages and it is important that their rights and privacy are respected.

However, we also acknowledge that this issue does raise important questions about deterrence and criminal liability as well as all the difficulties involved in assessing the context of the relationship or occasion. It also highlights the need for the increased availability of advice/support services and education that raises awareness about all the issues involved in engaging in sexual activity at a young age, including risk-taking as a factor in development.

These are clearly sensitive and serious issues that require a great deal of thought and therefore should be subject to further review. NICCY does have reservations about the prosecution of, for example, a 17 year old who had consensual sex with a 15 year old which led to their placement on the Sex Offenders Register. This is an issue which requires particular consideration of the nature of the offence, for example, whether it is penetrative sex or exploratory touching and kissing, as well as the maturity and understanding of those involved in being able to offer their consent. However it would, in our view, be unrealistic to define this in the legislation via the development of categories and sub-categories of acceptable behaviours between specific ages. Any potential investigation and assessment of sexual activity between young people by criminal justice agencies should incorporate a realistic appraisal of what the behaviour consisted of.

We generally have concerns about the introduction of laws with exceptions based on age differentials (also at Point 20), for example, if the scenario of an 18 and 15 year old is permissible does this also apply to ages 17 and 14? Of serious concern to NICCY would be exceptions based on age differentials serving the interests of the older party, rather than the best interests of the young person under 16.



## **16. Should the 'age of consent' remain at 17 or be changed to 16, as in the rest of the UK?**

The NICCY research on Children's Rights in Northern Ireland (Queens University) refers to this issue:

*"The age of consent for sex was raised by young people and health professionals as discriminatory against young people in Northern Ireland. Since 2001, in the rest of the United Kingdom the age of consent has been 16 years for both gay and straight sex. In Northern Ireland it is 17. It was suggested by one professional that the revisions of the Sexual Offences Bill would provide an opportunity to tackle this, "Young people can be married at 16 but can't have sex until they're 17!" (Health Professional). In the case of Sutherland versus United Kingdom case the European Court ruled that an unequal age of consent is a violation of the European Human Rights Convention (European Commission Human Rights, 1997)"<sup>2</sup>.*

Whilst we accept that there are strongly held views about this issue we would support the change of age of consent from 17 to 16.

## **17. Should we have additional specific offences designed to protect those under the age of 16 from particular types of sexual behaviour, e.g. causing or inciting a child to engage in sexual activity, engaging in sexual activity in the presence of a child and causing a child to watch a sexual act?**

Protection from harm, abuse and exploitation should be a priority within these proposals. NICCY is concerned about 'anecdotal' information reported to our Office in relation to an increase in these behaviours by adults with children under the age of 16. We therefore would support specific offences to further protect children under 16.

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<sup>2</sup> Kilkelly, U., Kilpatrick, R., Lundy, L., Moore, L., Scraton, P., Davey, C., Dwyer, C. and McAlister, S., 'Children's Rights in Northern Ireland', 2004, NICCY, p.111



**18. Should we seek to criminalise all sexual activity between children under the age of consent with those under the age of 18? Or should the criminal law be confined to targeted sexual intercourse only? Or should consensual sexual activity for this age group not be criminalised?**

NICCY again appreciates that this can be a difficult and complex issue to address and would like to offer comments predominantly in relation to sexual activity between children under 16 years of age.

It is important to consider, and we believe the consultation document does take this into account, whether prosecution serves any useful purpose, for example, as an effective deterrent. On the one hand, NICCY is concerned about the risks associated with sexual activity amongst young people under the age of consent, while on the other we recognise that consensual sexual activity *is* occurring *between* young people of this age which may not necessarily be regarded as being harmful but could be interpreted as a normal and healthy part of sexual development and growing up. In this case, mutually consensual kissing and exploratory touching should not be subject to criminalisation.

While there are those who might argue that criminalisation acts as a deterrent to sexual intercourse, it is NICCY's view that criminalising young people for consensual sexual activity is inappropriate. Indeed it should be appreciated that many young people feel able and confident to make mature decisions about when, or not, to be involved in a sexual relationship. It would not be NICCY's wish to criminalise these young people and we fully support their right to a private life as defined in Article 16 of the UNCRC.

It should also be considered that taking this approach in the legislation will further complicate the already mixed messages that young people receive about what is and what is not permissible. There is a danger of this legislation becoming counterproductive in that confusion may further increase the already existing barriers to young people accessing important sexual health information and services. This should clearly be avoided, particularly bearing in mind the high rates of teenage pregnancies and sexually transmitted infections amongst younger people.

In addition, while the reality is that consensual sex *is* occurring *between* young people, NICCY is concerned about instances of abusive, non consensual activity



and also the inability of many young people to have the emotional and physical maturity to engage in sexual relationships. One study found that 56% of unwanted early sexual experiences occurred for the first time when girls were aged under 14 and caused feelings of guilt, insecurity, anger, powerlessness and fear<sup>3</sup>. A disregard of the need for consent and an abusive undercurrent was disturbingly evident in some of the reports, where young people described being threatened and bribed into submitting to sexual activity. Significantly, one in three cited a boyfriend around their own age as responsible for the unwanted experience while 14% held a family member or family friend responsible; 13% 'a group of lads'; 10% a boyfriend more than five years older than them, and 4% a teacher.

Overall, a careful balance needs to be struck between not encouraging young people to engage prematurely in sexual activity while also accepting the reality that it is part of the developmental process. There should be a clear distinction between consensual sex between young people and sexually abusive behaviour, with clear unambiguous definitions provided for each. Although we would not support criminalisation of sexual activity, including penetrative sex, between young people of a similar age, it is NICCY's view that greater emphasis must be placed on helping young people deal responsibly with the pressures to have sex as well as providing them with the necessary information to make informed choices. As strong advocates of education and health programmes which provide information and advice to young people who require sexual health care and relationship guidance, NICCY believes that awareness-raising, support and enhanced education are more beneficial than prosecution.

NICCY also strongly feels that any discussion about young people, sexual activity, consent and age differentials should incorporate the views of young people themselves. We refer you to our comments in relation to consultation with children and young people (at Page 11) and would suggest that this is a particular area where the input of young people is vital.

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<sup>3</sup> NSPCC/Sugar Magazine Survey, 23<sup>rd</sup> May 2006



**19. If sexual activity between children is criminalised, and a similar maximum penalty of 5 years imprisonment is imposed how do we deal with the consequences of the obligation in Northern Ireland to report an arrestable offence (ie one with a five year sentence)?**

We have already indicated our views about the inappropriateness of criminalising sexual activity between young people. NICCY equally would not support prosecution of those failing to report this activity. The situation of course is different if the sexual activity is abusive in nature; in these circumstances it would be NICCY's view that the 3<sup>rd</sup> party with knowledge of the activity is failing to protect the child if they do not report the abuse.

**20. Comments are invited on a proposal based on age differentials which would criminalise all sexual activity between children under the age of consent and those under the age of 18 unless: A and B are less than 3 years apart in age and B is at least 13; No third party is involved; A reasonably believes that B is less than 3 years apart in age; B consents and; A has not obtained the agreement of B to the sexual activity by means of inducement offered or given, a threat made, or a deception practised by A for that purpose.**

Please also refer to our response at Point 15. It is difficult to appreciate the purpose of these particular proposals based on age differentials and we would require clarification as to what the rationale behind them is.

NICCY has already stressed our concerns on particular issues in relation to a minimum age of 13 and to an age differential between 18 and 15 years (please refer to our previous points). While we have also stated our position on sexual activity between people of a similar age, we do not endorse a position whereby it is acceptable for sexual activity between a 13 year old and a 16 year old. However, we stress again that criminalisation of such young people is not the most suitable approach and would prefer the emphasis being placed on education, awareness, health advice and support.



**21. Should we remove the time limit on prosecution for the new offence of adult sexual activity with a child?**

NICCY would support this proposed change. The trauma experienced by a child who has been involved in a sexual act can have significant long term effects on their physical and psychological well-being. It is well documented that failure to report within the existing timeframe is not unusual, therefore indefinite periods of time should be allowed for disclosure, criminal investigation and prosecution.

**22. Is it right to introduce as a full defence, rather than as a mitigating factor, a mistake of fact in age in relation to sexual activity with a child over 13, but with the restriction that it should be limited to reasonable belief.**

NICCY does welcome the proposal that a mistaken belief in age defence should also apply equally to defendants of either gender. This is, however, another complex issue and NICCY is unable to provide an evidence-based response. We would suggest that mistake of fact in age must be one consideration alongside other factors including the maturity and understanding of the child.

While we acknowledge that in occasional, exceptional circumstances an honest mistake about age may be made, this defence must not be an effective means for an adult to escape prosecution having knowingly had sex with an underage child. It is also our view that, unless absolutely necessary, children and young people should not be exposed to any potentially damaging and traumatic adversarial procedures. Therefore, mistake of fact in age should be restricted to a genuine and reasonable belief. However, clarification would be required in relation to the definition of reasonable; who decides what is reasonable and on what basis? Does the NIO intend to provide a list of circumstances?



**23. Those recognised as giving help, advice, treatment and support to children and young people in matters of sexual health should not be regarded as aiding and abetting a criminal offence, nor should the children and young people who seek help and advice about sexual health matters, including contraception.**

NICCY has already stated its position on this. The fact is that young people are engaging in sexual activity and it is therefore critical that they receive adequate advice and support, including contraceptive advice. To prosecute those who offer this advice is not acceptable; nor is it appropriate to consider young people seeking advice and help as aiding and abetting a criminal offence.

One of the priorities NICCY is currently engaged in is carrying out work on risk-taking behaviour, including sexual health. Our work in this field has just begun and therefore we are unable to offer any evidenced-based research to support your consultation. That said, in research carried out for NICCY in 2004 by Queens University into Children's Rights in Northern Ireland, significant reference was made to young people's sexual and reproductive health, for example,

*"A priority issue raised in focus groups of those working with young people and young people themselves, was the lack of access to sexual and reproductive health services in Northern Ireland. There are four sexual health clinics (genitourinary medicine – GUM) in Northern Ireland. However, the Brook Advisory Service in Belfast is the only specialist clinic in Northern Ireland for young people and has been picketed by opponents since its inception. The Nucleus Centre in Derry/Londonderry was also picketed when it commenced providing sexual health services to its young clients. A health care professional spoke for many interviewees in bemoaning the lack of services"<sup>4</sup>.*

There are those who believe that it should only be parents who discuss issues relating to sex and sexual health with their children. While we acknowledge the important role that parents have, experience tells us that not all young people, even if they have a positive relationship with their parents, feel able to discuss such intimate and personal issues with a family member. It is imperative that young people have access to confidential advisory and support services. This is currently

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<sup>4</sup> op cit., n.2, p.109



limited and needs to be broadened to be more routinely available in schools and outreach projects.

### **3.2 Additional Comments**

3.2.1 Page 17, Table 2b of the consultation document provides 2003 figures for prosecutions for indecent assault of young victims: 7 in relation to a female child and 1 for a male child. As noted at point 3.2.6 of the document, there is no specific statutory protection provided for male children against heterosexual acts and so the offence of indecent assault can be used. The figures cited illustrate that in practice this happens rarely and raises the question of the need for adequate specific statutory protection of male children.

3.2.2 Sexual crime against children in Northern Ireland: There were 36 indictable offences and 4 summary offences against children prosecuted in Northern Ireland in 2003. As these figures cover the entire range of sexual offences against children, they require further explanation. It would be helpful to have an analysis of how the low prosecution figures inform the current proposals, if at all. **With such a low prosecution rate for all the existing sexual offences against young people, what will the creation or extension of the range of offences mean in practice?**

3.2.3 The legislation strengthens the existing law in Northern Ireland on the offences arising from an abuse of a position of trust with a child. Whilst the extension to a wide range of settings in which young people are accommodated is to be welcomed, we would expect to see details of the frameworks in which this would be applied.

3.2.4 NICCY has received a number of reports from children and young people about the lack of structures in place which enable them to express their views, wishes and feelings without restriction. In light of this we are concerned about how much more difficult it may be for a child or young person to raise or report the commission of any of the above offences towards them by a person in a position of trust. One example is a young person detained in a young offenders' institution or secure training centre; what mechanisms would be in place to enable confidential and effective reporting of abuse? Effective means must be in place, not just to enable reporting of a sexual offence, but also to guarantee equal and effective access to the criminal justice system and all aspects of the information



and evidence-gathering process. The difficulties which outside agencies have, at times, encountered in accessing and investigating some residential settings, and aspects of the care of their young residents, illustrate the necessity for a package of measures to be in place to facilitate the proper implementation of the protection this range of offences is designed to provide.

3.2.5 It is our belief that the protection created by the offences is meaningless without the provision of safe and effective channels by which offences can be reported and fully addressed and recommend that this point is given due consideration.

#### **4.0 Consultation with Children and Young People**

4.1 Given that the NIO has explicitly stated it will be making special efforts to consult with children and young people in relation to this consultation on reforming sexual offences in this jurisdiction, NICCY has not sought their views on this occasion as part of our response. In light of Article 12 of the UNCRC which says that children have the right to express their views in all matters affecting them, it is pleasing to note this commitment. It is also particularly important considering the obligation under Section 75 of the Northern Ireland Act (1998) which places a duty on public bodies to engage in direct public consultation with those affected by their policies, including people of different ages.

4.2 Often, in NICCY's experience, consultation processes fail to engage in a meaningful and direct way with children and young people about matters which have a direct impact upon them. NICCY therefore warmly welcomes the Northern Ireland Office's commitment and commends the NIO for actively seeking the views of children and young people on this important issue. To ensure that the process is as inclusive as possible, we would recommend consultation with children and young people from a range of backgrounds, for example, different religions, ethnic groups and sexual orientations.

4.3 We would be grateful if you could forward details of how you have successfully engaged with children and young people and how you intend incorporating their views into the final legislation and guidance.



## 5.0 Sexual Abuse Within the Family

5.1 In the final legislation, NICCY would like to see clear evidence that the welfare and best interests of the child have been explicitly taken into account. Article 19 of the UNCRC provides that State Parties take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of abuse, including sexual abuse, while in the care of parents, legal guardians, or any other person who has the care of the child. The State also has obligations to provide victims of abuse with support and treatment, and has a duty to identify and punish those responsible for the abuse. (Article 39, CRC).

5.2 NICCY commends the NIO for the proposals to include the provisions currently in place for England and Wales under the Sexual Offences Act 2003 in Northern Ireland. We have a number of additional comments for your consideration;

- Consultation Point 5.4.2: The offences should apply to all children and young people under 18, without any differentiation at the age of 13. NICCY is unclear why between the ages of 13 and 18 the alleged perpetrator must believe the young person is 18 or over. The behaviour is wrong irrespective of age (under 13 or under 18), if the victim is a relative. Sexual abuse can be a life long detrimental and traumatising experience for children and young people. While prosecution alone does not provide the child or young person with the healing s/he needs, it can form part of this process.

Generally NICCY is concerned about the low prosecution rate and short sentencing of convicted abusers. Both can impact negatively on the child victim.

- Consultation Point 5.4.4: Again NICCY is unclear about the rationale behind the listed categories; do these provide for a range of sentencing options?
- Consultation Point 5.4.11: NICCY would like to seek explicit reference to adoptive relatives who abuse children and young people under 18. Article 2 of the CRC accounts for this:

“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion,



political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members”.

The situation is that the child would view the family as his/hers and view them in a position of Trust; this must be accounted for within the legislation.

- Consultation Point 5.6: NICCY supports all the suggested recommendations highlighted within this section.

## **6.0 Trafficking and Sexual Exploitation**

6.1 Sexual exploitation and trafficking is increasingly becoming a concern from both a domestic and international perspective. The key to effective protection of children from sexual exploitation and abuse is to introduce or reinforce national measures and cross-border cooperation. NICCY welcomes the proposals to replicate the offences outlined in the Sexual Offences Act 2003 in Northern Ireland.

6.2 In addition, we would recommend that the NIO considers adopting views from the Council of Europe as follows:

- there should be no limitation period to bring child abusers to justice
- national justice systems must apply the UN definition of a child
- ensure that children have knowledge and understanding of their basic human rights
- enhance the international cooperation among police forces against child pornography and trafficking of children for sexual exploitation.



## **Conclusion**

A balance needs to be struck between ensuring children's rights to protection from sexual harm, and a young person's natural sexual development and exploration. There are significant differences between these two issues; those responsible for abusing children and young people should be prosecuted, while consensual sexual activity amongst young people should not be viewed within the criminal context, where it is clear that both parties give unforced consent to their sexual activity.

Children and young people have the right to have those who perpetrate acts of sexual abuse against them brought to justice and it is clear that current sentencing fails children. It might be that the real success of the reforms to sexual offences legislation is partially measured by the rates of convictions. Indeed, it is the approach to investigating and prosecuting these offences which will be of importance. NICCY strongly recommends that the effectiveness of the new legislation is robustly evaluated and reviewed. It is also important that adequate training is provided to practitioners to ensure awareness of the legislation and its provisions.

It is however our strong view that young people should be provided with adequate educational and health care advice and support to help them make confident and informed choices about their sexual health and well being. Unfortunately at present, many young people lack the necessary knowledge and awareness about sexual health/relationships, staying safe and contraception. Some feel pressurised into becoming sexually active before they are ready and it is therefore of extreme concern that they do not have easy access to confidential advisory and support services.

NICCY acknowledges that these are very difficult issues but would commend the NIO for adopting a balanced approach and addressing what is a complex area of law reform in a clear and coherent manner. For the purposes of clarity, NICCY recommends that the NIO makes a clearer distinction between children and young people in the proposed legislation.

We also reiterate our belief that direct and comprehensive consultation with young people is necessary and urge the NIO to make every effort to obtain their views, including young people who are most vulnerable and marginalised. It is essential that the voices of young people are sought, heard and acted upon, in order that they may influence policy decisions, particularly on issues which have relevance to their own lives.

