



Sexual Offences – What’s New?

Public Information seminar on selected topics from the General Scheme of the Criminal Law (Sexual Offences) Bill

Thursday, April 23rd, 2015

Expert Speakers will cover:

- Grooming and other new sexual offences against children
- Child Pornography Offences
- Sex Offenders: Risk Assessment and Risk Management
- Special Measures – new Provisions
- What’s Missing: A Positive Definition of Consent

PART 2: Grooming Offences – Heads 7 and 8

As we develop a more comprehensive understanding of the full range of exploitation of children for sexual purposes our legislation must be capable of encompassing this complexity. Our laws must remain relevant into the future as adaptations in technology and culture give rise to new and unforeseen methods of exploitation.

Head 7: Meeting a child for the purposes of sexual exploitation (inside or outside the State)

- The scope of Head 7 is broader than the two offences it would replace, Sections 3(2A) and 3(2B) of the Child Trafficking and Pornography Act (CTPA) 1998, as amended, so that:
- As well as “intentionally meets, or travels with the intention of meeting, a child”, two more ways in which the offence can be committed are added, namely: “..makes arrangements with the intention of meeting a child” or “for a child to travel”;
- These meetings, travels, or arrangements for meetings or for a child to travel, may take place from within or from outside the State;
- Instead of the condition, “having met or communicated with that child on 2 or more previous occasions”, as in CTPA 1998, the new wording is: “having communicated by any means with that child on at least one previous occasion”;

The effect of these changes should be that these offences become easier to prosecute.

The second element of the original offences remains similar: “for the purpose of doing anything that would constitute sexual exploitation of the child”. The maximum penalty remains 14 years. Note however that “sexual exploitation” has been redefined (Head 2) and broadened in its reach.

Head 8: Use of information and communication technology (ICT) to facilitate sexual exploitation of child (sometimes called “On-line Grooming”)

This Head creates two new ICT offences. The first, Head 8(1), concerns any “sender” over 18 who:

- Communicates with another (“the recipient”) via ICT in order to
- Facilitate the sexual exploitation of the recipient by the sender or someone else over 18, and
- Does not reasonably believe that the recipient is aged 17 years or over.

In these circumstances, the sender is guilty of an offence and if convicted, faces a maximum penalty of 14 years. The second offence, Head 8(2), concerns any “sender” (of any age) who:

- Sends sexually explicit material to a child under 17 years – will be guilty of an offence and liable to a maximum penalty of 12 months in the District Court and 5 years in the higher Courts; and note that
- “sexually explicit material” means any indecent or obscene images or words
- Note: It appears that this is a strict liability offence, meaning that there is no defence of honest or reasonable belief by the sender that the recipient was over 17 years.

Part 3: Changes to Sex Offenders Act 2001: Risk Assessment & Management

Head 28: Assessment of risk posed by sex offenders:

- The “Responsible Persons” are the Garda Commissioner and the Director of the Probation Service, and their risk assessment responsibilities may be delegated to Gardaí of Inspector rank or above and senior Probation Officers, respectively;
- These responsible persons must make arrangements to assess risk posed by any relevant offender. Note that this includes sex offenders as defined in the Sex Offenders Act 2001, and also offenders “whose behaviour in the commission of an offence included a significant sexual aspect”;
- Where necessary, the responsible persons must convene an assessment team to assess risk, and all team members must share all relevant information they have about the offender with the other team members;
- The purpose of the risk assessment process is to establish the level of risk of harm posed by the relevant offender, to the public or any member of the public, and also how that risk might be reduced;
- Where necessary for risk assessment, information about the offender may be shared with third parties, who must treat that information as confidential, unless in particular circumstances, the responsible persons decide it may be disclosed in the public interest;

Heads 32 and 33: Sex Offender Orders – a form of Risk Management:

- A Sex Offender Order (SOO) restraining specified activities may be granted by a judge on the application of a Garda of Inspector rank or above, where the relevant offender has acted on one or more occasions in such a way as to give reasonable grounds for believing that such an order is necessary in order to protect the public from serious harm from him/her;
- The definition of the public is broadened and clarified to read, “the public or any particular member or members of the public”, and serious harm is defined as “death or serious personal injury, whether physical or psychological”, which would be caused if the offender committed a sexual offence any time after an application had been made for a Sex Offender Order;
- Note that SOOs may be sought in respect of sex offenders as defined by the Sex Offenders Act 2001, and also in respect of those convicted of an offence “in which there was a significant sexual aspect”

Head 35: Power of Court to amend conditions or impose new conditions - Risk Management tool

- This gives probation officers the power to apply to a judge not more than a month before an offender’s release from prison to have any conditions of any post-release supervision order imposed at sentence, changed or for new conditions to be included on the order, as long as risk assessment under the new procedure outlined above has been done first, and only if the changes are necessary to protect the public or any member of the public, from serious harm from the offender.

RCNI feel this is a progressive clause which acknowledges the development and learning or lack thereof of both the offender and authorities vis a vis the offender in relation to risk and empowers the authorities to adapt and respond.

Head 30: Disclosure of information in certain circumstances – a restricted version of “Sarah’s Law”:

- A Garda of Inspector rank or above may disclose the name and address of a sex offender where that person poses a threat of committing a sexual offence against a person, to the minimum number of persons “necessary to avoid such threat”. If his whereabouts are unknown, publication of all relevant personal details including the offender’s photograph, may be authorised.

RCNI feel this is the appropriate level of powers of disclosure needed to ensure the highest level of public safety, the capacity of the authorities to monitor the offender and the rights of the offender.

PART 5: “Special Measures” – Heads 47-50

Special measures are measures designed to protect and reduce the trauma of witnesses’ as they participate in a sexual offences criminal case. They have been recommended in a range of Oireachtas and research reports over the past decade. These Heads give effect to some of these which relate to child victims.

Head 47: Giving Evidence from Behind a Screen

- If a live television link is not used, a judge may allow a victim or other witness under 18 to give evidence in court from behind a screen which prevents him/her from seeing the accused, provided that the judge is satisfied that this is necessary in the interests of justice;
- It must be possible for the judge, any jury, the lawyers and any interpreter, intermediary or anyone else appointed to assist the victim or other witness, to see and hear that victim or other witness and to be seen and heard by him/her, and the accused must also be able to see and hear the victim or other witness;
- Applies to trials of sexual offences **and** other offences involving violence or threat of violence.

Head 48: Removal of Wigs and Gowns by Judges, Barristers and Solicitors

- This Head replaces an older provision and applies whether the witness is giving their evidence by video-link, or from behind a screen. It means that any judge, barrister or solicitor putting questions to any witness under the age of 18, must not wear a wig or gown while doing so.

Head 49: Protection against Cross-Examination by Accused

- If a witness is under 14, the judge **must** order the accused not to cross-examine him/her personally **unless** the judge’s view is that the “proper administration of justice requires” the accused to cross-examine the witness personally, however if the witness is under 18 but not under 14, the judge **may** order the accused not to cross-examine the witness personally, that is, not through his/her lawyer;
- If the accused is prevented from cross-examining such a witness personally, s/he will be invited to get their own lawyer to do that for them, will get legal aid for this purpose, and will be allowed a fixed period of time to tell the court whether s/he has done so;
- Where the accused does not engage a lawyer to cross-examine the witness, the court has power to appoint one to do so on behalf of the accused; and the judge must warn any jury appropriately to ensure that the accused is not prejudiced by any inference drawn from his being prevented from cross-examining the witness personally, or from that cross-examination being carried out by a lawyer other than his own.

Head 50: Video Recording as Evidence at Trial

- Video-recordings of any statements made to An Garda Síochána by a person under 14, or by a person under 18 other than the accused, may become part of the evidence at trial, if these statements relate to a sexual offence, or to certain offences under the Child Trafficking and Pornography Act 1998, and the Criminal Law (Human Trafficking) (Amendment) Act 2008.

PART 7: Harassment Orders – Heads 58 and 59

Ensuring the safety of members of the public and in particular the victims and witnesses for the state after an offender has been convicted is an essential aspect of justice. There has been a gap in our Harassment Orders legislation which that is being addressed by a number of welcome/comprehensive measures.

Head 58: Harassment Orders

- It appears that **Harassment Orders** may be made on sentencing OR at any time before release from prison, “for a sexual offence or an offence to which there is a significant sexual aspect”, i.e. that their scope is broader than sexual offences alone;
- Judge may decide to make a Harassment Order him/herself, or on application from the victim or from a Garda of Inspector rank or above, at sentence, OR on application from a probation officer OR from the victim, at any date before release from prison;
- Offender can be prevented by Harassment Order from doing anything which would cause victim or another “fear, distress, or alarm, or amount to intimidation”;
- Harassment Orders may only prevent the offender from doing anything the court considers necessary for the purpose of protecting victim OR another, from harassment by offender;
- In order to make a Harassment Order, a judge need only be satisfied that there is a reasonable expectation that the victim OR another person may be harassed by the offender, OR that the victim or another has a genuine fear of unwanted contact from or intimidation by the offender, which would cause that victim or other person “fear, distress or alarm”.

Head 59: Variation, Discharge or Renewal of Harassment Orders

- Harassment Orders may last for the whole of the prison sentence and additional period of up to twelve months, but may be renewed by a judge if the original circumstances “which gave rise to the making of the order have not significantly changed”, on the application of the victim OR other person named in the Order, or a Garda of Inspector rank or above, or a probation officer (if the offender is still in prison).
- Harassment Orders may also be varied or discharged by a judge, on the application of an offender, victim, other person named in the Order, Garda of Inspector rank or above, or a probation officer (if the offender is still in prison). The Order may be varied in such a way as to add new or additional prohibitions on the offender’s conduct, if the court is satisfied that these are necessary to protect the victim or other person from harassment by the offender;

Criminal Offences: Breach of Harassment Orders under Heads 58 and 59:

Breach of Harassment Order “without reasonable excuse”: is an offence carrying a maximum penalty of 5 years imprisonment and/or maximum fine of €10,000, on indictment and 12 months imprisonment and/or a Class B fine, on summary conviction.

Consent to Sexual Activity: A Positive Definition – Missing from this Bill

RCNI is advocating for a positive definition of Consent to Sexual Activity to be included in this Bill, because:-

- The current situation where there is no statutory definition of consent to any sexual act which might otherwise be a crime is far from ideal, leading to a lack of clarity for the complainant, the accused and decision makers (normally a jury of twelve people);
- The positive impact of a clear definition should also be felt outside the courtroom, preventing at least some acts of sexual violence;
- While an expanded definition is not a cure-all by any means, it should help protagonists and decision makers to a common understanding of whether or not there has been consent in a wide range of situations.

In addition, it has been suggested by some commentators that to omit a positive definition of consent is almost to create a presumption that there is consent unless the contrary is proved.

Proposed Form of a Positive Definition of Consent:

RCNI recommend a definition similar to that adopted in England and Wales in their 2003 Sexual Offences Act, at section 74, namely: 'A person consents if he agrees by choice, and has the freedom and capacity to make that choice', however

RCNI would add to that definition, an open list of situations in which there is no consent, as follows:

"Allowing sexual activity does not amount to consent in some circumstances:

1. A person does not consent to sexual activity just because he or she does not protest and/or offer physical resistance to the activity;
2. (1) A person does not consent to sexual activity if he or she allows the activity because of: (a) force applied to him/her and/or to some other person(s);
(b) the threat (express or implied) of force being applied to him/her and/or some other person(s),
or
(c) the fear of the application of force to him or her or some other person(s).
- 2(2) In any of the cases in subsection (1) above, it is immaterial whether it is the accused who applies force and/or threats of force against the complainant and/or other(s), or not;
3. A person does not consent to sexual activity if the activity occurs while he/she is asleep or otherwise unconscious;
4. A person does not consent to sexual activity if the activity occurs while he/she is so affected by alcohol and/or some other drugs(s) that he/she cannot consent or refuse to consent to the activity, whether or not that person took alcohol and/or some other drugs voluntarily;
5. A person does not consent to sexual activity if the activity occurs while he/she is so affected by an intellectual, mental, or physical condition or impairment of such a nature and degree that he/she cannot consent or refuse to consent to the activity;
6. A person does not consent to sexual activity with another person if he/she allows the sexual activity because he/she is mistaken about the identity of that person;
7. A person does not consent to sexual activity if he or she allows the activity because he or she is mistaken about its nature and quality;
8. A person does not consent to sexual activity if that consent is expressed by the words and/or conduct of someone other than themselves;

9. A person does not consent to sexual activity if he/she expresses by word and/or conduct, a lack of agreement to engage in that activity;
10. A person does not consent to sexual activity if, having first consented to sexual activity, he/she expresses by words or conduct a lack of agreement to continue to engage in that activity;
11. This section does not limit the circumstances in which a person does not consent to sexual activity”.

Notes:

1. This list draws heavily on the New Zealand wording, which is very clear and easy to understand, and whose definition of “allow” includes “acquiesces in, submits to, participates in, and undertakes”;
2. For the positive definition of consent referred to above, see Section 74 of the UK Sexual Offences Act 2003: “.....a person consents if he agrees by choice, and has the freedom and capacity to make that choice”.
3. This Briefing Note is adapted from Consent on Sexual Contact: RCNI Discussion Document (2008), available online at: <http://www.rcni.ie/wp-content/uploads/ConsentonSexualContactRCNidiscDocu8sept08.pdf>