

# CHILDREN

## CHILD ABUSE, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD AND THE CRIMINAL LAW

CLAIRE HAMILTON\*

### INTRODUCTION

The United Nations Convention on the Rights of the Child ("UNCRC"), adopted by the UN General Assembly on November 20, 1989, is essentially a bill of rights for children incorporating welfare rights, protection rights and social justice rights.<sup>1</sup> It has the distinction of being the world's most ratified Convention

(the USA and Somalia are the only countries not to have ratified it), indicating a high level of consensus among the international community in relation to the rights contained within it. Ireland signed the UNCRC on September 30, 1990 and ratified it, without reservation, nearly two years later on September 21, 1992. While this did not incorporate the

Convention into Irish law,<sup>2</sup> upon ratification the State entered into a binding obligation in international law to ensure its terms are honoured. It may be seen as a minimum threshold standard with which domestic legislation must comply and "the yardstick by which the Government, voluntary agencies and individuals measure their actions and efforts in protecting the welfare of children".<sup>3</sup>

Under Article 44 of the Convention, State Parties are required to submit reports describing their progress two years after ratification and every five years thereafter. To date, Ireland has only submitted one report (in 1996)<sup>4</sup> although the second and third reports are currently being prepared by the Government.<sup>5</sup> In anticipation of these reports, this article proposes to use the protective rights in the UNCRC as a benchmark in assessing the effectiveness of existing domestic criminal law in protecting children from abuse. While there are many areas of the criminal law where concerns may be raised as to consistency with the Convention, this paper is concerned with the physical and sexual abuse of children and the criminal law provisions in place to protect children from such abuse. Two glaring inadequacies in the current law relating to child abuse will provide the primary focus, namely, the existence of a common law defence of reasonable chastisement to a charge of cruelty or assault on a child and the absence of a comprehensive offence of child sexual abuse.

The rights in the Convention formulated to protect children from abuse are contained in Articles 19 and 34. Article 19 of the UNCRC outlines the State's obligation to protect the child from all forms of maltreatment, abuse and neglect at the hands of its parents or others charged with its care.<sup>6</sup> Article 34 deals specifically with the sexual abuse of children and recognises the child's right to protection from sexual exploitation and abuse including prostitution and pornography.<sup>7</sup>

### PHYSICAL CHILD ABUSE

In its *Concluding Observations on the First National Report of Ireland* in 1998<sup>8</sup>, the UN Committee on the Rights of the Child, the body charged with monitoring States' progress in relation to the Convention, welcomed the State's efforts in the field of law reform. It drew attention to civil law enactments such as the *Child Care Act 1991* and the *Domestic Violence Act 1996* which serve to protect children from domestic abuse. It continued to express concern, however, about the problem of

violence within the family and the lack of mandatory reporting mechanisms for cases of child abuse.<sup>9</sup> While the Committee did not highlight areas of particular concern in the criminal law, with the notable exception of the reasonable chastisement defence discussed below, it is axiomatic that children should be protected from abuse by the criminal law, as well as the civil law

In Irish criminal law, there is no single offence of physical child abuse. In addition to the protection afforded children by the traditional principles of criminal law relating to assault, the offence of child cruelty has existed in our law since the nineteenth century. This offence, which was created by virtue of s.12(1) of the *Children Act 1908*, has been re-enacted and updated in s.246 of the *Children Act 2001*. Section 246 of the *Children Act 2001* creates a single offence which may be committed by a wide range of behaviour, (assault, ill-treatment, neglect, and abandonment or exposure), in a manner likely to cause the child unnecessary suffering or injury to health. Moreover, this offence has been

considerably expanded under the 2001 Act. There is a substantial increase in the penalties from a maximum of 2 years imprisonment on conviction on indictment to 7 years and from a maximum of 6 months imprisonment on summary conviction to 12 months. The lower age limit of 17 for a person who can be charged with cruelty or neglect has also been removed. Perhaps the most significant change, however, is the expanded definition given to the term “the child’s health or wellbeing”. The term now includes mental or emotional health or wellbeing and the expression “ill-treat” is specifically defined in the legislation to include frightening, bullying or threatening a child. As John O’Donoghue, the then Minister for Justice, Equality and Law Reform, stated in the Dáil debates preceding the Act, “the legislation will now give out a clear message that cruelty can mean more than physical cruelty or neglect.”<sup>10</sup> It is submitted that this is a welcome development in light of the serious impact emotional deprivation can have on children and one which is wholly in line with Convention principles.

## CHASTISEMENT

The protection provided to children by the law on assault and the law on cruelty detailed above, however, is qualified by the common law concept of “reasonable chastisement” which provides parents or guardians with a defence. In its 1998 Report, the Committee noted as one of its principal subjects of concern the “lack of prohibition in legislation of corporal punishment within the family” and recommended that “the State Party take all appropriate measures, including those of a legislative nature, to prohibit and eliminate the use of corporal punishment within the family”.<sup>11</sup> In the Committee’s view the legal protection of those who corporally punish children contravened the principles and provisions of the Convention.

In Irish law, s.24 of the *Non Fatal Offences Against the Person Act 1997* abolished the common law rule that a teacher is immune from criminal liability in respect of the physical chastisement of pupils.<sup>12</sup> Parents, however, are still permitted to use corporal punishment as long as it can be described as “reasonable chastisement” and, if charged with an offence in relation to a child, can raise the common law defence of reasonable chastisement at their trial. What constitutes reasonable discipline is a matter for the jury to determine on the facts of each individual case. In *R v Hopley*,<sup>13</sup> however, Cockburn LJ stated that punishment would be unlawful if “administered for the gratification of passion or rage or if it be immoderate or excessive in its nature or degree, or if it be protracted beyond the child’s power of endurance or with an instrument unfit for the purpose and calculated to produce danger to life and limb.” Within these parameters, however, the law is unclear. In this relation Charelton *et al.* refer to two Canadian cases which they claim may be indicative of the common law as it stands in Ireland.<sup>14</sup> In the case of *D(RS)*,<sup>15</sup> the accused was convicted on two counts of assault for conduct such as spanking the child’s bare bottom and hitting the child on the back of the head and hands. In *M(RW)*,<sup>16</sup> however, a case decided in the same year, the defendant was acquitted of assault, having beaten his 13 year-old daughter around the face, chest, arms and legs with a belt. The girl was being punished for skipping school and subsequently being found in a car with an 18 year old boy. Significantly, Thompson CJ concluded “I will not speculate as to what form the severest acceptable discipline might have taken, but I am satisfied beyond a reasonable doubt that it falls significantly short of the use of a belt in the manner employed here by the accused”. It is submitted that it is difficult to reconcile the

outcomes in the two cases which serve to highlight the very different interpretations that can be placed on “reasonable” behaviour in this context.

This point was most effectively made, however, by the European Court of Human Rights in the case of *A v UK*<sup>17</sup>. The background to the judgment was that an Englishman had inflicted a severe beating on his young stepson with a garden cane, causing extensive bruising. He had been acquitted by a jury of criminal charges of assault occasioning actual bodily harm, having raised the reasonable chastisement defence. The judge told the jury that:

“It is a perfectly good defence that the alleged assault was merely the correcting of a child by its parent, in this case the stepfather, provided that the correction be moderate in the manner, the instrument and the quantity of it. Or, put another way, reasonable. It is not for the defendant to prove it was lawful correction. It is for the prosecution to prove it was not. This case is not about whether you should punish a very difficult boy. It is about whether what was done here was reasonable or not and you must judge that...”<sup>18</sup>

The European Court found that “children and other vulnerable individuals in particular are entitled to State protection in the form of effective deterrence against serious breaches of bodily integrity”.<sup>19</sup> English law, which provided that the prosecution had to prove that an assault on the child went beyond the limits of reasonable punishment, had not provided adequate protection to the applicant and had failed to vindicate the boy’s right under Article 3 of the European Convention on Human Rights “not to be subjected to torture or inhuman and degrading treatment or punishment.”

Since the decision in *A v UK* the Court of Appeal in England in the case of *R v H*<sup>20</sup> required that judges hearing assault cases against parents should direct the jury as to what might be considered reasonable

## CHILDREN

punishment in the light of the standards set out by the European Court. Thus, the jury should be directed in detailed terms as to the factors relevant to whether the chastisement was reasonable and moderate, namely, the nature and context of the defendant's behaviour; the duration of that behaviour; the age, sex and personal characteristics of the child; the physical and mental consequences in respect of that child; and the reasons given by the defendant for administering the punishment. While at least this ensures the compatibility of English law with the terms of the European Convention on Human Rights, it does not assist in bringing the law any closer to UNCRC standards which prohibit "all forms of physical or mental violence". This was highlighted by the UN Committee in their *Concluding Observations* on the UK's *Second Report*:<sup>21</sup> "governmental proposals to limit rather than to remove the reasonable chastisement defence do not comply with the principles and provisions of the Convention, particularly since they constitute a serious violation of the dignity of the child."

In the absence of *dicta* from the Irish courts or legislation on the subject, Irish law remains out of kilter with both human rights Conventions. If a similar case were brought before an Irish court, however, under s.2 of the *European Convention on Human Rights Act 2003*, the court would be bound to interpret Irish law in the light of Article 3 and the decision in *A*.<sup>22</sup> It is submitted that the law should go further and abolish the highly subjective defence of reasonable chastisement as a provision of domestic criminal law in breach of Article 19. The Convention emphasises children's need for "special care and protection" by virtue of their vulnerability, yet the defence affords children less protection from violence than adults. The existence of a common law

immunity for parents can be regarded as the last vestige of an era where the child was viewed as parental property and not as an individual with rights of his or her own. It may also contribute to a more violent society and the serious problem of child abuse.<sup>23</sup> In this latter regard, it is noteworthy that the Law Reform Commission, which examined the issue in its *Report on Non Fatal Offences Against the Person*<sup>24</sup>, approved the following statement from the Canadian Law Reform Commission:

"One person's discipline is another's abuse, and to perpetuate even this narrow exception to criminal liability, operating as it does within a system designed to reject responsibility for conduct whenever there is 'reasonable doubt', can encourage a climate for child abuse, and furnishes a slippery slope down which even the most well-meaning of disciplinarian may unwittingly slide."<sup>25</sup>

While "the tenor of its discussion leaves no doubt that that it would prefer that such a right be abolished",<sup>26</sup> in the final analysis the Commission recommended that parents' exemption from criminal liability be maintained for the time being. It made its recommendation largely on the basis that such a radical change in the law required parental re-education on the issue, such re-education to "proceed without delay". In the absence of any programme of public education on the issue since the Commission made its recommendations in 1994, it is submitted that this argument should not delay legislative action on the issue. Introduced in tandem with re-educative measures, legislation may itself provide the impetus for a change in attitudes.

### CHILD SEXUAL ABUSE

In its 1998 Report the Committee on the Rights of the Child praised the

efforts of the Government in protecting children from sexual exploitation, particularly the *Sexual Offences (Jurisdiction) Act 1996* and *Child Trafficking and Pornography Bill 1997* (now the *Child Trafficking and Pornography Act 1998*). These Acts respectively award jurisdiction to domestic courts to prosecute citizens who engage in child sex tourism abroad and prohibit trafficking and various forms of sexual exploitation of children. Since then, the *Sex Offenders Act 2001* has also entered into law. This Act contains provisions which *inter alia* allow the Gardaí to maintain a register of convicted sex offenders and create a new offence for sex offenders who seek or accept work involving unsupervised contact with children without informing the employer of their conviction.<sup>27</sup> While these positive aspects must be acknowledged, there is no room for complacency in this area. The Committee stated "cases of abuse and ill-treatment of children, including sexual abuse within the family, should be properly investigated, sanctions applied to perpetrators and publicity given to the decisions taken, with due regard to respect for the child's privacy."<sup>28</sup> There remains a serious deficiency in the criminal law relating to child sexual abuse in that the general law of sexual offences does not extend to all acts of sexual abuse against children and therefore sanctions cannot be applied to all perpetrators.

As with physical abuse, there is no single offence of sexually abusing a child. Most sexual offences apply equally to children as they do to adults and therefore sexual activity with a child when the child does not in fact consent can be prosecuted by rape or sexual assault. The law on sexual assault can be found in sections 2 and 3 of the *Criminal Law (Rape) (Amendment) Act 1990* which create the offences of sexual assault<sup>29</sup> and aggravated sexual assault respectively. The offence of

sexual assault can be described as an assault in circumstances of indecency. Given that the definition of assault is the same as that given in s.2 of the *Non Fatal Offences Against the Person Act 1997*, it can be committed in two ways: where there is indecent contact and where there is no actual contact but the actions of the accused give rise to a reasonable belief in the victim of being immediately subjected to indecent contact ("psychic assault"). Whether behaviour is indecent or not depends on the circumstances including the relationship between the parties; and how and why the defendant started upon the course of action.<sup>30</sup>

Section 14 of the *Criminal Law Amendment Act 1935*, moreover, provides children with an additional layer of protection in imposing a statutory age of consent. The section states that the minimum age at which a person can consent to a sexual assault is 15 with the result that consent is no defence to a charge of child abuse if the victim is under 15. The difficulty with such a provision, however, is that it is based on the law on assault which, as noted above, requires the application of force or a psychic assault. Thus, a defendant who merely invites another person to touch him or her will not commit an assault as the law does not criminalize a passive assault. This lacuna in the law was discussed by the Law Reform Commission in their *Report into Child Sexual Abuse*<sup>31</sup>:

"[Sexual assault] is an assault in the generic sense accompanied by circumstances of indecency... there is thus no assault if the defendant, without force or threats or touching with his own hands, induces a child to undress before him or touch him (the defendant) indecently"<sup>32</sup>

The Commission went on to emphasise the inappropriateness of using the concept of an assault in this area:

"It is not an assault. It is rather Victorian to describe the activity itself as indecent. It is, rather, the exploitative nature of the activity, the exposure of the very young to sexual activity appropriate to the mature and the abuse of trust which offends... The law of assault, however well-settled, is simply irrelevant".<sup>33</sup>

The failings of Irish law in this regard are well illustrated by the decision in the English case of *Fairclough v Whip*<sup>34</sup>. In that case a defendant had exposed himself in the presence of a 9 year old girl and invited her to touch his exposed person, which she did. It was held by the Court that this did not amount in law to an indecent assault. This decision, together with subsequent decisions of the Court of Appeal, bolstered the case for reform in that jurisdiction and in 1959 the Criminal Law Revision Committee was established to review the law in relation to child abuse. Following the Committee's first report, the *Indecency with Children Act 1960* was passed.<sup>35</sup> The Act created two offences: committing an act of gross indecency "with or towards" a child under 14 and inciting a child under 14 to such an act.<sup>36</sup> Significantly, the Act did not prohibit "permitting" an act of gross indecency to be performed, an omission which gave rise to difficulties in later cases.<sup>37</sup>

To turn once more to the Irish law, the glaring deficiency in the law led the Commission to recommend the creation of a new offence of "child sexual abuse" to replace the present offence of "indecent assault with consent". This new offence was much more comprehensive and was based on a definition used in Western Australia. It included:

"(i) intentional touching of the body of a child for the purpose of the sexual arousal or sexual gratification of the child or the person;

(ii) intentional masturbation in the presence of the child;

(iii) intentional exposure of the sexual organs or any other sexual act intentionally performed in the presence of the child for the purpose of sexual arousal or gratification of the older person or as an expression of aggression, threat or intimidation towards the child; and

(iv) sexual exploitation which includes permitting, requiring or allowing a child to engage in prostitution or any other sexual act or involving the child in recording any sexual act for the purpose of sexual gratification."<sup>38</sup>

As can be seen from the definition above, only behaviour from which the defendant derived sexual gratification or intended as an expression of threat, aggression or intimidation would constitute the offence. The offence would be prosecutable summarily or on indictment and would carry a maximum penalty of 5-7 years imprisonment. It could be committed with children under the age of 15 or children aged 15 and 16 where the offender could be described as a "person in authority". A "person in authority" is defined by the Commission as including "a parent, step-parent, grandparent, uncle or aunt, any guardian or person in *loco parentis* or any person responsible, even temporarily, for the education, supervision or welfare or a person below the age of 17."<sup>39</sup>

The Commission's recommendations have been endorsed by O'Malley, who notes that this is an area of the law "in urgent need of reform".<sup>40</sup> He further notes that the introduction of the new offence would allow Ireland to comply fully with the terms of the Convention.<sup>41</sup> It would also have the effect of bringing the criminal law much closer to the definition of child sexual abuse in *Children First*,<sup>42</sup> the guidelines used nationally by professionals in the identification and reporting of child abuse.

Fifteen years have now elapsed since the publication of the Report by the Law Reform Commission and

## CHILDREN

no legislation to address this lacuna has been brought forward by the Government. In 1998, however, the Department of Justice produced a *Discussion Paper on the Law on Sexual Offences*<sup>43</sup> which examined the issue of child sexual abuse. While the Paper conceded that the “need for legislation to deal with [the offence of indecent assault with consent] would seem to be incontrovertible”, it appeared to highlight two main difficulties with the introduction of legislation in this area. The first of these concerned ensuring the term “child sexual abuse” is not too narrowly or broadly defined. The Paper expressed concerns about possible overlap with existing criminal law provisions, such as offences contained in the *Child Trafficking and Pornography Act 1998*.<sup>44</sup> The second reservation related to the wide ranging nature of the putative offence and the corresponding need for different age limits in respect of the different elements. As noted above, under the Commission’s recommendations all the elements of the offence could be committed against children under 15 years of age and also by persons in authority or older persons against 15 and 16 year old children. Following on from this, the Paper states “it could be argued that the elements that make up the offence proposed by the Commission are so varied that different age limits should apply to different parts.”<sup>45</sup>

In relation to the first difficulty highlighted in the Discussion Paper, it is clear that the offence is not too narrowly defined. As discussed above, difficulties arose in England from the fact that “permitting” sexual activity was not included in the definition. This was specifically addressed by the Commission in their Report: “we think it would be wise if legislation also captured ‘permitting’ such acts as well as ‘committing’ and ‘inciting’ them”.<sup>46</sup> On the other hand, it is clear there is some overlap between the meaning attributed to “sexual exploitation” in

the Commission’s definition and the taking or using a child for sexual exploitation as proscribed in s.3 of the *Child Trafficking and Pornography Act 1998*.<sup>47</sup> Both prohibit permitting, requiring or allowing a child to engage in prostitution or involving the child in recording any sexual act. However, it is also clear that the definition of sexual exploitation in the 1998 Act is limited by its very reliance on the current law. While the 1998 Act, at its broadest, refers to “inducing or coercing the child to participate in any sexual activity which is an offence under any enactment or the commission of any such offence against the child”<sup>48</sup> the Commission’s definition would prohibit “permitting, requiring or allowing a child to engage in ... any sexual act... for the purpose of sexual gratification” The existence of legislation dealing with the specific social ills of child trafficking and pornography does not detract from the need for a general offence of child sexual abuse. In any event, it is surely preferable that such matters are left to prosecutorial discretion than prosecutors are unable to prosecute due to inadequacies in the law.

Concerns about the age limits which should apply to the different elements of the offence also do not seem to present an insuperable obstacle to the adoption of the Commission’s recommendations. The Paper questioned whether some of the elements contained within the Commission’s definition would not be better applied to all children under 17. This is to overlook the arguments raised by the Commission that above a certain age the criminal law should not intrude in sexual relations between persons of the same age but children between 15 and 17 should continue to have protection against abuse by persons in authority. As O’Malley writes “[the Commission’s recommendations] ... strike a balance between sexual ‘exploration’ (sexual activity other

than intercourse between young person of the same age) and sexual exploitation.”<sup>49</sup> Under the Commission’s recommendations, protection would be extended to children between the ages of 15 and 17 from sexual abuse by “persons in authority” which term is defined broadly to include “any person responsible, even temporarily, for the education, supervision or welfare of a person below the age of 17”.<sup>50</sup> The extension of the law in this regard would also go some way towards criminalizing consensual sexual activity between children and their step parents which are not covered by the current law on incest.<sup>51</sup>

## CONCLUSION

Irish law now contains a much wider range of provisions for the protection of children from abuse than it did when Ireland submitted its *First Report* in 1996. In addition to the enactments mentioned above, recent initiatives include the *Protection for Persons Reporting Child Abuse Act 1998*, the publication of the *Children First National Guidelines* in 1999 and the establishment of the Irish Social Services Inspectorate, soon to be placed on a statutory basis.<sup>52</sup> The adoption of a National Children’s Strategy and the appointment of an Ombudsman for Children also represent significant steps forward for children’s rights in this jurisdiction.<sup>53</sup> Nevertheless, it is extremely disappointing, given the media attention which the issue of child abuse has received in the past twenty years or so and the alarming increase in recent years in the number of reports of abuse,<sup>54</sup> that the State has yet to achieve compliance with the minimum standards provided in the Convention in the two fundamental respects outlined above. Perhaps it will only be with incorporation into domestic law that full compliance with the Convention will be achieved.<sup>55</sup> At a minimum, it is sincerely to be hoped that in its next performance before the Committee in Geneva the

Government will be brought to account for its legislative inactivity in these core areas.

\*LL.B. (Ling. Franc), Barrister-at-Law, M. Litt., Dip. Eur. Con. On Human Rights. Assistant Lecturer in Criminology, Dublin Institute of Technology

1 For further information on the Convention see T. Blake "The United Nations Convention on the Rights of the Child" [1991] I.L.T. 114.

2 Ireland is a dualist State and as such international law is binding on, but not within the State. This is reflected in Article 29.6 of the Constitution: "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."

3 J. Nestor *Law of Child Care* (2004, Blackhall Publishing) at p.27.

4 For a critical assessment of Ireland's last appearance before the UN Committee on the Rights of the Child see U. Kilkelly "In the best Interests of the Child?: An Evaluation of Ireland's Performance before the UN Committee on the Rights of the Child" [1998] I.L.T. 293.

5 The Second and Third Reports fell due on the October 27, 2004. At the time of writing, the Government was still engaged in the requisite consultation process with NGOs.

6 "State parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has the care of the child..."

7 "State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials."

8 Committee on the Rights of the Child Concluding Observations on the Report Submitted by Ireland under Article 44 of the Convention (Geneva, United Nations, 1998) available at [www.unhcrh.ch/reports](http://www.unhcrh.ch/reports). Also published by the Children's Rights Alliance (with an introduction from the Alliance) under the title *Children's Rights, Our Responsibilities: Concluding Observations of the UN Committee on the Rights of the Child following Examination of the First National Report of Ireland on the Implementation of the Convention on the Rights of the Child* (1998).

9 Committee on the Rights of the Child *op. cit.* at para. 16. Despite recommendations by both the Kilkenny Incest Investigation Report in 1993 and the Law Reform Commission in their Report on Child Abuse in 1990 that a system of mandatory reporting be put in place, there has been no firm Government commitment on the issue. In July 2000, the then Minister for Children expressed an intention to bring a White Paper to Cabinet on the issue but this has not been forthcoming. See further K. Doran "The Case for Mandatory Reporting" (1998) 92(1) LSG 16. 10 517 Dáil Debates Col. 97, Second Stage.

11 Committee on the Rights of the Child *op. cit.* at para.39.

12 While the Department of Education had prohibited the use of corporal punishment in schools since 1982 by means of Department Circulars, this did not affect teacher's criminal liability for assault. 13 (1860) 2 F&F 202 at 206.

14 P. Charleton, P.A. McDermott, and M. Bolger, *Criminal Law* (1999, Butterworths) paras 9.173-9.179.

15 (1996) 102 CCC (3d) 319.

16 (1996) 103 CCC (3d) 375.

17 [1998] E.H.R.L.R. 82; [2000] 1 F.L.R. 266.

18 *Ibid.* at para. 10.

19 *Ibid.* at para. 22.

20 [2001] 2 F.L.R. 431.

21 Committee on the Rights of the Child. Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. (Geneva: United Nations, 2002)

available at [www.unhcrh.ch/reports](http://www.unhcrh.ch/reports) at p.8. 22 It should be noted, moreover, that earlier decisions touching upon the subject invite optimism as to the attitude which may be taken by the Irish courts. Arthur draws attention to the case of *JO'C v MO'C* where Kenny J awarded custody of the children to the father on the grounds that the mother frequently resorted to corporal punishment as a means of discipline. In the course of his judgment he commented that "civilised human beings have long since abandoned this barbaric practice." R. Arthur "The European Court of Human Rights and the Abolition of Corporal Punishment" [1999] 4 I.J.F.L. 10.

23 For further arguments in relation to the defence of reasonable chastisement see C. Lyon *Child Abuse* (3<sup>rd</sup> ed., Family Law) at para. 2.64 and 12.41; Children's Rights Development Unit UK Agenda for Children: A Systematic Analysis of the extent to which law, policy and practice in the UK complies with the principles and standards contained in the UN Convention on the Rights of the Child (1995) at p.56-7.

24 Law Reform Commission Report on Non-Fatal Offences Against the Person (L.R.C. 45-1994) at paras. 9.207-9.214.

25 *Ibid.* at para. 9.208; Law Reform Commission of Canada, Working Paper No. 38 Assault at p.46.

26 C. Hanly *An Introduction to Irish Criminal Law* (Gill and MacMillan, 1999) at p.223.

27 For a further discussion of legislation relating to sexual abuse see J. Nestor *Law of Child Care* (Blackhall Publishing, 2004), chapter 5.

28 UN Committee on the Rights of the Child *op. cit.* at no.7 at para.39.

29 The old offence of indecent assault was renamed "sexual assault" by s.2 of the Criminal Law (Rape) (Amendment) Act 1990 and the penalty was reduced from 10 to 5 years. This section has since been amended by s.37 of the Sex Offenders Act 2001 which restored the maximum sentence to 10 years or 14 years where the victim is a child.

30 *R v Court* [1989] A.C. 28.

31 Law Reform Commission Report on Child Sexual Abuse (L.R.C. 32-1990).

32 *Ibid.* quoting G. Williams *Textbook on Criminal Law* (2<sup>nd</sup> ed., 1983) at p.230.

33 Law Reform Commission *op. cit.* at paras 4.18 and 4.19.

## CHILDREN

34 [1951] 2 All E.R. 834.

35 Criminal Law Revision Committee First Report: *Indecency with Children* (HMSO, 1959, Cmd. 835).

36 The Act only protected those under the age of 14 from such activity. This was remedied in the Criminal Justice and Court Services Act 2000 which extended the section's protection to all children under the age of 16.

37 See, for example, *R v Speck* [1977] 2 All E.R. 859 where a young girl placed her hand on the defendant's crotch outside his trousers, causing him to have an erection. While he did nothing to encourage her, the Court of Appeal upheld his conviction under the section as amounting to "an invitation to the child to do the act". This decision has been subject to much criticism as a clear abuse of the language of the section. See, for example, *C.Lyon op. cit.* at p.438.

38 Law Reform Commission, *op. cit.* at para 1.10.

39 Law Reform Commission *op. cit.* at para 4.11.

40 T. O'Malley *Sexual Offences* (Round Hall Sweet and Maxwell, 1996) at p.102.

41 *Ibid.* at p.108.

42 Department of Health *Children First: National Guidelines for the Protection and Welfare of Children* (1999). In the Guidelines sexual abuse is defined broadly as occurring when a child is used by another person for his or her gratification or sexual arousal or for that of others. Examples of child sexual abuse given in the Guidelines include the following:

"(i) exposure of the sexual organs or any sexual act intentionally performed in the presence of the child;

(ii) intentional touching or molesting of the body of a child whether by a person or object for the purpose of sexual arousal or gratification;

(iii) masturbation in the presence of the child or the involvement of the child in an act of masturbation;

(iv) sexual intercourse with the

child whether oral, vaginal, or anal;

(v) Sexual exploitation of a child includes inciting, encouraging propositioning, requiring or permitting a child to solicit for, or to engage in,

prostitution or other sexual acts. Sexual exploitation also occurs when a child is involved in the exhibition, modelling or posing for the purpose of sexual arousal, gratification or sexual act, including its recording (on film, video tape or other media) or the manipulation, for those purposes, of the image by computer or other means. It may also include showing sexually explicit material to children which is often a feature of the "grooming" process by perpetrators of abuse." (Para. 3.5.)

43 Department of Justice, Equality and Law Reform Discussion Paper on the Law of Sexual Offences Dublin: Stationery Office (1998) at p.68.

44 This Act has now been amended by the Child Trafficking and Pornography (Amendment) Act 2004 which inserts the following section after s.12 of the 1998 Act:

"13.—Nothing in this Act prevents—

(a) the giving of or compliance with a direction under s.3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997, or

(b) the possession, distribution, printing, publication or showing by either House of the Oireachtas, a committee (within the meaning of that Act) or any person of child pornography for the purposes of, or in connection with, the performance of any function conferred by the Constitution or by law on those Houses or conferred by a resolution of either of those Houses or resolutions of both of them on such a committee."

45 *Ibid.* at p.69.

46 Law Reform Commission *op. cit.* at para. 4.17.

47 (3) In this section "sexual exploitation" means:

(a) inducing or coercing the child to engage in prostitution or the production of child pornography,

(b) using the child for prostitution or the production of child pornography,

(c) inducing or coercing the child to participate in any sexual activity which is an offence under any enactment, or

(d) the commission of any such offence against the child.

48 S.3(3)(c)-(d), *Child Trafficking and Pornography Act 1998*. Emphasis added.

49 O'Malley *op. cit.* at p.103.

50 Interestingly, a similar criminal offence of abuse of trust by a person in a position of authority has been created in England with the enactment of s.3 of the *Sexual Offences (Amendment) Act 2000*.

51 The Commission noted that "this recommendation is aimed particularly at the sexual abuse of young persons of this age by their parents or step parents". Law Reform Commission *op. cit.* para. 4.20.

52 *National Children's Strategy Our Children, Their Lives* (Dublin, Stationery Office, 2000) at p.61-2.

53 Emily Logan was appointed to the position in 2003 further to the enactment of the *Ombudsman for Children Act 2002*.

54 In 1995, the health boards received 6,414 reports of alleged child abuse (2,276 were confirmed). In 2000 (the latest figures available), there were 8,269 cases reported, (3,085 cases were confirmed).

55 A possibility which is currently being considered by the All-Party Oireachtas Committee on the Constitution.