

Advancing Children's Rights through the Criminal Law (Sexual Offences) Bill 2015

November 2016



The Children's Rights Alliance unites over 100 members working together to make Ireland one of the best places in the world to be a child. We change the lives of all children in Ireland by making sure that their rights are respected and protected in our laws, policies and services.

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Irish Primary Principals Network
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Irish Second Level Students' Union (ISSU)
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Irish Traveller Movement
Irish Youth Foundation (IFY)
Jack & Jill Children's Foundation
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Kids' Own Publishing Partnership
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National Parents Council Post Primary
National Parents Council Primary
National Youth Council of Ireland
One Family
One in Four
Parentstop
Pavee Point
Peter McVerry Trust
Rape Crisis Network Ireland (RCNI)
Realt Beag
SAFE Ireland
Saoirse Housing Association
SAOL Beag Children's Centre
School of Education UCD
Scouting Ireland
Simon Communities of Ireland
Social Care Ireland
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Special Needs Parents Association
SpunOut.ie
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St. Nicholas Montessori Teachers' Association
St. Patrick's Mental Health Services
Step by Step Child & Family Project
Suas Educational Development
Sugradh
Teachers' Union of Ireland
Terenure Rugby Football Club
The Ark, A Cultural Centre for Children
The Guardian Children's Project
The Prevention and Early Intervention Network
The UNESCO Child and Family Research Centre, NUI Galway
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1. Introduction

The Criminal Law (Sexual Offences) Bill 2015 is a landmark bill for the protection of children and young people in Ireland. As children and young people increasingly spend time online and with technology evolving quickly, this Bill gives legislators the opportunity to close gaps and loopholes in current legislation, which leave children exposed to abuse, in particular through grooming and solicitation for the purpose of sexual abuse.

Grooming and solicitation can be the first steps that lead to a childhood of abuse both online and offline. Our laws have not kept up with the pace of technological practices and developments and this Bill will close key loopholes to ensure that children are safe and are protected from abuse.

The majority of children and young people in Ireland are active online.¹ 86 per cent of 9 year olds have a computer in the home and 82 per cent of teenagers and 35 per cent of 9-12 year olds have social networking profiles.² Irish children use the internet more than their European counterparts and increasingly use private space or private personal devices to get online.³ This demonstrates the importance of monitoring and protecting children online; however, when it comes to risk online, Irish children and young people are considered to be in the 'lower use, some risk' classification, compared to their European peers.⁴

The Bill will mean that Ireland is closer to meeting its international human rights obligations for children under the Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and the EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography⁵ as well as the Second Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

2. The current legal framework for sexual offences – national and international

A range of sexual offences are currently prohibited under Irish law. Key pieces of legislation in this area include:

- a) Child Trafficking and Pornography Act 1998
 - This Act sets out the offences of child trafficking, producing and distributing child pornography and possession of child pornography. Key amendments were made to this Act by the Criminal Law (Sexual Offences)(Amendment) Act 2007 and the Criminal Law (Human Trafficking) Act 2008 which also created the offence of trafficking a child for exploitation.
- b) Criminal Law (Sexual Offences) Act 2006
 - This Act sets out the offences of defilement of a child under 15 and under 17 and was amended by the Criminal Law (Sexual Offences) (Amendment) Act 2007.
- c) Criminal Evidence Act 1992

1 Brian O'Neill and Thuy Dinh, 'Children and the internet in Ireland: research and policy perspectives' (Digital Childhoods Working Paper Series (No.4), 2013 Dublin Institute of Technology, 8.

2 James Williams et al, 'Growing Up In Ireland, National Longitudinal Study of Children, The Lives of 9 year Olds' (The Stationery Office, 2009) <<http://arrow.dit.ie/aaschmedcon/32/>> [accessed 27 October 2016] 121.

3 Brian O'Neill, Simon Greha, Kjartan Ólafsson, 'Risks and safety for children on the internet: the Ireland report.' (LSE, 2011) <<http://arrow.dit.ie/cserrep/22/>> [accessed 27 October 2016] 14, 15.

4 Brian O'Neill and Thuy Dinh, 'Children and the internet in Ireland: research and policy perspectives' (Digital Childhoods Working Paper Series (No.4), 2013 Dublin Institute of Technology, 8.

5 Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011.

- This Act sets out the current framework for children giving evidence including evidence via television link.

While there are deficiencies in the existing framework, ‘fundamental reform’ is not considered to be necessary.⁶ As noted by the Special Rapporteur on Child Protection, Professor Geoffrey Shannon, while the legislation does address aspects of online sexual offences such as the audio and visual representation of children being engaged in or witnessing sexual activity, there were a number of key areas such as such as the viewing of child pornography which are not addressed.⁷

At the international level, the area of child protection online is addressed under three key instruments:

- The UN Convention on the Rights of the Child 1989 and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (hereafter referred to as ‘the Optional Protocol’), which entered into force in 2002. Articles 19 and 34 of the Convention provide for the right to protection from abuse, neglect as well as from sexual exploitation. The Optional Protocol builds upon these provisions setting out that States must prohibit and criminalise the sale of children, child prostitution and child pornography and covers the international nature of offences with its provisions on jurisdiction, extradition and the assets of such crimes. Crucially it also addresses measures to protect the rights and interests of child victims. In addition to these instruments, the UN Committee on the Rights of the Child (hereafter ‘the Committee’) produced General Comment No. 13 in 2011 which addresses the right of the child to freedom from all forms of violence.⁸
- The Council of Europe Convention against Sexual Exploitation and Sexual Abuse⁹ (hereafter referred to as the ‘Lanzarote Convention’).
- The Council of Europe Convention on Cybercrime¹⁰ (hereafter referred to as the ‘Budapest Convention’).
- Directive 2011/92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (hereafter referred to as the ‘EU Directive’). As for all EU Directives, it must be brought into force at the national level through the laws, regulations and administrative provisions necessary to comply with the Directive. The deadline for transposition was 18 December 2013.¹¹

The UN Committee on the Rights of the Child in January 2016 called on Ireland to ratify the Optional Protocol of the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. Ireland is the only country in Europe that has yet to ratify the Optional Protocol.

The Lanzarote Convention and the Budapest Convention have also yet to be ratified. Ireland is only one of five members of the Council of Europe which has not ratified the Lanzarote Convention and one of seven that has yet to ratify the Budapest Convention.

The Law Reform Commission published its *Report on Harmful Communications and Digital Safety* in September 2016.¹² It focuses predominantly on reform of the offence of harassment and a new offence of stalking and proposes the establishment of a Digital Safety Commissioner which would be a welcome development.

6 Prof Geoffrey Shannon, ‘Seventh Report of the Special Rapporteur on Child Protection’ (DCYA 2014) <<http://www.dcy.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf> > [accessed 27 October 2016] 134.

7 *ibid.*

8 UN Committee on the Rights of the Child, ‘General Comment No 13, The right of the Child to freedom from all forms of violence’ (2011) UN Doc CRC/C/GC/13, 18 April 2011.

9 Council of Europe, ‘Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention)’ (Council of Europe 2010) CETS No. 201.

10 Council of Europe, Convention on Cybercrime’ (Budapest Convention) (Council of Europe 2001) ETS 185, 23.XI.2001.

11 Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011 Art 27.

12 Law Reform Commission, ‘Report Harmful Communications and Digital Safety’ (LRC 116-2016).

Recommendations:

- Ratify in full the following international conventions:
 - Second Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.
 - Lanzarote Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
 - Budapest Convention on Cybercrime.
- Transpose in full the EU Directive on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography.

3. The Criminal Law (Sexual Offences) Bill 2015

The Criminal Law (Sexual Offences) Bill 2015 (hereafter 'the Bill') makes important amendments to our existing legislative framework with regard to sexual offences and creates new offences, strengthening the law surrounding child protection both on and offline. It also makes provision for sex offences against protected persons (Part 3), the purchase of sexual services (Part 4) and incest (Part 5) as well as Criminal Evidence (Part 6) and Jurisdiction (Part 7).

The UN Convention on the Rights of the Child defines a child as a person under the age of 18¹³ as does the Lanzarote Convention¹⁴ and the EU Directive.¹⁵ The Bill does not define the child. Instead, under the Bill, each offence is specific to a child under a certain age varying from children under 15 to under 18. This appears to be linked to existing tiered offences under the Criminal Law (Sexual Offences Act 2006).¹⁶ The age of a child for the purposes of the Child Trafficking and Pornography Act 1998 and under the Sexual Offences (Jurisdiction) Act 1996 is increased under the Bill by one year to include young people under the age of 18.¹⁷ As a result of this provision, more children will be protected from abuse.

Key issues that arise under the Criminal Law (Sexual Offences) Bill 2015

i. Sexual exploitation using information and communication technology including online grooming

To understand the vulnerability of young people to potential online sexual exploitation, it is important to note the context in which young people send and receive messages of a sexual nature online. In a recent survey, 11 per cent of the young people questioned (aged 11-16) said they had

13 Convention on the Rights of the Child (20 November 1989) 1577 UNTS 3 (UNCRC) Art 1.

14 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Art 3.

15 Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011 Art 2.

16 Under the Criminal Law (Sexual Offences) Act 2006, offences are tiered by age (section 2 relates to defilement of a child under 15 years of age whereas section 3 relates to defilement of a child under the age of 17 years) to reflect the vulnerability of younger children.

17 Criminal Law (Sexual Offences) Bill 2015 s 2. In his Seventh Report, the Special Rapporteur on Child Protection states that the decision to use 17 for the age at which a person ceases to be a child with regard to child pornography under section 2 of the Child Trafficking and Pornography Act 1998 is 'problematic'. Prof. Geoffrey Shannon, 'Seventh Report of the Special Rapporteur on Child Protection' (DCYA 2014) <<http://www.dcy.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf>> [accessed 27 October 2016] 135.

seen or received sexual messages online over the past year.¹⁸ Three per cent of 11-16 year olds had been asked to talk about sexual acts with someone on the internet and two per cent had been asked to show a photo or video of their genitals to someone online.¹⁹ Almost a third of children surveyed had made contact online with someone they did not already know offline beforehand.²⁰ Just four per cent of nine-16 year olds had met face to face with someone they had met online for the first time – however, notably the figure rises to 10 per cent when teenagers alone are considered, a troublesome statistic. In almost every case, parents were not aware of this happening.²¹

One in Four, the organisation that supports victims of sexual abuse found that almost a quarter of those in their Phoenix Programme for sex offenders began contact with the child victim online.²² It also found that a growing number of the offenders on the programme were young men aged 18-29 (31 per cent of all participants) and that ‘without intervention, this age group has the highest recidivism rate’.²³ At the launch of their Annual Report, the CEO of One in Four, Maeve Lewis, commented that ‘offenders will tell us that when they were caught the next step for them would have been to commit a contact offence’.²⁴

This highlights the importance of the Bill’s provisions in relation the sexual abuse of children through information and communication technology (ICT) in particular grooming and solicitation of children online as well as provisions on child pornography. The Bill criminalises the exploitation of children ICT under section 8.²⁵ Specifically the Bill will create the offences of:

- Communicating with another person for the purpose of facilitation of sexual exploitation of a child by that person or any other person (Section 8(1)) or grooming.²⁶
- Sending sexually explicit material to a child by any means of ICT (Section 8(2)).

Currently, in order to prosecute the crime of meeting a child for the purpose of sexual exploitation under the Child Trafficking and Pornography Act 1998, the Director of Public Prosecutions has to show that the accused has communicated with a child at least twice, and has met the child.²⁷ The ‘offline’ meeting is an essential element of the crime meaning that the sending of an explicit photo for the purposes of sexual exploitation of a child does not satisfy the provision. The new Bill ensures that a predator can be prosecuted after only one communication²⁸ and the ‘offline’ meeting is also not necessary, in effect creating the offence of grooming.

With regard to sexual abuse and exploitation, the UN Committee on the Rights of the Child includes in its definition the use of children in audio or visual images of child sexual abuse.²⁹ The Committee has stated that ‘many children experience sexual victimisation which is not accompanied by physical force or restraint but which is nonetheless psychologically intrusive, exploitative and traumatic’.³⁰ This offence closes the gap in existing legislation in circumstances where exploitation took place online, through social media, webcams, instant messaging or voice technology. This might happen

18 Brian O’Neill, Simon Greha, Kjartan Ólafsson, ‘Risks and safety for children on the internet: the Ireland report.’ (LSE, 2011) <<http://arrow.dit.ie/cserrep/22/>> [accessed 27 October 2016] 36.

19 *ibid.*

20 *ibid.* 39.

21 *ibid.*

22 One in Four, ‘Annual Report 2015’ (One In Four 2016) 14.

23 *ibid.* 12.

24 Joyce Fegan, ‘Child sex offenders start out online’ *Irish Examiner* (Dublin, 13 October 2016)

<<http://www.irishexaminer.com/ireland/child-sex-offenders-start-out-online-425475.html>> accessed 13 October 2016.

25 Criminal Law (Sexual Offences) Bill 2015, s 8.

26 Grooming has been defined as ‘a process by which a person prepares a child, significant adults and the environment for the abuse of this child. Specific goals include gaining access to the child, gaining the child’s compliance and maintaining the child’s secrecy to avoid disclosure. This process serves to strengthen the offender’s abusive pattern, as it may be used as a means of justifying or denying their actions.’²⁶ The term ‘grooming’ is not used explicitly within the legislation but many of the offences fall within the above definition. Dr Zsuzsanna Rutai, ‘Online Grooming of Children’ (Hope for Children UNCRC Policy Centre 2013) para 2.2 <http://www.uncrcpc.org/assets/images/Online-Grooming-of-Children_final.pdf> accessed 27 October 2016.

27 Child Trafficking and Pornography Act 1998 (as amended) S 3(2A) s 3(2B).

28 Criminal Law (Sexual Offences) Bill 2015, s 7.

29 UN Committee on the Rights of the Child, ‘General Comment No 13, The right of the Child to freedom from all forms of violence’ (2011) UN Doc CRC/C/GC/13, 18 April 2011 para 25(c).

30 *ibid.* para 25(d).

for example, in a situation where a predator coerces a child to share a sexual explicit photograph or video of themselves online through a standard messaging application. In effect, the section includes the offence of meeting a child for the purpose of sexual exploitation having communicated on a previous occasion, by any means, so as to include potential grooming online or in person or by other means. This is a very welcome provision.

The section further strengthens the child's right to be protected from abuse and sexual abuse and exploitation under Articles 19 and 34 of the UN Convention on the Rights of the Child and Article 3 of the Optional Protocol and the Committee's General Comment 13 which provides that the 'inducement or coercion of a child to engage in any unlawful or psychologically harmful sexual activity must be prohibited.'³¹ It satisfies Article 23 of the Lanzarote Convention, which requires Member States to criminalise grooming, that is, to criminalise a predator that communicates with a child online or via social media and arranges to meet them for a sexual purpose. It also satisfies Article 6(1) of the EU Directive provides that a 'proposal' by means of ICT by an adult to meet a child for the purposes of engaging in sexual activity or for the production of child pornography, where the proposal was followed by 'material acts leading to such a meeting'.

A child is anyone under 17 for the purpose of these grooming provisions. This is because the age of consent to sexual activity in Ireland is 17 for all young people.

ii. Meeting a child for purpose of sexual exploitation

As noted above, section 3(2A) of the Child Trafficking and Pornography Act 1998 currently criminalises the meeting of a child for the purpose of sexual exploitation. Required under that section is that the accused has intentionally met, or travelled with the intention of meeting a child, having met or communicated with that child on two or more previous occasions, and that he does so for the purpose of doing anything that would constitute sexual exploitation of the child.³²

Under Section 7 of the Bill, two previous communications are no longer required, reducing the threshold necessary for the offence to be satisfied. The section introduces an offence of meeting a child, travelling to meet a child, or making an arrangement to meet a child, for the purpose of sexual exploitation having communicated with the child on just one previous occasion. While the manner of communication is not elaborated upon under the 1998 Act, the new provision in the Bill covers communication 'by any means' on at least one previous occasion. The new offence also criminalises the making of arrangements to meet a child, whereas under the 1998 Act the act of travelling to meet the child must have occurred.

The new section does not specify from whom the communication must emanate for the offence to be satisfied (that is, whether the child or the accused makes the communication). Clarification should be provided to ensure that regardless from whom the communication emanates that once the adult knows that the person with whom they are communicating is a child, and the meeting is for the purpose of sexual exploitation, then the elements of the offence are met.

This satisfies Article 23 of the Lanzarote Convention and Article 6 of the EU Directive which requires States to take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child who has not

31 UN Committee on the Rights of the Child, 'General Comment No 13, The right of the Child to freedom from all forms of violence' (2011) UN Doc CRC/C/GC/13, 18 April 2011 para 25(a).

32 Child Trafficking and Pornography Act 1998 s 3(2A)(a) and (b). The first prosecution under this provision took place in 2015 in the case of *The People at the Suit of the Director of Public Prosecutions v Muhammad Hussain*, [2015] IECA 187, para 11. (Ms. Justice Finlay Geoghegan, May 18, 2015).

reached the age of sexual consent, for the purpose of sexual activities or producing child pornography, where this proposal has been followed by material acts leading to such a meeting.³³ Section 7 requires direct communication with the child on at least one occasion. This does not provide for a situation where an arrangement may be made to meet the child but is done through a third party; however Section 8 appears to cover this situation.

This appears to be a strict liability offence and no defence of reasonable mistake as to age appears to be available. A child is anyone under 17 for the purpose of these grooming provisions.

Recommendation:

- Clarify in the legislation that it is an offence to groom a child regardless of who makes contact first, perhaps using wording such as ‘communication by any means, having occurred on at least one previous occasion’.

iii. Child Prostitution

The Bill adds to provisions under the Child Trafficking and Pornography Act 1998 with regard to the offence of child prostitution by adding a new Section 4A to the 1998 Act.³⁴ The Bill provides for a new offence where a person controls or directs the activities of a child for the purposes of the prostitution of the child or the use of the child for the production of child pornography which expands on the current definition.³⁵ Under section 3(5) of the 1998 Act the definition of exploitation includes the inviting, inducing or coercing the child to engage in prostitution or the production of child pornography.

The Bill is in line with Article 3 of the Optional Protocol (Offences relating to the sale of children) and Article 19 of the Lanzarote Convention (Offences concerning child prostitution) in calling for the criminalisation of such acts. The language in relation to offences relating to child prostitution in the Bill could be strengthened by including the phrase ‘threatening a child for such purposes’ to bring it into line with the EU Directive.³⁶

The EU Directive provides explicitly for non-prosecution or non-application of penalties to the victim to ensure that child victims of sexual abuse and exploitation are not penalised or prosecuted for their involvement in criminal activities which ‘they may have been compelled to commit’.³⁷ No such provision is set out in the Bill. This should be rectified to ensure that child victims of prostitution and exploitation are not prosecuted or penalised.

Recommendation:

- Ensure that children cannot be prosecuted for involvement in criminal activities which they may have been forced to commit.

iv. Child Pornography (Child Sex Abuse Material)

Child Sex Abuse Material (CSAM) is referred to as ‘child pornography’ in the Bill. Child pornography is currently defined under the Child Trafficking and Pornography Act 1998.³⁸ The weakness in this

33 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201; Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011 Art 6.

34 Criminal Law (Sexual Offences) Bill 2015, s 11.

35 The Explanatory Memorandum to the Criminal Law (Sexual Offences) 2015 Bill 4.

36 Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011 Art 4(6) states “coercing or forcing a child into child prostitution, or threatening a child for such purposes”

37 ibid Art 14.

38 Section 2 (1)(a) of the Child Trafficking and Pornography Act 1998 defines ‘child pornography’ as:
(a) any visual representation –

definition is that it does not explicitly cover all computer-generated or realistic images of children being engaged in sexually explicit activity. The Bill strengthens the protection of children against child pornography in a number of ways including by strengthening the definition of child pornography under the Child Trafficking and Pornography Act 1998. Under the Bill, 'child pornography' is defined as:

“(a) any visual representation

(i) that shows, or in the case of a document relates to, a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in real or simulated sexually explicit activity,

(ii) that shows, or in the case of a document relates to, a person who is or is depicted as being a child and who is or is depicted as witnessing any such activity by any person or persons, or

(iii) that shows, for a sexual purpose, the genital or anal region of a child or of a person depicted as being a child”.³⁹

As noted above, the UN Committee on the Rights of the Child explicitly includes the use of children in audio or visual images of child sexual abuse.⁴⁰ The Lanzarote Convention requires that States criminalise 'knowingly obtaining access, through information and communication technology, to child pornography'.⁴¹ Article 9 of the Budapest Convention requires the production of child pornography for the purpose of its distribution through a computer system as well as possession.⁴² This has now been clarified in the Bill as the definition now includes 'real or simulated sexually explicit activity.'

While the EU Directive makes similar provision to the Lanzarote and Budapest Conventions on child pornography, it provides for measures against websites containing or disseminating child pornography. It provides that States must ensure 'prompt removal of web pages containing or disseminating child pornography' within their territory and to 'endeavour' to have pages hosted outside of their territory removed.⁴³ It also provides that States take measures to block access to web pages containing or disseminating child pornography to internet users within their territory.⁴⁴ In September 2016, the Law Reform Commission recommended that such a role be given to the proposed new Office of the Digital Safety Commissioner of Ireland.⁴⁵

While this is welcome, the language used in relation to the bodies of children under the Bill is slightly narrower than that under the Optional Protocol, the Lanzarote Convention and the EU Directive. The Optional Protocol uses the words 'sexual parts of a child'⁴⁶ and both the Lanzarote Convention and the EU Directive use 'sexual organs'.⁴⁷ The Bill refers only to 'genital or anal region' and therefore the definition does not cover for example, a teenage girl who is topless.

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- (i) that shows or in the case of a document, relates to a person who is or is depicted as being a child and who is engaged in or is depicted as being engaged in explicit sexual activity,
 - (ii) that shows or, in the case of a document, relates to a person who is or is depicted as being a child and who is or is depicted as witnessing any such activity by any person or persons, or
 - (iii) whose dominant characteristic is the depiction, for a sexual purpose, of the genital or anal region of a child'.

39 Criminal Law (Sexual Offences) Bill 2015, s 9.

40 UN Committee on the Rights of the Child, 'General Comment No 13, The right of the Child to freedom from all forms of violence' (2011) UN Doc CRC/C/GC/13, 18 April 2011 para 25(c).

41 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Art 20.

42 Council of Europe, Convention on Cybercrime' (Budapest Convention) (Council of Europe 2001) ETS 185, 23.XI.2001 Art 9(1).

43 Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011 Art 25(1).

44 *ibid* Art 25(1).

45 Law Reform Commission, 'Harmful Communications and Digital Safety, Report' (LRC 116-2016) para 3.69.

46 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>> [accessed 27 October 2016] Art 2.

47 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Art 20(2); Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011 Art 2.

Viewing child pornography is not an offence in Irish law. For the first time, the Bill will criminalise anyone who watches a child being abused in a pornographic act that is being broadcast over the internet by introducing a new section 5A into the 1998 Act.⁴⁸ At present only the person who ‘shows’ an image is guilty of an offence under the 1998 Act, meaning that other ‘viewers’ are not. This is in line with Article 4 of the EU Directive, though that provision specifies that it covers a pornographic performance *involving the participation of a child* (emphasis added). This has not been included in the Bill and should be added to specify that the section only relates to performances involving children.

With regard to the possession of child pornography, the Special Rapporteur on Child Protection, in his Seventh Report, notes that the question of ‘possession’ using ICT was not clear in all cases. For example ‘material that has been downloaded but deleted and later recovered during an investigation’ may not fulfil the elements of ‘possession’ required for a prosecution to take place.⁴⁹ Section 14 of the Bill will amend the Child Trafficking and Pornography Act 1998 to provide that a person who ‘knowingly obtains access to child pornography by means of information and communication technology’ shall be guilty of an offence. This section appears to address the possibility of accessing child pornography without downloading or saving the material. It adds the offence of ‘acquiring’ and ‘knowingly obtaining access’. This section brings Irish law into line with the requirement of Directive 2011/93/EU and the Lanzarote Convention.⁵⁰ However, it is not clear whether this covers situations such as that outlined above and this should be clarified before the Bill is enacted.

The EU Directive allows discretion to Member States as to whether to criminalise certain consensual sexual activities of children including the production and possession of child pornography, where this involves children ‘who have reached the age of sexual consent where that material is produced and possessed with the consent of those children and only for the private use of the persons involved, in so far as the acts did not involve any abuse.’⁵¹ Similar provisions are set out under the Lanzarote Convention.⁵² In its report, the Law Reform Commission notes that under existing law, there is no express provision relating to ‘self-produced’ child pornography, that is, intimate images produced by individuals under 17 which are sent to others under 17.⁵³ Provisions are included in the Bill to prevent prosecution of young people have been included with regard to a child the offence of the use of information and communication technology to facilitate sexual exploitation of a child, including the sending of sexually explicit material to a child under section 8(3) and with regard to the offence of a sexual act with a child under the age of 17.⁵⁴ However, no such provisions have been expressly included in the Bill with regard to child pornography.

The Law Reform Commission Report states that the proposed offence of sending sexually explicit material to a child in the Bill could be applied in cases involving the underage sending of intimate images and ‘sexting’ instead of applying provisions on the distribution of child pornography offence under the Child Trafficking and Pornography Act 1998. This is considered to be more suitable for such cases because it requires the Director of Public Prosecutions to consent before such proceedings could be brought to ensure that cases involving teenagers of similar age consensually

48 Criminal Law (Sexual Offences) Bill 2015, s 13.

49 Prof. Geoffrey Shannon, ‘Seventh Report of the Special Rapporteur on Child Protection’ (DCYA 2014) <<http://www.dcy.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf>> [accessed 27 October 2016] 136.

50 The Explanatory Memorandum to the Criminal Law (Sexual Offences) 2015 Bill, 5.

51 Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011 Art 8(3).

52 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Article 20(3).

53 Law Reform Commission, ‘Harmful Communications and Digital Safety, Report’ (LRC 116-2016) Overview and Executive Summary at para 2.101.

54 Criminal Law (Sexual Offences) Bill 2015, s 16 and 17. Under section 17, there is to be no proceedings against a child aged under 17 except with the consent of the Director of Public Prosecutions where Section 17 also provides for a defence where the sexual activity was consensual and the child had attained the age of 15 years but was under 17 years and the defendant is younger or less than two years older than the child. Where the offence is one of a sexual act with a child under 15 years, there is no similar defence for the accused child.

exchanging intimate images are not prosecuted.⁵⁵ The Law Reform Commission goes on to recommend that no prosecution for the offences discussed in its report be brought against children under the age of 17 except by or with the consent of the Director of Public Prosecutions.⁵⁶

Recommendations:

- Expand the language used in relation to the body of the child in the definition of child pornography in line with the Optional Protocol, the Lanzarote Convention and the EU Directive.
- Add the words ‘involving the participation of a child’ to section 13(4) of the Bill to clarify that the section applies only to performances involving children.
- Amend the Bill to provide clarification as to what constitutes possession of child pornography using Information and Communication Technology.
- Amend sections 12 and 14 of the Bill to ensure that no child under the age of 17 can be prosecuted except by or with the consent of the Director of Public Prosecutions.

v. Jurisdiction

The Optional Protocol requires States to ‘take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 3 paragraph 1 when the offences are committed in its territory or on board a ship or aircraft registered in that State’. Existing Irish law complies with this provision.

Particular issues arise with regard to jurisdiction in relation to sexual offences committed or incited by an Irish person or other person abroad using ICT. The Bill makes provision for offences relating to Irish citizens or those ordinarily resident in Ireland who commit, conspire with another to commit or incite another to commit a sexual offence against a child abroad, which would be an offence if committed in Ireland.⁵⁷ It also addresses the situation where any person conspires with another person or incites them to commit a sexual offence on a child abroad that would be an offence if committed in Ireland.⁵⁸ These are broadly welcome.

The EU Directive provides that Member States shall take measures to establish jurisdiction where the offence is committed in whole or in part within their territory.⁵⁹ However, the Special Rapporteur on Child Protection has noted that under existing legislation where a child in Ireland is groomed by a foreign resident ‘and arranges to meet in Ireland, it appears that no offence has been committed’.⁶⁰ It would also appear that this gap has not been addressed under the Bill.

Further, given that the jurisdictional provisions only relate to sections 4A, 5(1)(a) or 5A(1) of Child Trafficking and Pornography 1998 Act or of section 2, 3, 3A of Criminal Law (Sexual Offences) 2006 Act, it would appear that the act of possession of child pornography is not included under the provision as is recommended by the EU Directive under Article 17.

The Optional Protocol goes on to provide for jurisdiction not only when the alleged offender is a national of the State or is habitually resident there but also where the victim is a national of the State. While the Bill would appear to provide for the former, save in the instance outlined above, it

55 *ibid* at para 2.104.

56 *ibid* para 33. The Commission has a strong view that it is “highly undesirable to criminalise children under the age of 17 years for behaviour undertaken as a result of their inherent immaturity and where there is no intention to cause serious distress. It also reflects one of the Commission’s guiding principles in this Report, that in the case of children and young people, the criminal justice process should be seen as a last resort and only after other responses, such as education or suitable diversion programmes, have been applied”.

57 *ibid* s 41.

58 *ibid*.

59 Council Directive (EC) 92/EU on Combatting the Sexual Abuse and Sexual Exploitation of Children and Child Pornography [2011] OJ L 335 of 17.12.2011 Art 17.

60 Prof. Geoffrey Shannon, ‘Seventh Report of the Special Rapporteur on Child Protection’ (DCYA 2014) <<http://www.dcy.gov.ie/documents/publications/SeventhSpecialRapReport2014.pdf>> [accessed 27 October 2016]140.

does not propose to provide victim-based jurisdiction. The Lanzarote Convention introduces the principle of victim-centred jurisdiction which has not been incorporated into the Bill.

The Optional Protocol calls for States to take such measures as may be necessary to establish jurisdiction in the case of an offence where the alleged offender is present in the territory of the State and the State does not extradite him or her to another State.⁶¹

Recommendations:

- Strengthen the legislation to ensure the protection of a victim in the State be they national or non-national ;
- Ensure that perpetrators of offences within the State can be prosecuted, whether national or non-national, particularly where there is no extradition agreement in place;
- Include the offence of possession of child pornography as an offence covered by the jurisdiction provisions.

vi. Duty of care by persons in authority

The Bill extends the categories of people who are to be considered ‘a person in authority’ under the Criminal Law (Sexual offences) Act 2006.⁶² Under the 2006 Act, persons in authority over a child who engage in a sexual act with that child are subject to more severe penalties.⁶³ The law currently criminalises parents, guardians and persons exercising authority, custody, care or charge over a child, for allowing a child to be abused in pornography⁶⁴ and a person exercising authority is presumed to have care of a child.⁶⁵

The definition in the Bill now includes a former guardian, a foster parent, a former step-parent and includes current or former partners of a parent of the child who lives or has lived in an enduring family relationship with the parent. It also now includes persons who were acting in loco parentis to the child or were responsible for the education, supervision or welfare of the child.⁶⁶ The expansion of the definition of a person in authority is an important development as it now explicitly encompasses non-marital relationships which involve the partner of the parent living in the home of the child victim and also persons who have a training or educational role in a child’s life. The Children’s Rights Alliance welcomes the expansion of this definition; however, the Alliance would consider the addition of ‘persons involved in religious or faith instruction’ to be a necessary inclusion to this definition.

The Bill also creates a new offence of engaging in a sexual act with a 17 year old by a person in authority by inserting a new Section 3A into the Criminal Law (Sexual Offences) Act 2006.⁶⁷ This new offence protects the child from being taken advantage of by a person in a position of trust, such as in a school or extra-curricular setting. Consent is not a defence but the defendant can argue that he or she was mistaken as to the child’s age.⁶⁸ Currently, such an offence only arises in relation to children up to the age of 17 years.⁶⁹

The new additions and amendments are important in the context of many relationships a child may have growing up, some of which may be for short periods of time in a school or extra-curricular

61 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>> [accessed 27 October 2016] Art 4 (3).

62 Criminal Law (Sexual Offences) Bill 2015, s 15.

63 Explanatory and Financial Memorandum to the Criminal Law (Sexual Offences) Bill 2015, 5.

64 Child Trafficking and Pornography Act 1998, s 4.

65 Child Trafficking and Pornography Act 1998, s 4(2)(c).

66 *ibid.*

67 Criminal Law (Sexual Offences) Bill 2015, s 18, inserting a new s3A into the Criminal Law (Sexual Offences) Act 2006.

68 *ibid.*

69 Explanatory and Financial Memorandum to the Criminal Law (Sexual Offences) Bill 2015, 6.

activity but after which the adult person would remain as a person of authority to the child after the reason for the establishment of the relationship has ceased.

This section brings Ireland in line with Article 18 of the Lanzarote Convention which calls for the criminalisation of sexual conduct by those in a position of trust, authority or influence over the child and is a requirement of the EU Directive.

Recommendations:

- Retain the expanded definition of a person in authority in the final Act.
- Amend the definition of a person in authority to include ‘persons involved in religious or faith instruction’ to the definition of a person in authority under Section 18 of the Bill.

vii. Protecting Victims

The Children’s Rights Alliance welcomes Part 6 of the Bill which aims to minimise trauma and to protect victims and witnesses. This includes provision that judges, barristers and solicitors will not wear wigs or gowns in court when a child under the age of 18 is giving evidence in cases involving sexual abuse.⁷⁰ Under current legislation, wigs and gowns are only removed in the case where a child is giving evidence through a live video link.⁷¹ These measures are in addition to the Criminal Justice (Victims of Crime) Bill 2015 which was currently at the Second Stage in the legislative process. It includes special protection measures for child victims and training for key officials who come into contact with child victims such as the Gardaí and members of the Courts Service.⁷² The Lanzarote Convention provides that States should ‘adopt a protective approach towards victims ensuring that...criminal proceedings do not aggravate the trauma experienced by the child’.⁷³ The Optional Protocol also provides that the ‘vulnerability of child victims’ should be recognised.⁷⁴

However, there are two key areas in which we would support amendments in this part of the Bill both of which are set out under section 35 of the Criminal Law (Sexual Offences) Bill 2015.

- **Evidence from behind a screen etc.**

Section 35 of the Bill amends the Criminal Evidence Act 1992 to add a new provision, section 14A. It provides that in proceedings relating to sexual abuse, where ‘a person under the age of 18 years is to give evidence other than through a live video link, the court may, if satisfied that the interests of justice so require, direct that evidence be given from behind a screen or other similar device so as to prevent the witness from seeing the accused.’ The Bill’s Explanatory Memorandum notes that the aim of the screen is to protect a child from ‘any potential intimidation, or feeling of intimidation, by the sight of the accused’ while giving evidence. It goes on to say that ‘[i]n such circumstances, it may be more appropriate for the child to give evidence through a live video link’. Furthermore it states that in cases where a child wishes to be heard in person before a judge with a jury present, this section ensures such provision is available.

The Alliance recommends that this section should be amended to provide that the default position should be that where a child up to the age of 18 is giving evidence as a victim or a witness in cases of sexual abuse, a live video link should be provided in the courthouse to allow the child give evidence in a separate room. The facility of a screen should be available in circumstances where a child wishes

70 Criminal Law (Sexual Offences) Bill 2015, s 35 which will introduce a new section 14B into the Criminal Evidence Act 1992.

71 Criminal Evidence Act 1992, s 13(3).

72 Department of An Taoiseach, ‘State of Play of Bills before the Dáil’ <http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/State_of_Play_of_Bills_befo_re_the_D%C3%A1il/> [accessed 29 September 2016].

73 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Art 30(2).

74 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCRC.aspx>> [accessed 27 October 2016] Art 8(1)(a).

to make a representation to the judge in person or for practical reasons such as back-up should technology fail on a given day. This would bring the provision into line with the EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography (Article 20, paragraph 5). It provides that States must ensure that in criminal proceedings relating to sexual exploitation, a 'child victim must be heard in the courtroom without being present, in particular through the use of appropriate communication technologies'. It also provides, under paragraph 4, that all interviews with child witnesses and child victims 'may be audio-visually recorded' and may be used as evidence in criminal proceedings. The Lanzarote Convention provides that in such proceedings, victims and witnesses should be enabled 'to choose the means of having their views, needs and concerns presented, directly or through an intermediary and considered'.⁷⁵ It further provides that States must ensure that 'contact between victims and perpetrators within court and law enforcement agency premises is avoided, unless the competent authorities establish otherwise in the best interests of the child or when the investigations or proceedings require such contact'⁷⁶ and that witnesses and victims are protected from intimidation.⁷⁷

Providing for a child to give evidence in line with the EU Directive, that is, through a video link from another room, will ensure that they are allowed to participate in a manner without potentially being further traumatised by being present in the same room as the accused and without feeling that they are in the public eye.

The Explanatory Memorandum goes on to note that in the interests of justice the accused should be able to see and hear the witness giving evidence. If the facility of the live video link was the default position, this would ensure that the accused can see and hear the witness.

As a witness or victim in such proceedings, the child also has the right to have his or her best interests as a primary consideration in their treatment by the criminal justice system.⁷⁸ It can be argued that shutting a child away behind a screen in a court proceeding is not in their best interests with regard to their sense of empowerment and participation in proceedings.

While it is acknowledged that there may be a cost or technical issues involved in ensuring the technology is available to provide a video-link in courthouses, the proliferation of the use of technology, mobile phones and free live-video applications, should allow this to be facilitated without excessive additional expense.

- **Protection against cross-examination by accused**

Section 35 also adds section 14C to the Criminal Evidence Act 1992. It provides that where a child under the age of 14 is to give evidence in a sexual abuse case 'the court shall direct that the accused may not personally cross-examine the witness unless the court is of the opinion that the interests of justice require the accused to conduct the cross-examination personally.' It further provides that where the child is aged 14 to 17, the court 'may direct' that the accused shall not cross-examine the witness. As noted above, the Lanzarote Convention provides that contact between the victim and accused is avoided within the court unless it is in the best interests of the child.⁷⁹ It also provides that victims and witnesses are protected from intimidation and repeat victimisation.⁸⁰

75 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Art 31(1)(c).

76 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Art 31(1)(g).

77 *ibid* Art 31(1)(f). This is also called for under Article 8(1)(f) of the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

78 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>> [accessed 27 October 2016] Art 8(3).

79 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Art 31(1)(g).

80 *ibid* Art 31(1)(f).

With regard to children under the age of 14, while it is unclear what 'interests of justice' might be called upon to justify an accused personally cross-examining a 13 year old alleged victim or a victim of any age, this phrase should be retained to ensure that judicial discretion is not curtailed absolutely. However, if a judge decides to allow a child to be personally cross-examined by an accused in the interests of justice, his or her reasoning should be published in advance to ensure that sufficient scrutiny has been given by the Court in reaching its decision. The new section 14(C)(3) provides for an invitation to be extended to the accused to appoint a legal representative to act on his or her behalf in a case where the accused is prevented from cross-examining the witness. Where the accused fails to do so, the court may appoint a legal representative where it is of the opinion that this would serve the interests of justice. This would appear to provide a safeguard to ensure that the fair procedure rights of the accused are protected and to satisfy Article 30 paragraph 4 of the Lanzarote Convention which provides that States must ensure that such measures 'are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial'.

There seems to be no justification for lesser protection afforded under the Bill to children aged 14-17 with regard to personal cross-examination by the accused. Senator Ivana Bacik, in her comments on the Bill in the Seanad on 6 October 2015, noted that researchers at Trinity College Dublin have found that personal cross-examination by an accused can cause 'real trauma' for a witness and there is a real argument that such protections should be extended to all witnesses in sexual abuse cases regardless of their age, that is, all children and adults. She notes that this has had a positive effect in other jurisdictions. This is the case in the UK for example.

Recommendations:

- Amend Section 35 of the Bill to provide that where a child up to the age of 18 is giving evidence as a victim or a witness in cases of sexual abuse, a live video link should be provided in the courthouse to allow the child give evidence in a separate room by default.
- All children up to the age of 18 should be protected from personal cross-examination by the accused unless it is in the interests of justice to do so. In addition, should a judge find that an accused be allowed to personally cross-examine a child under the age of 18 in the interests of justice, his or her reasoning should be published in advance.
- Ensure that the 'best interests of the child' principle is a primary consideration in proceedings relating to offences of child sexual exploitation.

viii. Disclosure of third party records in certain trials

The Lanzarote Convention provides that the State take measures 'to prevent the public dissemination of any information that could lead to the child's identification'.⁸¹ It also states that States must protect the child's privacy, identity and image. The EU Directive makes a similar call.⁸²

Under existing law, there is no regulation of the obligation on a third party to disclosure records, such as the records of a counsellor who treated a child against whom a sexual offence is alleged to have been committed. This means that a child and his or her family can be left wondering whether the records of counselling sessions will be disclosed in the course of a trial and on what basis this decision might be determined. The Law Reform Commission recommended legislative reform in this area in 2014 and noted that the Office of the Director of Public Prosecutions signed a Memorandum of Understanding (MoU) with the HSE which the Director of Public Prosecutions stated "provides for the disclosure of information in a consistent manner (with the informed consent of the complainant) in all requests for information made by the Office to the HSE in relation to criminal prosecutions."⁸³

81 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (Council of Europe 2010) CETS No. 201 Art 31(e).

82 *ibid* Art 20(6).

83 Law Reform Commission, 'Issues Paper on Disclosure and Discovery in Criminal Cases' (LRC IP 5-2014) 14.

Section 38 of the Bill provides clarity in this area. It provides the court with the jurisdiction to decide whether or not to disclose the content of a record to an accused, taking into account factors such as the expectation of privacy with respect to the record, the potential prejudice to the right to privacy of any person to whom the record relates and the extent to which the record is necessary for the accused to defend the charges against him or her. The Bill gives a comprehensive procedure for the parties and court to follow in determining whether the relevant record should be disclosed and this guidance is welcome.

Recommendation:

- Ensure the proposed standards are used in practice and that safeguards are in place to ensure their effective use to protect victims and to ensure that the public interest in encouraging the reporting of sexual offences is maintained.