Appendix 2 Law on sexual offences

Introduction

A2.1 This chapter examines the legal framework within which allegations of child sexual abuse have been investigated, prosecuted and adjudicated upon in the criminal justice system in the period from 1975 to 2004 which is under review by the Commission. It sets out the applicable law on sexual abuse of children and the law on sexual offences in general where that impacts on the issues under review by the Commission.

Sexual assault

A2.2 The term 'sexual assault' is often used to describe the entire range of offences involving sexual aggression by one person on another. However, in law, sexual assault has a specific meaning. During the period under review by the Commission the name of this offence has changed. Until 1990 it was known as 'indecent assault'. There were different penalties for a sexual assault on a male and on a female. Section 2 of the *Criminal Law (Rape) (Amendment) Act 1990* (the 1990 Act) changed the name of the offence to sexual assault but it did not define the offence itself and, in fact, the offence has never been defined by statute. Therefore, the elements of the offence must be outlined from the relevant common law principles developed by the courts over the years. Essentially the offence consists of touching another person in a sexual way without that person's consent.

A2.3 The elements required to prove that a sexual assault occurred are as follows:

(a) An assault must be proved to have been perpetrated by a person;

(b) The assault and the circumstances accompanying the assault must be shown to be indecent by the contemporary standards of right-minded people;

(c) The person who perpetrated the assault must be shown to have intended to commit an assault as referred to in (b) above.

Age of consent

A2.4 In general, where there is consent to sexual activity, there is no assault because the act is not committed against the person's wishes. However, under Irish law, a boy or a girl under the age of 15 is incapable at

law of consenting to sexual activity. Section 14 of the *Criminal Law Amendment Act 1935* provides:

> *"It shall not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that such person consented to the act alleged to constitute such indecent assault".*

A2.5 This means that a person who perpetrates a sexual act upon a child under the age of 15 years would be unable to avail of a defence that the child was consenting to the activity involved.

A2.6 The law in relation to this issue was recently considered by the Supreme Court in July 2005 in the case of *C.C. and P.G. v. Ireland*.[126] Following that decision, it is a defence for a person charged with a sexual assault offence to show that the activity was consensual and that he or she had made a genuine mistake as to the person's age when the conduct alleged to be a sexual assault occurred. There is no requirement for the mistake as to age made by the person to be objectively reasonable although the circumstances surrounding the alleged activity can be taken into account by the judge or jury in deciding if the mistake asserted by the person was genuine or not.

Sentencing for sexual assault

A2.7 Various laws prescribed the penalties for sexual assault in the time period under review by the Commission reflecting the changing attitudes of society to this type of offence. Differing penalties existed for an indecent assault perpetrated on a male and a female until the *Criminal Law (Rape) (Amendment) Act 1990* was enacted. Prior to that, Section 62 of the *Offences Against the Person Act 1861* provided a penalty of ten years penal servitude for an indecent assault on a male, whereas a maximum sentence of two years imprisonment could be imposed for an indecent assault on a female. That had remained the position until 1935 when Section 6 of the *Criminal Law Amendment Act 1935* increased the penalty for indecent assault on a female to five years where the offence was a second or subsequent offence perpetrated by the offender in question. Following that, Section 10 of

126 (2006) IESC 33.

the *Criminal Law (Rape) Act 1981* raised the penalty for sexual assault on a female to ten years imprisonment.

A2.8 Section 2 of the *Criminal Law (Rape) (Amendment) Act 1990* unified the law in this area and imposed a maximum five year penalty for all sexual assaults. The situation with regard to sexual assaults on children has now been further amended by Section 37 of the *Sex Offenders Act 2001* which provides for more stringent penalties for the sexual assault of a minor. Section 37 of the *Sex Offenders Act 2001* provides for a penalty of 14 years imprisonment for sexual assaults perpetrated on children under 17 years of age. For all other sexual assaults the maximum penalty that could be imposed was increased to ten years imprisonment. These apply only to offences committed after the Act came into force.

A2.9 In the case of *S.M. v. Ireland,*[127] Laffoy J. found that the distinction between the sentencing structure for indecent assault offences on males and females as laid down by Section 62 of the *Offences Against the Person Act 1861* which applies to offences committed against males prior to 1990, was unconstitutional on the basis that it offended against the principle of equality before the law enshrined in Article 40.1 of the Constitution. Section 62 provided a penalty of up to ten years for an indecent assault on a male but only two years for a similar assault on a female. That decision means, in effect, that no statutory penalty now exists for the sexual assault of a male perpetrated before 1990 and common law principles apply to the sentencing in these cases. The practice being adopted by the courts following this decision appears to be to apply the two year maximum sentence for indecent assault on a female, to all such cases.

Aggravated sexual assault

A2.10 The offence of aggravated sexual assault was created under Section 3 of the *Criminal Law (Rape) (Amendment) Act 1990*. It is a gender neutral offence and is differentiated from general sexual assault by the level or threat of violence involved in the assault or the grave nature of the injury, humiliation or degradation caused to the person assaulted. It carries a maximum penalty of life imprisonment. Section 3(1) defines the offence as follows:

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127 Unreported, High Court 12 July 2007 (Laffoy J.).

"In this Act 'aggravated sexual assault' means a sexual assault that involves serious violence or the threat of serious violence or is such as to cause injury, humiliation or degradation of a grave nature to the person assaulted".

Rape offences

A2.11 There are two forms of rape known to Irish law since the enactment of the *Criminal Law (Rape) (Amendment) Act 1990*. There is rape as defined and created by the common law and now defined in Section 2 of the *Criminal Law (Rape) Act 1981*. In addition, there is also an offence of rape under Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*. Both offences carry a maximum sentence of life imprisonment and could be used in relation to the prosecution of child sexual abuse allegations in some instances.

Common law rape

A2.12 Rape as defined by the common law has been ascribed a definition by Section 2 of the *Criminal Law (Rape) Act 1981* in the following terms:

"(1) A man commits rape if—

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, and

(b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it,

and references to rape in this Act and any other enactment shall be construed accordingly.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed."

A2.13 As shown by the definition, common law rape can only be committed by a man on a woman. For such an offence to be proved the following elements must be shown to exist:

- Sexual intercourse must have occurred, which means vaginal intercourse with the person must be proved. Intercourse is complete

once there is any penile penetration of the vagina. There is no need to prove ejaculation by the man concerned;

- An absence of consent from the female involved must be proved. The concept of 'consent' for this offence is not defined by statute although consent obtained by the use of force or fraud or by an abuse of authority does not constitute consent in law. In addition, Section 9 of the *Criminal Law (Rape) (Amendment) Act 1990* provides that a failure or omission to offer resistance to the doing of an act that is an offence if done without consent does not constitute consent to the act itself;
- The man must intend to have intercourse with the woman and at the time of the intercourse he either knows that she is not consenting or is reckless as to whether she is or is not consenting.

Rape under Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*

A2.14 Rape under Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990* was introduced in the wake of calls for reform on the law on rape offences in the 1980s. The offence encompasses two different acts and carries a maximum sentence of life imprisonment. The following sexual assaults may constitute 'Section 4 rape':

- penetration (however slight) of the anus or mouth by the penis;
- penetration (however slight) of the vagina by any object held or manipulated by another person.

A2.15 One of the acts which constitute rape under Section 4 of the 1990 Act can be perpetrated by a female. What is colloquially known as 'male rape' can be prosecuted under Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990* as a rape offence.

Offences perpetrated by males on other males

Buggery

A2.16 Until the enactment of the *Criminal Law (Sexual Offences) Act 1993* (the 1993 Act) all sexual acts between males were deemed to be criminal in nature. This applied irrespective of the age of the people involved and whether they consented to the acts involved. The 1993 Act decriminalised consenting sexual activity between males over the age of 17. Section 3 provided that it is an offence to commit or attempt to commit an act of

buggery with any person under the age of 17 years, unless the defendant was married to or believed with reasonable cause that he or she was married to the person with whom buggery is committed.

A2.17 There was no statutory definition of the buggery offence in the 1993 Act and O'Malley's text on Sexual Offences[128] quoted from another textbook as to the definition of the offence itself (where buggery is called sodomy):

> *"Everyone commits the [offence] called sodomy who*
>
> *(a)carnally knows any animal; or*
>
> *(b) being a male, carnally knows any man or any woman (per anum)."*

A2.18 The penalties for the offence of buggery are dependent on the age of the victim. Buggery of a person under the age of 15 could give rise to a maximum of life imprisonment while buggery of a person between 15 and 17 years of age could give rise to a maximum penalty of five years imprisonment for a first offence and ten years imprisonment for a second or subsequent offence. The attempted buggery of a person in either age band gives rise to graduated penalties depending on whether it is a first or subsequent offence. Consent provided no defence to a charge of buggery contrary to Section 3 of the 1993 Act.

A2.19 It should be noted that Section 3 of the *Criminal Law (Sexual Offences) Act 1993* has now been repealed and replaced by Section 2 and Section 3 of the *Criminal Law (Sexual Offences) Act 2006*. However, the discussion above is relevant as one of the acts which it is prohibited to perform with a person under the age of 17 years under the 2006 Act is that of buggery.

Gross Indecency

A2.20 Until 1993, Section 11 of the *Criminal Law Amendment Act 1885* prohibited acts which were described as *"outrages on decency"*. Section 11 of the 1885 Act provided:

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128 O'Malley, T, Sexual Offences: *Law, Policy and Punishment* (Dublin: Roundhall/Sweet & Maxwell, 1996).

> *"Any male person who, in public or in private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour...".*

A2.21 The offence created under the 1885 Act covered actions between males irrespective of age. Both men had to be consenting to the activity in question and both parties had to be acting in concert. This offence was repealed under the 1993 Act and replaced with the offence of gross indecency. Section 4 of the *Criminal Law (Sexual Offences) Act 1993* provided:

> *"A male person who commits or attempts to commit an act of gross indecency with another male person under the age of 17 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 2 years".*

A2.22 This offence was also age specific in that it applied to acts committed on or with a male under the age of 17. There was no statutory definition of gross indecency and general definitions have been adopted by the courts to deal with the matter. As with the definition of sexual assault, circumstances of gross indecency might be said to arise where there is a marked departure from the conduct expected by decent members of society but more specific examples of such conduct would depend on the situation concerned and whether it was done in public or in private. This offence has also been repealed and replaced by the offences created under Section 2 and Section 3 of the *Criminal Law (Sexual Offences) Act 2006*.

Unlawful carnal knowledge and replacement offences

Unlawful carnal knowledge

A2.23 Prior to May 2006 sexual intercourse with girls under the age of 17 years was criminalised by Sections 1 and 2 of the *Criminal Law Amendment Act 1935*. That legislation provided for an offence of having sexual intercourse with a girl under the age of 15 years with a penalty of up to life imprisonment and for a separate offence of having sexual intercourse with a girl between the age of 15 and 17, for which the penalty was set at five years

for a first offence and ten years imprisonment for a second offence. Until the decision in *C.C. v Ireland*[129], it was considered that neither consent on the part of the girl involved nor mistake on the part of the male as to her age would afford a defence to the offence. However, the Supreme Court held in the *C.C.* case that a criminal offence which creates absolute liability for an act which in itself was not criminal did not accord with the personal rights of the citizen guaranteed under the Constitution and that the lack of the availability of a defence for the male of mistake as to the girl's age in the circumstances of the particular case meant that the provisions of Section 1 of the 1935 Act were unconstitutional.

Criminal Law (Sexual Offences) Act 2006

A2.24 Arising from that, the *Criminal Law (Sexual Offences) Act 2006* was enacted. This created offences of defilement of a person under the ages of 15 and 17 years respectively. This criminalises "*sexual acts*" as defined under the legislation carried out with a child. Such sexual acts include sexual intercourse between people not married to each other, buggery, aggravated sexual assault and rape as defined by Section 4 of the *Criminal Law (Rape) (Amendment) Act 1990*. The section also provides for the defence of mistake as to age on the part of the male involved although it also stipulates that the absence or presence of reasonable grounds for such a belief is something that the tribunal of fact can have regard to in making a decision as to whether the belief in question was genuine.

A2.25 Section 2 of the 2006 Act provides:

> *"(1) Any person who engages in a sexual act with a child who is under the age of 15 years shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.*
>
> *(2)...*
>
> *(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child*

[129] [2006] 4 IR 1.

against whom the offence is alleged to have been committed had attained the age of 15 years.

(4) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances.

(5) It shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted."

A2.26 Section 3 of the 2006 Act is in similar terms and relates to offences against people between 15 and 17 years old. It has a graduated system of penalties depending on whether the offence in question was the principal offence or an attempt of same and/or whether the perpetrator is convicted of a first offence or where the offence is a second or subsequent conviction of the person concerned.

Solicitation offences

A2.27 Until 1993 the only statutory law on soliciting was contained in the *Vagrancy Act 1898,* which contained an offence of "*soliciting for immoral purposes*". This was replaced by the *Criminal Law (Sexual Offences) Act 1993* with a summary offence of soliciting or importuning another person for the purposes of committing a buggery, gross indecency or unlawful carnal knowledge. This offence acts to prevent the sexual exploitation of young people who are vulnerable.

A2.28 In its original form Section 6 of the 1993 Act provided as follows:

"A person who solicits or importunes another person for the purposes of the commission of an act which would constitute an offence under section 3, 4 or 5 of this Act or section 1 or 2 of the Criminal Law Amendment Act, 1935 , shall be guilty of an offence

and shall be liable on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 12 months or to both."

A2.29 This definition of the offence was changed in Section 250 of the *Children Act 2001*[130] but that has been subsequently substituted by Section 2 of the *Criminal Law (Sexual Offences) (Amendment) Act 2007*. Offences under this section now give rise to a maximum penalty on conviction on indictment of five years imprisonment. In its amended form, Section 6 of the 1993 Act provides that the soliciting must relate to the defilement of a young person under the ages of 15 or 17 respectively as defined under the C*riminal Law (Sexual Offences) Act 2006* or a sexual assault offence. Section 6 of the 1993 Act now provides:

"6.—(1) A person who solicits or importunes a child (whether or not for the purposes of prostitution) for the purposes of the commission of an act that would constitute an offence—

(a) under section 2 or 3 of the Criminal Law (Sexual Offences) Act 2006, or

(b) referred to in section 2 of the Act of 1990,

shall be guilty of an offence.

(2)..."

A2.30 This means that the soliciting or importuning of any child (meaning a person under the age of 17) for sexual intercourse, buggery, aggravated sexual assault, rape under Section 4 of the 1990 Act or for a sexual assault offence is covered by the section.

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130 Section 250 of the *Children Act 2001* provided as follows:
"The Criminal Law (Sexual Offences) Act, 1993, is hereby amended by the substitution for section 6 of the following:
'6. A person who solicits or importunes another person (whether or not for the purposes of prostitution) for the purposes of the commission of an act which would constitute an offence under section 3, 4 or 5 of this Act or section 1 or 2 of the Criminal Law Amendment Act, 1935, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or to imprisonment for a term not exceeding 12 months or to both.'."

The Sex Offenders Act 2001 – notification requirements for sex offenders

A2.31 The *Sex Offenders Act 2001* provides that those convicted of certain sexual crimes are required to notify certain information to the authorities - their name(s), address(es), their date of birth and travel arrangements outside of the State. These notification requirements also apply to people convicted of offences in other jurisdictions which contain similar legislation. Overall, the legislation seeks to ensure that some level of monitoring exists over the whereabouts and movements of sex offenders. The requirements of this Act are generally described in terms of being placed on a 'sex offenders' register'. There is no such register.

A2.32 Section 10(1) of the 2001 Act also requires that the notification requirement for a sex offender in the State as follows:

> *"A person who is subject to the requirements of this Part shall, before the end of the period of 7 days beginning with the relevant date, or, if that date is prior to the commencement of this Part, that commencement, notify to the Garda Síochána—*
>
> > *(a) his or her name and, where he or she also uses one or more other names, each of those names, and*
> > *(b) his or her home address."*

A2.33 Section 10(6) of the 2001 Act also outlines that the notification should include information about the person's date of birth, name and home address. These notification requirements also apply to a person who moves from the address that has been previously notified to the authorities. Requirements to notify the relevant Garda Station about travel arrangements are also imposed where the person intends to leave the State for more than seven days.

A2.34 The *"relevant date"* for complying with the notification requirement is defined by Section 6 of the 2001 Act and it refers to the date of conviction. The notification obligation is imposed on a sex offender from that date. The date of conviction may not itself be the date upon which the convicted sex offender would have to notify Gardaí of the relevant information. Section 10(7) of the 2001 Act stipulates that certain periods of time are to be

disregarded when calculating the seven day period for notification purposes. Section 10(7) provides:

> *"For the purpose of determining any period for the purposes of subsection (1), (2), (3) or (4), there shall be disregarded any time when the person concerned is—*
>
> *(a) remanded in custody,*
>
> *(b) serving a sentence in prison, or*
>
> *(c) temporarily released under section 2 or 3 of the Criminal Justice Act, 1960."*

A2.35 This means the sex offender's notification requirement would begin after release from prison where he/she is convicted and sentenced to a term of imprisonment on the same day. In those circumstances, where the sex offender receives a custodial sentence the notification requirement is imposed on him/her after his release from prison. After that, Section 12 of the 2001 Act imposes criminal liability for a failure to notify the relevant information to the Garda authorities within seven days of the sex offender's release.

A2.36 The length of time that a person is subject to the notification requirements under the 2001 Act is set out in the Act. Where the person is sentenced to imprisonment for a term exceeding two years the notification period is indefinite. Where the term of imprisonment is between six months and two years the notification period is ten years. If the term of imprisonment imposed is less than six months then the notification requirement is imposed for seven years. Allowance is also made for a suspended sentence and a non-custodial sentence by imposing a notification period in both circumstances of five years.

A2.37 In addition, the 2001 Act introduced post-release supervision orders. This means that the sentencing judge can impose orders which require the offender to be under the supervision of the probation service after release from prison and can also specify other conditions to be complied with by the person. The failure to comply with such supervision orders is a criminal offence under the 2001 Act. In addition, certain Garda officers can apply for "*sex offender orders*" under the 2001 Act to prohibit a person to whom the 2001 Act applies from doing certain things. Such orders can be made where

the person was convicted of a sexual offence for the purposes of the 2001 Act and there are reasonable grounds for believing that an order under the section is necessary to protect the public from serious harm from him or her.

Child pornography and trafficking

Child Pornography

A2.38 The principal legislation in the area of visual representations of child abuse is the *Child Trafficking and Pornography Act 1998* (the 1998 Act). Both the production, distribution and the possession of images and materials which constitute child pornography are prohibited under the 1998 Act. There is a wide definition of the materials that constitute prohibited materials under the 1998 Act. Section 2(1) of the 1998 Act defines *"child pornography"* as including any visual, audio or computer generated representations, including documents, that

> "(i) *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)...or 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 person...or …*
> *(iii) whose dominant characteristic is the depiction, for a sexual purpose, of the genital or anal region of a child*
> *(c) any visual or audio representation that advocates, encourages or counsels any sexual activity with children which is an offence under any enactment, or*
> *any visual representation or description of, or information relating to, a child that indicates or implies that the child is available to be used for the purpose of sexual exploitation within the meaning of section 3."*

A2.39 The definition also includes photographs or negatives of same and storage devices.

A2.40 As outlined above, the production, distribution, printing, publishing, importation, exportation, sale, showing, encouragement, facilitation and

possession of child pornography are prohibited by the 1998 Act. Simple possession of child pornography can give rise to a maximum sentence of five years imprisonment whereas any of the activities prohibited by Section 5 of the 1998 Act, which include the production, distribution, importation and exportation of such images can give rise to a maximum sentence of 14 years imprisonment. The wide-ranging nature of the definition of child pornography is designed to ensure that such images and materials are captured by the remit of the 1998 Act and the prohibitions contained therein.

Child Trafficking

A2.41 The trafficking and taking of children for sexual exploitation was criminalised in the 1998 Act itself. However, that prohibition has been amended in more recent times by the *Criminal Law (Sexual Offences) (Amendment) Act 2007* and is now subject to further revision by the *Criminal Law (Human Trafficking) Act 2008*. Under Section 3 of the 1998 Act as originally enacted a person who organised or facilitated the entry or transit or exit through the State of a child for the purposes of sexual exploitation or the provision of accommodation for a child for such a purpose was guilty of an offence. The section also criminalised the taking, detention, or use of children for such purposes. Section 3 of the *Criminal Law (Human Trafficking) Act 2008* has substituted Section 3 of the 1998 Act and provides that a person involved in child trafficking for the purposes of sexual exploitation can be sentenced to life imprisonment. The concept of "*sexual exploitation*" is defined by the 1998 Act (as substituted by the 2008 Act) and involves the following:

> *"'sexual exploitation' means, in relation to a child—*
>
> *(a) inviting, inducing or coercing the child to engage in prostitution or the production of child pornography,*
>
> *(b) the prostitution of the child or the use of the child for the production of child pornography,*
>
> *(c) the commission of an offence specified in the Schedule to the Sex Offenders Act 2001 against the child; causing another person to commit such an offence against the child; or inviting, inducing or coercing the child to commit such an offence against another person,*
>
> *(d) inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act, or*

(e) inviting, inducing or coercing the child to observe any sexual, indecent or obscene act, for the purpose of corrupting or depraving the child..."

A2.42 Section 3(2A) and Section 3(2B) of the *Child Trafficking and Pornography Act 1998* (as inserted by the *Criminal Law (Sexual Offences) (Amendment) Act 2007)* provide for offences where a person intentionally meets or travels to meet a child for the purposes of doing anything that would constitute *'*sexual exploitation', for which the definition outlined above applies. Section 3(2A) criminalises someone who meets or travels to meet a child within the State for sexual exploitation purposes whereas Section 3(2B) of the 1998 Act introduces a partial extraterritorial offence where a citizen (or person ordinarily resident in the State) meets or travels to meet a child outside of the State for such purposes. For both offences it is necessary to show that the person met or communicated with the child on two or more previous occasions and is doing so for the proscribed purpose. A person convicted of this offence is liable on conviction to a maximum sentence of up to 14 years imprisonment.

Sexual Offences (Jurisdiction) Act 1996

A2.43 The enactment of the *Sexual Offences (Jurisdiction) Act 1996* (the 1996 Act) ensures that sexual offences committed by citizens of the State or by those ordinarily resident in the State against a child (meaning somebody under 17 years old) can be prosecuted in this jurisdiction if the activity in question would also constitute an offence under the law of the country in which the activity occurred. This allows the State to prosecute people for offences which might be known in colloquial terms as 'sex tourism' whereby people travel abroad to perpetrate offences against children and then journey back to the State.

A2.44 In addition, Section 3 of the 1996 Act creates the offence of knowingly transporting a person for the purposes of enabling the other person to commit an offence against a child in another jurisdiction while Section 4 of the 1996 Act prohibits the publication of information intended to or likely to promote, advocate or incite the commission of an offence by a person under Section 2 of the 1996 Act. Thus, this legislation acts to ensure that advertising of such 'sex tourism' is also prohibited in wide terms to ensure that it cannot be

accessed by those wishing to perpetrate offences against children abroad. It should also be noted that Section 7 of the *Criminal Law (Human Trafficking) Act 2008* provides for extra-territorial jurisdiction in relation to the prosecution of people for child trafficking offences concerned with the sexual exploitation of children, although those offences created by Section 3(2A) and Section 3(2B) of the *Child Trafficking and Pornography Act 1998* are excluded from this extraterritorial jurisdiction.

Reckless endangerment

A2.45 In response to a recommendation in the *Ferns Report*, the offence of reckless endangerment was introduced by Section 176 of the *Criminal Justice Act 2006.* It applies to the activities or omissions of those in authority which causes or permits a child to be left in a situation of substantial risk of serious harm or sexual abuse and criminalises such actions or omissions. In addition, the section also stipulates that it is an offence to fail to take reasonable steps in that regard to ensure that children, as defined under the *Criminal Justice Act 2006*, under their care or authority are free from sexual abuse or serious harm.

A2.46 This offence is extensive in its terms in criminalising the behaviour of authority figures that cause, permit or otherwise fail to act in the face of a situation where they know that there is a "*substantial risk*" to a child of such harm or sexual abuse ensuing from a failure to act. The penalty for such an offence is a maximum term of ten years imprisonment.

A2.47 Section 176 of the *Criminal Justice Act 2006* provides:

> *"(1) In this section—*
>
> *"abuser" means an individual believed by a person who has authority or control over that individual to have seriously harmed or sexually abused a child or more than one child;*
>
> *"child" means a person under 18 years of age, except where the context otherwise requires;*
>
> *"serious harm" means injury which creates a substantial risk of death or which causes permanent disfigurement or loss or impairment of the mobility of the body as a whole or of the function of any particular member or organ;*

"sexual abuse" means an offence under paragraphs 1 to 13 and 16(a) and (b) of the Schedule to the Sex Offenders Act 2001.

(2) A person, having authority or control over a child or abuser, who intentionally or recklessly endangers a child by—

(a) causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse, or

(b) failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation, is guilty of an offence…

(4) A person guilty of an offence under this section is liable on conviction on indictment, to a fine or to imprisonment for a term not exceeding 10 years or both."