Lowering of the Age of Consent-some points for consideration drawn up by the National Institute for Childhood[i], the President's Foundation for the Wellbeing of Society.

The National Institute for Childhood (NIC) within the President s Foundation for the Well-being of Society wishes to contribute to the present discussion on the lowering of the age-of-consent by bringing to the attention of the Social Affairs Committee the following points.

The current debate surrounding the lowering of the age-of-consent has emerged out of an apparent awareness that minors may be sexually active. Advocates in favour of lowering the age-of-consent to 16 make the argument that for improved access to health services the sexual activity between these consenting minors, age 16 to 18, should be decriminalized. The NIC feels that this is too narrow a conceptualization of the issues at stake. It would like to place the concern regarding access to sexual health services within a wider consideration of the duty to protect minors from sexual exploitation at the same time as recognizing minors' rights and evolving capacities; of the conceptualization of the nature of consent itself; of how access to sexual health and other services for minors can be reframed; and of how the professional responsibility toward safeguarding the rights and welfare of minors can be envisioned. A delicate balance between thinking of minors as right holders with capacity and autonomy and as a 'subordinate group defined by their dependency and need for protection' (Yarrow *et al.* 2014) is advised.

NIC observes that, at present, when minors voluntarily seek to access sexual health services, especially without parental consent, health professionals may find themselves in an ethical dilemma in terms of whether or not to report the activity. Our understanding is that medical doctors have a moral and ethical obligation to give sexual health advice or treatment to any person that seeks it provided that the person, in the doctor's assessment, is capable of

understanding the context of the situation. Doctors cannot divulge patient information unless given permission by the said patient or by order of a court of law. Furthermore doctors cannot report cases of sexual activity in minors unless there is physical proof of violence or rape.

NIC wishes to note the following points:

- If age of consent is lowered to 16, health professionals will still be faced with the same ethical dilemma regarding reporting when minors under 16 seek access to sexual health services. Such scenarios require an overarching service delivery protocol guiding professionals' actions, rather than just the lowering of the age of consent.
- Lowering the age of consent to 16 does not and should not absolve health professionals' responsibilities in terms of assessing the nature of any minor's involvement and consent in sexual activity, nor does it resolve challenges health professionals face when they offer sexual health services to those over 16 who have been subject to sexual abuse, violence or coercion of any type.

Within this document NIC will refer to international literature and local legislation to discuss the issues raised above to demonstrate that the debate should be framed within a wider discussion.

Protecting minors from harm

Concepts of childhood as a social category and of sexuality are context-dependent; they vary from country to country and across cultures. This notwithstanding, a minimum legal age for sexual consent 'is almost universal across national jurisdictions' (Yarrow, Anderson,

Apland, and Watson, 2014). National jurisdictions most commonly protect minors from sexual exploitation and other harms such as rape, paedophilia and other form of sexual interference of adults through minimum legal age of sexual consent legislation. This legally determined age-of-consent differs across countries. Neither the European Union nor the Council of Europe have suggested any specific age of consent; there has not been any effort so far to standardise the age across member states. However, most countries in Europe now have binding legal obligations with regard to the sexual abuse of children under the age of 18. Directive2011/92/EU obliges member states to combat the sexual abuse and sexual exploitation of children, including of child pornography. Here 'the child' is considered to be any person under the age of 18. Malta is also signatory to the Lanzarote Convention, 2011 regarding the involvement of minors under 18 in prostitution and pornography, which also protects them from sexting and grooming. On 17 June 2015, the Lanzarote Committee included other acts of sexual exploitation of a minor, (where a 'child' is defined in Article 3 as 'person under the age of 18 years') that must be criminalized:

"Engaging in sexual activities with a child where:

- *Use is made of coercion, force or threats; or*
- *Abuse is made of a recognized position of trust, authority or influence over the child, including within the family; or*
- *Abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence."*

The age-of-consent is called 'the legal age for sexual activities' and must be chosen by states at the age they see fit. No specific age is recommended. As of 2015, the Lanzarote Convention has been ratified by 36 states, while another 11 states have signed but not yet ratified the convention.

Furthermore, in its concluding observations for Malta's Periodic Review the **UN committee on the Rights of the Child Recommendation** expressed concern that the age 16 for marriage is inappropriate. It encouraged the legislator to raise the age of marriage to 18, in compliance with age of majority. Not only has this recommendation not be taken on board but there is now the intention to lower the age-of-consent to 16 whilst age of marriage remains at 16 years of age. The Civil Unions Act, ACT IX of 2014, cap. 530 wherein the age at which a person may enter into such a union is also set at 16.

Research finds that with early sexual activity there are 'consequent risks of physical and mental harm' (Madkour, Farhat, Halpern, Godeau and Gabhainn, 2010). Apart from the very serious psychological consequences of sexually exploitative and abusive relationships, there are other 'harms' of even consensual, close-in-age adolescent early sexual initiation [ESI]. This has been found to be a 'risk' or 'problem' behaviour across developed nations. Substance abuse is found to be positively, and school attachment, negatively, related to early sexual initiation (Madkour *et al,* 2010,). In other words, adolescents who engage in ESI are also more likely to be involved in substance abuse as well as to be less attached to school.

Moreover, comparative research finds that girls under 15 years of age are 'physiologically unprepared for pregnancy'; their cervixes are 'more vulnerable to STI infection'. Given the immaturity of the prefrontal cortex before the age of 15, their 'cognitive capacity' to make decisions which are 'informed, safe and voluntary' may be restricted (Madkour *et al,* 2010,). This cognitive immaturity is also a concern regarding adolescent boys, who encounter their own set of physical and psychological risks with ESI. Whilst repressing adolescent sexual activity through legal restrictions does not necessarily lead to less sexual activity nor straightforwardly lessen the risk of harms, the lowering of the age of consent should be

framed within a discourse that recognises these harms. The legal remedy of access to sexual health services should be matched by policy guidelines and services that actively seek to reduce these harms.

Internationally, the LGBTiQ lobby often makes the case that the age-of-consent legislation criminalises many already marginalised young LGBTiQ youth and their partners, and does not recognise cultural difference, where first relationships of these youth may be with adults (Hunt, 2009). They argue that there has been a 'heterosexual hegemony' in establishing what is 'deviant or dangerous' (Hunt, 2009). Furthermore, though a situation of equality may prevail regarding the age of consent for both heterosexual and LGBTiQ minors ' legal equality does not imply recognition of the legal value of homosexuality and heterosexuality' (Hunt, 2009). Whilst not wishing to contribute to the further marginalisation of these youth and still less to their criminalisation, the question of the cognitive maturity of the adolescent needs to be studied further, this especially when adolescents are in relationships with those who are not close-in-age (Benedet, 2010).

The young are also at risk of harm because of 'their inferior social status and relative powerlessness' in relation to (sexually exploitative) adults. Yarrow *et al* (2014) make the point that whilst in line with a positive approach to children's rights, arguments for more autonomy 'underestimate structural power relations' and give minors rights whilst failing 'to challenge unequal social contexts in which they are embedded'.

Researchers refer to the coercive nature of relations between minors and those older in age, between minors and those in a position of trust, authority and influence over them and also of those with whom minors are in a relationship of dependency. These relationships should be

seen to 'vitiate' any form of consent, not simply of children but also of adolescents 16-18 years of age (Benedet, 2010). Moreover, even when the minor is close-in-age to the person in the relationships of trust, authority, influence and/or dependency, then the very ability to give voluntary consent is considered vitiated (such as when the minor is close-in-age to an uncle-carer or to a teacher, but is also in a relationship of trust or dependency with him or her). The relational nature of power explains why it is also considered to vitiate consent when both parties to sexual activity are close-in-age minors, but one of them is either emotionally or socially vulnerable, or has an intellectual or other disability, such that the power differential between them makes the relationship non-consensual. Courts often operate within too narrow an interpretation of what constitute such relationships, such that often the more powerful are protected more than the less powerful.

The nature of 'consent'

In the discussion regarding the lowering of the age of consent, consent has been seen to have a solely legal definition. The discussion is framed solely within a debate surrounding the age-of-consent, where the 'nature' of consent itself is not discussed, yet courts often resort to examples of 'consent' or 'compliance' even when they are dealing with minors below the age of consent. The age of consent is usually determined by states to never fall below the age of 12 (or Statutory Rape for which there is no defence). According to Yarrow *et al* (2014) 'Almost all States around the world have established a minimum legal age for sexual consent; that is a prescribed age below which a child is deemed unable to consent to sexual activity.' This recognises differences in cognitive, physical and emotional development as well as issues of power. States rightly legislate to protect minors.

However, presenting 'consent' as solely a legal question and omitting the nature of consent itself is unfortunate. Minors' ways of dealing with unwanted sexual advances and activities, their distress when they are exploited, even their oft-time apparent 'compliance', is misunderstood because there is no engagement with minors and their point of view. Whilst the law protects minors by age-of-consent legislation, it removes their voices from the discussion. Criminal law does not set out to protect individuals directly- it acts on behalf of the state to protect society which is why it is restrictive in nature. If the current system prevails, there can be little or no provision for discussion. If this were viewed as child abuse or treated under domestic violence the outcome might be different.

The sexual exploitation of minors by adults

The Lanzarote Committee (17 June 2015) adopted a resolution whereby acts with a child (defined in Article 3 as "person under the age of 18 years) that must be criminalized should include those acts where

- *Use is made of coercion, force or threats; or*
- *Abuse is made of a recognized position of trust, authority or influence over the child, including within the family; or*
- *Abuse is made of a particularly vulnerable situation of the child, notably because of a mental or physical disability or a situation of dependence."*

Malta protects minors from sexual exploitation through a number of articles under Chapter 9 of the Laws of Malta, the Criminal Code and under other Acts (Malta has also ratified the UNCRC Protocol on Sale of children, child prostitution and child pornography). Whilst there are a strong range of measures to protect minors some comment is necessary here, especially to see how far the current protection should continue to be extended to those between 16-18,

even if the age-of-consent is lowered to 16 for the twin purposes of decriminalising the sexual activity of close-in-age teenagers in consensual relationships (Romeo and Juliet clause) and of giving these same teenagers access to sexual health services. Historically the protection offered to minors regarding 'fraud or seduction' was seen as a crime against the family. Indeed Article 199 (2) and other articles related to the defilement of minors (Article 203) appear in the Criminal Code as crimes 'against the peace and honour of families and against morals'. This is the crux of the matter. Article 203 (1) provides for aggravating circumstances; it specifically mentions offences committed by persons related by 'consanguinity or affinity', including by adoption, by 'tutor or any other person charged, even temporarily, with the care, education, instruction control or custody of the minor'. There are number of other Articles which are protective of minors (197, 199, 203, 204, 205, and 208) which appear to be mainly comprehensive in coverage. These cover the inducement to prostitution; abduction or fraud or seduction with intention to abuse or marry; defilement of minors; the facilitation of defilement; the encouragement to practise prostitution; the use of violence, threat, coercion or force to compel a minor to prostitution or into pornographic performance; participation in sexual activities with a minor; violent indecent assault of a minor; producing, circulating or consuming child pornography; allowing a child to watch pornography; solicitation of a minor through information and communication technologies. Despite this raft of legal protections some of the extant penalties are light considering the gravity of the abusive act and the long-term consequences of them.

Here, NIC cannot elaborate further, except to say that this protection should continue to apply to persons age 16-18. Furthermore, the criminalisation of sexual activity between a people in a position of authority, trust, influence, or who is in a relationship with a minor who is dependent on him or her should also continue to apply to those who are between 16-

18 years of age. These young persons are still young enough to be in a position of far less power than others in these positions of trust, to need protection from sexual activity with them. This is about structural inequality and its effect on voluntary consent. It is also influenced by the definition of 'child' where the criteria adopted are affected by the shifting perception of childhood- with all that it entails (e.g. juvenile used instead of child for offenders and minor instead of child for asylum seekers).

NIC furthermore feels that Maltese law should give more importance to online grooming and prostitution, phenomena which spring from fast technological advances. Benedict (2010) describes pertinent legislation in Canada which addresses the sexual exploitation of minors through the rise of electronic means of communication showing how this can be potentially damaging to children. The Canadian Parliament passed new laws dealing with child pornography (with an age-of-consent of 18 years), created an offence of video voyeurism to cover surreptitious recording of children and adults (Criminal Code 162) and creating an offence of luring a child by means of a computer system (Criminal Code 172) (Benedet, 2010).

NIC feels that very tight age-of-consent legislation should remain in place and that defences of mistake-in-age should become inadmissible. A number of studies (Warner, 2012) demonstrate how 'mistake-in-age' defences are in their majority made to protect abusing adults. They rarely, if ever, protect minors, especially those very vulnerable minors who have been sexually exploited from a very young age and who therefore appear to be more sexually 'knowledgeable'. These very vulnerable young people, sexualised though they may be, need more protection from abusing adults since they are the most likely targets of adult interest. According to Warner (20 12) having a 'no-defence age' may be contrary to *mens*

rea- though here are other grounds over which an accused may defend his or herself. Warner (20 12) states that for many 'the argument in favour of absolute liability as to age for this offence is that sexual abuse of children is so harmful and so abhorrent that liability without proof of fault is justified.' . Warner (20 12) gives alternatives such as a narrowing of the defence of mistake, which , for example, puts' a restriction on the upper age of the defendant who can argue a mistake as to age on the grounds that a greater age disparity is an indication of exploitation'. This should be accompanied by a 'reasonable steps' requirement whereby the defendant would have to demonstrate what 'reasonable steps ' had been taken to ensure that there was no mistake of age. . However, NIC feels that at a time when more minors are culturally and socially encouraged to appear older and to be more sexualised, this 'mistake-in-age' defence should not be accepted, since it will leave too many minors unprotected. Minors now carry forms of identification which include date of birth; any person in doubt as to the age of the minor can request to see these documents or desist from sexual relations when in doubt.

The mistake-in-age exemptions should not be there to allow adults who are NOT close in age to use mistake-in-age defences. This is especially important in the case of minors and of young people under 18 (16-18) who have been exploited in the past and who may appear even sexualised. Regardless of the appearance, of the behaviour (for example, prostitution) it should be the responsibility of the adult to make no mistakes in age. In discussing 2008 changes to Canadian legislation which raised the age of consent from 14 to 16, Benedet (2010) argued that criminal law 'failed to recognise the coercive nature of significant differences in age'. Furthermore, the application of mistake-in-age defence 'prioritizes adult sexual autonomy over all else' (Benedet, 2010). Though it is often argued that not to accept these exceptions regarding 'mistake-in-age' between older adults and minors is to remove the

right of *mens rea*, Benedet (210) and others point out that most of the evidence on the sexual exploitation of minors, on sexual abuse and forced sex, on harmful and destructive relationships including on the fathering of teenage mothers' babies point to adults who are at least five or more years older than the minor victims. Moreover, according to Benedet (2010) mistake-of-age obscures gender –based violence since proof of age 'serves as a proxy of nonconsent'; that is, if the defendant can prove he or she made a mistake, then there is no further exploration of whether there was consent or nonconsent. Benedet (2010) shows how the capacity to consent is more complex than the capacity to know that sexual contact is not wanted; this nonconsent 'must be recognised and affirmed by the court' which should not just rely on mistake-in-age defences (Benedet, 2010).

Close-in-age exemptions

Currently, close-in-age exemptions partially decriminalises the sexual activity between consenting adolescents age 14-16 (Article 37 of Act IV of 2014) . With the raising , by Act IV of 2014, of the age of criminal responsibility to age 14, further attention is required into the question of sexual relationships of this under 14 and 14-16 age group particularly in relation to Articles 203 (1) and 203 (A). Minors under age 14 are exempt from criminal responsibility for any act or omission; they are considered *doli incapax*, that is 'incapable of mischievous intent'. Minors under 16 are exempt from criminal responsibility if acting without mischievous intent. However, if they are between 14 and 16 and acting with mischievous intent or if they are above 16 years of age, there is criminal liability but with mitigated punishment. If they are above 18, full punishment is meted out. Whilst the law appears to protect minors from minor-to-minor sexual abuse, NIC feels that therapeutic and other services are a more effective way of promoting respectful and healthy sexual relationships.

NIC suggests that close-in-age exceptions be only admissible for the very close ages within a 2 year band for those minors age 14-16, and of five years for those adolescents age 16-18. The purpose of the close-in-age bands is solely to decriminalise the consensual sexual activity of adolescents. The emphasis here is on the issue of the voluntary consent in these close in-age bands.

Presently, no public health services exist for effective therapy with under 14, or 14-16, sexually active youngsters involved in inappropriate (such as coercive, or with under 12 year olds) sexual activity. Therapeutic programmes need to be established to address the needs of such perpetrators and help them overcome the desire to engage in this type of coercive sexual activity. Research shows that prompt treatment is effective in addressing this type of behaviour which puts all young people at risk, including those who engage in sexually abusive behaviour as the abusing partner (Edwards, et al.,2005). But there is research to show that sexual activity with under 12s who are pre-pubescent is not remediable.

The question of the minor's consent, that is, the minor's right to be protected from unwanted sexual advances and activities should continue to apply and be taken into consideration when the minors are close-in-age, within these close-in-age bands. Articles 203 (1) and 203 (A) of Act IV of 2014 proscribe penalties that are not sufficiently prohibitive for nonconsensual sexual activity between minors who are close-in-age. These close-in-age exemptions are not strong enough to prevent minor-to-minor sexual abuse, the incidence of which may be not fully known but is likely to grow with minors' access to electronic media and as a result of the sexualisation of society, amongst other causes.

Additionally, NIC argues that though minors may not have the full cognitive capacity to give 'consent' (and is the reason why they are being protected), they do have other capacities through which they can, in some cases, indicate lack of consent. Their behaviour in the face of abuse is complex and may be difficult for Courts to understand; it is important for there to be more training in this field. It is also important that more professionals who are attuned to listening and understanding children are engaged and that more opportunities are built into judicial proceedings which ensure child participation.

Kitzinger (1999) argues that many of the discourses surrounding minor protection from sexual abuse use a concept of innocence which is 'problematic' for three main reasons. She points out how the very concept of 'childhood innocence' is itself 'a source of titillation for abusers'. Secondly, this notion of 'innocence' stigmatizes the 'knowing' child, who may be 'penalised' for responding to the abuse, since if it is the violation of 'innocence' that is being protected then this allows an abuser (or a Court) to argue (a defence) that the minor was not 'innocent' in the first place. This leaves the minor without protection. Instead of recognising the particular vulnerability of this category of (previously sexualised) minors, this type of reasoning leaves them open to further sexual exploitation to the point where they are targeted by abusing adults. A third reason why the 'innocence' discourse is problematic is that it denies 'children access to knowledge and power and hence actually increases their vulnerability to abuse'. For example, not giving children access to information and services in the name of protecting 'innocence' denies them the tools to recognise abuse. Children's individual acts of resistance (and 'passivity' is one of them) are ignored or misinterpreted by adults; their successful defences are hidden. This portrays minors as less able to exercise agency than they are and disempowers them in the face of abuse by others more powerful than them. If Courts do not validate the various ways through which minors resist abuse,

then many minors will feel they cannot refuse the more powerful abuser. It is in this sense that Courts need to balance the duty to protect with the responsibility not to disempower or further victimise minors by retaining an outdated concept of 'childhood innocence'.

This is not to say that because some minors do have successful strategies then the responsibility for resisting abuse should ever devolve to them. Even with good Child Safety and other empowering programmes in place, the message must be clear and categorically stated **that it is <u>not</u> ever the minor victim who is responsible for resisting the abuse**. However, the agentic resistance and nonconsent of minors should be recognised for what it is. When it is present, this nonconsent should be acknowledged. By not acknowledging the minor's voice, defences and judgements are made which ignore all the signs the minor makes to indicate nonconsent; these defences and judgements further contribute to minor disempowerment. Every public policy effort should be made so that both children and adults learn to appreciate that consent is an active process which requires an unequivocal, spoken 'yes'. It is a process which may be interrupted at any time by one of the parties who wishes to withdraw his or her 'yes'.

Conclusion: Sexual health and sexual health services

According to the current working definition given by WHO (2006) sexual health is:

> "…a *state of physical, emotional, mental and social well-being in relation to sexuality; it is not merely the absence of disease, dysfunction or infirmity. Sexual health requires a positive and respectful approach to sexuality and sexual relationships, as well as the possibility of having pleasurable and safe sexual experiences, free of coercion, discrimination and violence. For sexual health to be attained and maintained, the sexual rights of all persons must be respected, protected and fulfilled."*

The definition of sexual health services in Malta is subject to a reservation (CEDAW, 1991) so as to always exclude the possibility of including abortion as a service being offered should the term “health services and sexual and reproductive rights” be used .

The issue of criminalisation of abusive behaviour should not interfere with the right to access sexual health services. These are to be made available to those who require health services regardless of age and whether they are the perpetrator or the victim in case of an abuse. If a person has committed an indictable act on a minor, he or she should still have access to health services independently of any legal measures against him or her.

NIC believes that the question of the criminalisation of sexually abusive behaviour should be re-framed in such a way as de-couple it from the crucial question of ensuring that minors have access to sexual health services. Similarly the development of sexual health services should proceed within a framework which includes a service delivery protocol which clarifies:

- how minors may access sexual health services irrespective of their age
- procedures to be followed in terms of informing and seeking the consent of adults with parental responsibility when minors seek sexual health services
- how the above mentioned procedures will be applicable to over and under 16 year olds
- which, if any, sexual health interventions require parental consent
- child protection procedures to be followed in situations where health professionals assess that minor did not consent to sexual activity or where a minor has acted in an abusive manner.

Further to the above, NIC would like to foreground the delicate nature of the issue of informing parents or otherwise reporting to child protection authorities. Health professionals need to have access to continuous professional development about this issue, especially in terms of not perceiving it as a one-off reporting activity but rather handling it as a process

issue within their relationship with the minor. Moreover, NIC notes that initiatives need to be set in place in order to promote dialogue and consultation between health professionals and young persons, especially regarding young persons' expectations and aspirations in seeking the advice and services of health professionals.

In terms of available health services, NIC notes that such services need to include specialised therapeutic services offered to minors who engage in sexually abusive behaviour. Research indicates that early intervention with such minors may prevent the escalation of such behaviour in adulthood (Pithers, Gray, Busconi, and Houchens, 1998).

If as a country we would like to remain sensitive to the changing needs of our young population we need a holistic approach to the above mentioned issues which transcends the one-off legislative act of changing an age boundary.

Disclaimer:

The views expressed in this document are those of the members of the National Institute for Childhood which do not necessarily reflect those of the President's Foundation for the Wellbeing of Society.

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