



**RCNI Observations on the General Scheme of the  
Criminal Law (Sexual Offences) Bill 2014**

**Spring 2015**

# RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

## 1.0 Introduction: Rape Crisis Network Ireland

Rape Crisis Network Ireland is the national network for Rape Crisis Centres. The RCNI role includes the development and coordination of national projects including expert data collection, supporting Rape Crisis Centres to reach best practice standards, legal advice and policy development, and using our expertise to influence national policy and social change. We are the representative body for our member Rape Crisis Centres who provide free advice, specialised counselling, advocacy and other supports such as Court and Garda accompaniment, for survivors of sexual abuse in Ireland, including a growing number between the ages of 14 and 18.

## 2.0: RCNI Legal Policy:

The RCNI Legal Policy director is responsible for researching and drafting legal policy documents and for advocating positive legal changes to benefit survivors of sexual violence, especially those who are considering reporting, or have decided to report, sexual offences to An Garda Síochána. These policies are not based on research alone, but on the daily experiences of our member Centres and clients as they interact with the criminal justice system and in many cases, approach the RCNI for advice, assistance and information.

Many changes advocated by the RCNI over the past number of years are given expression in the General Scheme of the forthcoming Criminal Law (Sexual Offences) Bill 2014. Therefore, RCNI broadly welcomes this Bill, and especially welcomes the commitment it demonstrates to improving the experience of survivors of sexual violence, as they interact with the criminal justice system. We look forward to seeing this Bill enacted in due course.

## 3.0: RCNI Observations on the General Scheme of the Criminal Law (Sexual Offences) Bill 2014 – Structure:

The Observations begin by following the broad structure and numbering system of the General Scheme itself for ease of reference, divided into Parts. Under each Head selected, RCNI comments and (where possible and appropriate) recommendations are put forward, and where appropriate, Heads with a similar theme are discussed together. These Observations are followed by RCNI submissions and recommendations on what is missing from the General Scheme as it stands now. Individual recommendations are in **bold type**, except where they are numerous and/or detailed under certain headings. The Observations should be read in conjunction with the comprehensive RCNI Submission to the Joint Oireachtas Committee on Justice, Defence and Equality, available online via weblink footnoted below.<sup>1</sup>

## 4.0: Part One – Preliminary:

### 4.1: Head 2: Interpretation

---

<sup>1</sup> <http://www.rcni.ie/wp-content/uploads/RCNISubmissiononSexualViolencetoJointOireachtasCommitteeonJusticeEqualityandDefenceJune2013FINAL.pdf>

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

“sexual exploitation”: RCNI welcomes this expanded definition. We have only one comment: with great respect, we are not convinced that the addition of “for the purpose of corrupting or depraving the child or vulnerable person”, is necessary at the end of (e): “inviting, inducing or coercing the child or vulnerable person to observe any sexual, indecent or obscene act, for [etc]”. We think that words such as “corrupting or depraving” do not have a clear meaning for any non-lawyer, and also that there are no circumstances in which it would be appropriate, non-criminal behaviour **for an adult** to invite, induce or coerce children and/or vulnerable persons, to observe any sexual, indecent or obscene act. **RCNI recommends therefore, that the end of (e), “for the purpose [etc]”, be dropped.**

“vulnerable person”: while we have criticized the use of such a definition elsewhere as outmoded and out of line with the latest scientific approaches, we understand that from a criminal law perspective, this is fairly tight and precise, as it has to be. That said, we question whether there is any need in the second part of the definition, to restrict it to those disorders or disabilities which are such as to “restrict the capacity of the person to guard himself or herself against *serious* exploitation or abuse..” (our emphasis). Why should exploitation which might be considered by some as less serious, not be regarded as also criminal in nature? The nature of sexual abuse of children and/or vulnerable people is that it often begins with more minor criminal activities which are replaced by others of increasing gravity over time, and if the less serious ones were recognized, reported and investigated as criminal offences, the more serious ones might be prevented altogether. **RCNI recommends therefore that the word “serious” be dropped from the latter part of this definition.**

### 4.2: Part Two – Sexual Exploitation of Children [and Vulnerable Persons]

#### 4.2.1: Heads 3, 9: Soliciting or paying for purpose of sexually exploiting a child/vulnerable person

These two Heads will replace the current Section 6 of the Criminal Law (Sexual Offences) Act 1993, as amended, which refers to “soliciting or importuning” a child or “mentally impaired” person. The wording of the two Heads is very similar as to the range of offences covered and the penalties. RCNI welcomes the expanded reach of both these Heads, and the increased penalties. In particular, the new wording will criminalise not only those who solicit, importune, pay, offer to pay, or give (etc) children or vulnerable persons for the purpose of sexual exploitation, but also those accepting or agreeing to accept, children or vulnerable persons who have been so solicited, importuned, paid, offered, given or promised money or other consideration (etc). The maximum penalties are also doubled to ten years under each Head (offences against children and vulnerable persons respectively). In our view, these penalties reflect better the gravity of these offences than the current maximum for soliciting or importuning, of five years.

#### 4.2.2: Head 4: Invitation etc to sexual touching

This Head criminalises invitations (etc) to sexual touching by a child of another person, whether that person was the person who invited the touching or not. RCNI welcomes the creation of this offence, as it should ensure that from now on, adults who invite, induce, advise or incite sexual touching by a child of themselves or others, can incur criminal liability. It could now be argued in court that this behaviour did not constitute an indecent or sexual assault, and the person accused could escape any criminal liability if the argument were successful. To a victim, however, both invitations (etc) to sexual touching and indecent or sexual assaults, are sexual abuse, and both kinds of abuse may have extremely serious and long-lasting effects.

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

### **4.2.3: Heads 5 and 6: Sexual activity in presence of child/causing a child to watch sexual activity, respectively**

RCNI broadly welcomes both these offences, which will now stand alone, instead of being listed as two specific forms of sexual exploitation within the meaning of Section 3(5) of the Criminal Law (Human Trafficking) Act 2008 as amended. The range of sexual offences against children is thereby extended, and the form of trial and maximum penalties reflect the gravity of the behaviour identified in these two offences – they are both indictable only, and the maximum penalty is ten years for each of them. Finally, with regard to “corrupting or depraving”, we refer to our comments under Head 2 above, to the effect that this is not a phrase which would be likely to a clear or precise meaning for any non-lawyer, and **recommend that it is replaced by something which would be clearer and more precise, such as “in order to facilitate the sexual exploitation of a child by himself and/or another person”**.

### **4.3.4: Head 7: Meeting a child for the purpose of sexual exploitation**

The effect of this Head is to rework the existing Sections 3(2A) and 3(2B) of the Child Trafficking and Pornography Act 1998 as amended, so as to add two new ways in which this offence can be committed, namely by making arrangements either with the intention of travelling to meet a child, or for a child to travel. These two new possibilities should make it easier to bring prosecutions for grooming-related behaviour. In addition, the new wording specifies that it is only necessary for communication on at least one previous occasion to have taken place between child and adult, rather than the current two or more occasions. This should also make prosecutions easier for this behaviour. Finally, this Head redefines “sexual exploitation” so as to broaden its meaning, thus once again making prosecutions in this area easier.

### **4.3.5: Head 8: Use of information and communication technology to facilitate sexual exploitation of child:**

The new offence created by this Head is welcomed by the RCNI. It will now be an offence for an adult to communicate with a child (“the recipient”) via ICT in order to the sexual exploitation of the recipient by the sender or someone else over 18. Certainly, our experience with our clients under the age of 17 is that a great deal of grooming of children, and attempts to do so, takes place by electronic means. However, some grooming behaviours do continue to take place by non-electronic means, which are likely to involve direct communication. Where such grooming behaviour involves travelling to meet a child, meeting a child or making arrangements with the intention of so or for a child to travel, Head 7 may provide an offence which fits the facts of the case. The range of non-electronic behaviours which can result in a child being groomed for purposes of sexual exploitation is wide, and accordingly, **RCNI recommends that this wording be amended to read, “via ICT or by any other means”**, to take account of this and to ensure that a broad spectrum of non-electronic grooming behaviours are also criminalised. Finally, RCNI welcomes the criminalisation of the sending of sexually explicit material, by any means, to children.

### **4.3.6: Head 10: New Section 5A in Act of 1993 (including new offence of purchasing sexual services) and Head 11: (offence of purchasing sexual services from a trafficked person)**

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

RCNI welcomes both offences identified under this Head, as we are very much aware from our daily work with clients engaged in prostitution, of the significant psychological damage to them which results from this form of sexual abuse. **RCNI also recommends that offences under Section 10 should be designated as arrestable offences.**

### **4.3.7: Head 12: Substitution of Section 5 of Act of 1993 (protection of mentally impaired persons)**

RCNI looks forward to making observations on this Head when it appears in due course.

### **4.3.8: Heads 13 through 17 on Amendments of the Act of 1998: child pornography offences:**

RCNI broadly welcomes these amendments, which increase the ambit of existing offences, extend their application to children under the age of 18, and create the new offence of organisation of child pornography. In particular, RCNI notes with approval that the new offence of organisation of child pornography (under Head 14), also includes pornography offences involving vulnerable persons who are adults, as well as children under the age of 18, as subjects, and that the same offence includes provisions criminalising the control or direction of the activities of a child both for the prostitution of that child and for the use of that child for the production of child pornography.

With regard to Head 15 (Participation of child in pornographic performance), RCNI recommends that the expression “live exhibition” at Head 15(6), be clarified, so that it is clear whether it refers to “live action exhibition”, that is, an exhibition which may or may not be video-recorded but which is made by real children, or, a “live exhibition” in the sense that it is NOT recorded for future onward transmission, but may be transmitted live as it is happening, to a wider audience. RCNI does note also with approval, that as in Head 13, the expression “explicitly sexual” is replaced with the more comprehensive “real or simulated sexually explicit conduct”.

With regard to both Head 16 (Producing, distributing, etc., child pornography) and Head 17, (possession of child pornography), RCNI notes that the qualification “knowingly” included in the wording of most of the 1998 Act offences they replace, has been removed from several offences. Our concern is that this change could result in at least some of the relevant new offences being challenged on the basis they are unconstitutional because they do not provide for any defence, e.g. reasonable/lawful excuse in the case of investigating Gardai possessing and making available child pornography to colleagues for purposes of criminal investigation. **We recommend that the provisions in the Bill are worded so as to avoid as far as possible the possibility that they might be attacked on this ground.**

### **4.3.9: Heads 18 through 21: Amendment of Act of 2006**

Head 18 expands the definition of “person in authority” to include **former** as well as existing guardians, foster parents, adoptive parents, step-parents, persons in loco parentis, etc, and also provides a list of specific relationships of trust and authority, as well as allowing for a person in authority to include “any other person who is or has been responsible for the education, supervision, training, care or welfare of the child”. RCNI welcomes this development, as it reflects the variety of different means by which adults may find themselves in a position of responsibility towards children, and it also clarifies that adults may be prosecuted as persons in authority at the time of the offence, even if they are no longer persons in authority over the child concerned.

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

With regard to the phrasing in Heads 19, 20 and 21 of “reasonably mistaken” as to the age of the child concerned, RCNI appreciates that this is more objective and more stringent than the current formulation, and has long advocated for this approach, which we think is right in principle. However, the advice we have received is that this formulation is likely to be viewed as unworkable in the criminal courts, which are concerned with whether an accused person’s belief was honestly held or not at the time of the offence. Whether or not such belief was reasonable is a question of fact for the jury to decide. With regard to Heads 19(4), 20(4), and 21(4), where it falls to the court to consider whether the defendant was reasonably mistaken as to the age of the child concerned, RCNI has been advised that the phrasing “the court shall consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age” is likely to be challenged successfully as unconstitutional. In these circumstances, and also because it has not been challenged successfully, **RCNI’s recommendation on pragmatic grounds rather than on principle, is that the existing wording in Sections 2, 3 and 4 of the Criminal Law (Sexual Offences) Act 2006 as amended, be allowed to stand, ie “shall have regard to the presence or absence of reasonable grounds for the defendant’s so believing and all other relevant circumstances”.**

### 5.0: Part Three – Amendment of the Sex Offenders Act 2001

RCNI broadly welcomes these amendments, which will provide the statutory foundation for a more effective system of monitoring of convicted sex offenders on their release into the community.

#### 5.1: Heads 25 to 27: Provisions relating to Notification Requirements:

The new provisions for notification by sex offenders of their personal details and whereabouts, including powers to take fingerprints, palm-prints and photographs, obliging sex offenders to make the notification **in person only**, specifying detailed procedures in cases of homeless sex offenders and those convicted of offences abroad, and reducing to 3 days the period by which notification must have taken place, are set out in this Head. These new procedures will improve the ability of An Garda Síochána to monitor the movements and activities of sex offenders, and for this reason RCNI looks forward to their implementation in due course.

#### 5.2: Head 28, 29 and 31: Assessment of risk posed by sex offenders

It is entirely appropriate that risk assessment of all convicted sex offenders should be a statutory obligation, and that those charged with making such assessments should have statutory powers to exchange relevant information in order to carry them out effectively, that is, in order to protect the public, or any member thereof, from the risk of harm posed by any such offender. RCNI also approves of the inclusion in this Head not only of sex offenders but also of those “whose behaviour in the commission of an offence included a significant sexual aspect” (see the definition of “relevant offender”). RCNI also notes that this Head includes powers to share information with another person or body outside the designated assessment team, “where such sharing is deemed necessary by the responsible persons, or an assessment team, for the preparation of an assessment of the risk posed by a relevant offender to the public or any member of the public”. It seems to RCNI that this power under Head 28(8) is important because it would permit for example, individual psychologists or psychiatrists working with the offender, or indeed, victims or victims’ support organisations on their behalf, to feed valuable information into the process of risk assessment.

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

With regard to the wording of Head 28, **RCNI recommends that the definition of “assessment team” is amended to clarify that an assessment team always includes the two responsible persons as defined therein, and shall include in addition any or all of the listed persons (HSE representatives, prison personnel, or housing authority personnel),** as this does not seem quite clear from the existing wording. Finally, **RCNI recommends that failure by an offender to present themselves for assessment interview without reasonable excuse, should be an offence.**

### 5.3: Head 30: Disclosure of information in certain circumstances

RCNI’s view is that these provisions represent an appropriate balance between the likely benefits and possible negative effects of disclosure of an offender’s personal information. In particular, Head 30(7) which obliges the Garda Commissioner to publish information on this section is welcomed, as it is of vital importance to sexual violence victims to know when and how such disclosures may be made.

### 5.4: Heads 32 and 33: Sex Offender Orders

RCNI welcomes the amendments proposed in this Head, which will broaden the reach of these Orders by allowing An Garda Síochána members of rank of Inspector or above to apply for them, by rewording the section to read “protecting the public or any particular member or members of the public from ...” instead of the more restrictive “member or members of the public”, and by including not only those convicted of sexual offences, but also those convicted of “an offence in which there was a significant sexual aspect”.

### 5.5: Head 34: Amendment of section 27 of Act of 2001 (Interpretation, part 5)

This Head defines “post-release supervision” and apparently is intended to clarify that failure to comply with any one of a list of seven listed components of a post-release supervision order, without reasonable excuse, “shall be treated as a failure to comply with a condition for securing the supervision”. RCNI agrees completely that post-release supervision should be understood to include all the listed components, but suggests that in order for the meaning to be clear, it should be reworded to read: “post-release supervision means that the offender on whom the court has imposed a sentence including a post-release supervision order, must:

- (a) attend all supervision appointments [etc]
- (b) on release from prison, advise the supervising probation officer [etc]
- (c) immediately advise the probation officer [etc]
- (d) reside at an address agreed [etc]
- (e) comply with the directions [etc]
- (f) attend for assessment or treatment [etc]
- (g) co-operate with any other reasonable direction [etc]

and that failure to comply with paragraph (a),(b), (c), (d), (e), (f), or (g) without reasonable excuse, shall be treated as a failure to comply with a condition of the said post-release supervision order”. This clarifying Head is important, as RCNI is aware that unless specific conditions are included in the post-release supervision order at sentence, for which the offender can be breached, it can be difficult to bring a prosecution home for breach of a post-release supervision order. It is also vital that the offender being sentenced understands what he must do in order to avoid being breached for failure to comply with his post-release supervision order.

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

### 5.6: New Section 30A in Act of 2001 (Power of court to amend conditions or include new conditions)

As both risk assessment and risk management are dynamic in nature, it seems to RCNI very important that the court should have powers to include **new** conditions on post-release supervision orders to deal with new risks which become apparent post-sentence. Therefore RCNI welcomes this clarification that such conditions may be added post-sentence, and notes that such conditions may only be added “following an assessment under section 14A of the risk posed by the offender and [only if] the court.. satisfied that they are necessary in order to protect the public or any member of the public from serious harm from the offender”. RCNI’s view is that any such additional condition would not constitute an increased sentence.

### 5.7: New Part 7 in Act of 2001 (Prohibition against working with children and vulnerable persons)

RCNI welcomes this new power on sentence to prohibit sex offenders (not those convicted of offences in which there was a significant sexual aspect), from engaging in work of which a “necessary and regular part” consists, “mainly, of the offender having access to or contact with, a child or children or vulnerable person or persons”.

### 6.0: Part 4: Amendment of Punishment of Incest Act 1908

#### 6.1: Heads 40 through 44 – various amendments, exclusion, anonymity and penalties

RCNI’s only observation in relation to this Part is that it welcomes the equalisation of the maximum sentence for incest to life, for both men and women convicted of offences under this Part. It is clear that the current anomaly that women convicted of incest are subject to a seven year maximum, while men convicted of identical offences are subject to a maximum of life imprisonment, cannot be defended in principle.

### 7.0: Part 5: Criminal Evidence

#### 7.1: Heads 47, 48, 49, 50: Special Measures provisions with regard to children

These measures all relate to child witnesses other than the accused under the age of 18, and make provision for the giving of evidence from behind a screen, removal of wigs and gowns, protection against cross-examination by accused, and video recording as evidence at trial, respectively. Head 48 (removal of wigs and gowns) is mandatory, while the others only come into effect if the judge so decides. That said, there is a presumption against cross-examination of any child witness under the age of 14 in a sexual case by the accused in person, and the conditions under which the judge may refuse to allow video-recorded evidence by a child witness under the age of 14 or 18 (depending on the offence(s) charged), are limited.

While RCNI welcomes these changes as positive for child victims of sexual violence, **it also recommends that these important special measures, particularly the protection against cross-examination by the accused in person and the power to allow video recorded interviews with a member of An Garda Síochána or “any other person who is competent for the purpose”, should be extended to sexual violence victims of all ages and most especially, those adult victims who are defined in this legislation as “vulnerable persons”.** This is already the position in relation to the

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

prevention of personal cross-examination by the accused in sexual assault trials, in England & Wales (See section 34 of the Youth Justice and Criminal Procedure Act 1999, which can be viewed on line via the weblink footnoted below)<sup>2</sup>. RCNI respectfully submits that these special measures should be presumed to be available to all victims of sexual crime, whatever their age or intellectual capacity. Such a presumption would give effect to the spirit and the letter of the relevant Articles of EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, in particular Article 22 (individual assessment of victims' needs, in which victims of sexual violence are identified as a group likely to have specific protection needs) and Article 23 (which sets out protective measures which must be made available both during investigation and in court, to those victims who have been assessed under Article 22 as having specific protection needs). See weblink to the Directive footnoted below.<sup>3</sup> This Directive is due to be transposed into Irish law by 16 November 2015.

### **7.2: Head 52: Disclosure of third party records in sexual abuse cases**

RCNI broadly welcomes these provisions, which attempt to strike a balance between the right which the accused has to a fair trial, and the right of a complainant to be protected from gratuitous, unnecessary, psychologically damaging, and/or irrelevant invasions of his/her privacy within the therapeutic atmosphere of the counselling or therapy room. It is fair to say that this Head also considers not only private rights, but the public interest in encouraging the reporting of sexual offences, and the public interest in encouraging complainants of sexual offences to seek counselling, and the inclusion of these two factors in the disclosure determination checklist is most welcome. We make the following observations and recommendations on Head 52:

Head 52(1): Definitions: "relevant record" should be narrowed to include confidential records made by a counsellor only, and also, the phrase "or about which the prosecutor has knowledge" is too vague in our view, to be workable. A more precise phrase might be, for instance, "which the prosecutor knows to exist or to have existed".

Head 52(2): RCNI welcomes this provision.

Head 52(3)(b): (i) RCNI objects to the inclusion of the phrase, "or to the competence of the complainant or witness to testify" and recommends that it be deleted. It seems clear to us that as the ambit of counselling records is the emotional world of the victim, and not at all his/her intellectual capacity to understand court proceedings and to contribute to them, and that therefore this ground for potential disclosure of counselling records is irrelevant and unnecessary.

(ii) RCNI would add another subparagraph (c), putting responsibility on the court, or possibly the prosecutor, to serve copies of the disclosure application on the victim or his/her nominee and any third party, such as a counsellor or counselling centre. Where the complainant is a child or vulnerable adult, there should be a presumption that such applications would not be served directly upon him/her but upon the nominee, and any victim should have the right to service via such a nominee.

Head 52(4): RCNI is concerned that the wording, "none of the following assertions shall be sufficient, on its own to establish [likely relevance etc].." might be interpreted as meaning, one on its own would not be enough, but more than one might be. RCNI recommends therefore that this Subhead might be

---

<sup>2</sup> <http://www.legislation.gov.uk/ukpga/1999/23/section/34>

<sup>3</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2012.315.01.0057.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2012.315.01.0057.01.ENG)

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

reworded to read for example, no one or more of the following assertions shall be sufficient to establish [likely relevance etc].”

Head 52 (9): The factors to be taken into account in determining whether disclosure to the accused should be allowed, should in the view of the RCNI, also include:

1. the risk of harm to the complainant from disclosure. RCNI staff and volunteers can testify to the reality of psychological damage which can be caused to complainants by unregulated disclosure of confidential records. It should be noted also that the EU Directive 2012/29, at Article 18, is quite clear that “Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, **including against the risk of emotional or psychological harm**, and to protect the dignity of victims during questioning and when testifying” [emphasis added]. Head 52 must surely be viewed as such a protective measure; and
2. whether the same evidence is available from another, non-confidential source besides the counselling record

Head 52(11): As we are very conscious of the distress caused to complainants by the accused viewing their personal counselling records in person, RCNI recommends that there should be a presumption that the accused does not have a right to view them in person, but only to be made aware of their contents by his legal representative, insofar as the judge permits in a particular case.

With regard to Head 52(11)(vii), RCNI recommends that Rules of Court should provide for the return to their owner of the records within a short specified period of the end of the trial.

With regard to the first Head 52(15), RCNI respectfully submits that Legal Aid should be made available to third parties as well as to victims, who wish to be represented and heard on disclosure applications.

With regard to the second Head 52(15), RCNI recommends that it should not be possible to avoid these provisions on consent. There is after all no possibility of avoiding the provisions of Section 3 of the Criminal Law (Rape) Act 1981 as amended, on consent (these relate to evidence of “other sexual experience”). It is submitted that the issues raised by the admission of confidential material are at least as serious for the complainant as those raised by admission of evidence of her “other sexual experience”, and that accordingly, it should not be possible to circumvent them on consent.

### **8.0: Part 7 – Miscellaneous – Selected Provisions:**

#### **8.1: Heads 58 and 59: Harassment orders, including variation, discharge and renewal**

RCNI welcomes these innovative provisions, which will allow the court on sentence, or between the date of sentence and the date of release, to make an order preventing the convicted person from doing anything which would cause the victim or another person “fear, distress or alarm, or amount to intimidation”. It is important for victims that these orders may be made of the court’s own motion at sentence, and many victims will welcome the provisions allowing them to make applications for harassment orders not only at sentence, but at any time up to release from prison. RCNI is well aware that fear of the convicted person upon release is enormous for many, if not most, victims of sexual crime. However, it some victims may be unwilling or unable to undertake making an application without legal assistance. **RCNI recommends therefore that either there should be provision for the**

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

investigating Garda to make such an application on behalf of the victim, after sentence as well as before, or that Legal Aid should be extended to cover legal representation for such applications by victims, at either stage.

RCNI also notes that these harassment provisions do not apparently cover offenders convicted of an offence “in which there was a significant sexual aspect”, because Head 58(10) specifies that the expression “in which there was a significant sexual aspect” should be construed in accordance with Section 3 of the Act of 2001, which includes **only** sexual offences. **RCNI recommends that these orders be extended to include in their ambit those convicted of offences “in which there was a significant sexual aspect”.**

### 9.0: RCNI Recommendations for Inclusion in the Criminal Law (Sexual Offences) Bill:

#### 9.1: Positive Definition of Consent to Sexual Activity

The following is an edited extract from the RCNI Submission on Sexual Violence to the Joint Oireachtas Committee on Justice, Defence and Equality, for which a weblink is included at footnote 1 above:

##### “Consent to Sexual Activity – for Adults

In this context, “consent” refers essentially to consent to sexual activity by adults who have full capacity to so consent, not minors and not adults who have a learning disability.

In Irish criminal law, there is no positive statutory definition of what is meant by “consent” in the context of sexual activity. However, the law does state that failure to resist should not be taken as consent to sexual activity.<sup>2</sup> 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. While a definition of consent 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. The positive impact of a clear definition should also be felt outside the courtroom, by raising awareness of the nature of legal consent and thereby helping to prevent at least some acts of sexual violence.

We favour a definition similar to that adopted in the UK in their Sexual Offences Act 2003, at section 74, namely: ‘A person consents if he agrees by choice, and has the freedom and capacity to make that choice’. However, we would add to the positive definition section an open list of situations in which there is no consent, which includes some situations in which the complainant is **voluntarily** intoxicated. The UK SOA 2003 Act includes a closed list of evidential and conclusive presumptions about the absence of consent, in sections 75 and 76 respectively. We think this approach is unnecessarily complicated, and have based our list of situations, rather than presumptions, on models from other common-law jurisdictions. In addition, we feel it is important that the list of situations in which there is no consent is an open one.

In practical terms, the most important issue in sexual assault and rape cases is whether the complainant has the capacity to refuse consent, usually in situations where s/he is intoxicated. The list of evidential presumptions in Section 75 of the UK SOA 2003 Act does **not** include situations where the complainant is **voluntarily** intoxicated, but not actually unconscious as a result.

The proposed open list of situations in which there is no consent is contained in Appendix IV to the RCNI’s Consent Discussion Document dated September 2008, and reads as follows:

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

### **Proposed new wording, incorporating elements from all the lists of situations in which there is no consent<sup>4</sup>**

Note: This draws heavily on the New Zealand wording, which is very clear and easy to understand, and adopts the same definition of “allow”, i.e. it **includes** “acquiesces in, submits to, participates in, and undertakes”.

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 was counselled and/or incited by a person in a position of power, trust and/or authority in relation to him/her, to engage in that activity
10. 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
11. 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
12. This section does not limit the circumstances in which a person does not consent to sexual activity.”

### **9.2: RCNI recommended Refinements of Section 3 of the Criminal Law (Rape) Act 1981 as amended (“previous sexual history” and associated separate legal representation)<sup>5</sup>**

#### **“Previous Sexual History” and Separate Legal Representation.**

The current legislation allows for the complainant to be legally represented on the hearing of a defence application under Section 3 of the Criminal Law (Rape) Act 1981 as amended, for leave to cross-examine on and/or adduce evidence of the complainant’s other sexual experience (including with the accused). However, it does not give the legal representative any right to be present during the whole of the complainant’s evidence, or while any other evidence of “other sexual experience” is adduced. In addition, the detailed procedure for giving notice of a leave application and the criteria upon which the judge must decide whether to grant leave or not, are not specified clearly in the legislation, or provided for in rules of court. We suggest therefore that the existing legislation be

---

<sup>4</sup> Extracted from RCNI document, Consent on Sexual Contact (2008), accessible online through this weblink: <http://www.rcni.ie/wp-content/uploads/ConsentonSexualContactRCNidiscDocu8sept08.pdf>

<sup>5</sup> Note: this is an edited extract from RCNI Submission on Sexual Violence to the Joint Oireachtas Committee on Justice, Defence and Equality (June 2013), for which a weblink is included at footnote 1 above

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

amended as follows:

(a) The general rule should be that notice of a defence intention to make an application to adduce previous sexual history evidence is in writing and is served on the prosecution and the complainant in advance of trial within a specified time frame;

(b) The existing law requires that any application for leave to cross-examine and/or adduce evidence of “previous sexual history” of the complainant **must** satisfy the statutory test, that is: *“The judge shall give leave if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied”*.

This statutory test has been elaborated in *DPP v G.K.*[2006] IECCA 99, so the questions should “*be confined to what is strictly necessary*” and should exclude any suggestion that what is intended is in fact a “*character assassination*”, to borrow the wording of the judgment. Having regard to the above, there is no reason why the notice of intention should not indicate clearly the categories of questions to be asked, the reasons for asking them, and the parameters of the questions to be asked;

(c) Court Rules should indicate a time limit within which any notice of intention to make a Section 3 application must normally be served. We suggest a time limit of 28 days before the trial date, at latest. This would reduce uncertainty and resultant stress to complainants;

(d) It should only be possible to serve notice of intention to make a Section 3 application outside the time limit with the leave of the trial judge, if he/she is satisfied that to do so is in the interests of justice, i.e. there must be a residual discretion to allow a Section 3 application to be made notwithstanding non-compliance with the time limits for service of the notice. Criteria for consideration by a trial judge in relation to a late application to cross-examine should also be prescribed in the legislation.

(e) At a Pre-Trial Hearing to case manage the issue to be held 21 days before the date on which the case is listed for trial, the prosecution should indicate their position on the application (if known), and the position of the complainant (if known) should also be communicated to the Court. The defence should also attend and indicate whether it intends to proceed to make the Section 3 application. Such early indications will lead to early identification of trial issues, should cut down on delays and uncertainty, and should lead to shorter, more efficiently run trials where the jury have a clearer “run” at the evidence as there should be fewer interruptions;

(f) The law should be amended to ensure that the role of the separate legal representative includes legal advice and representation from the time that notice of intention is served on the complainant, before and during the Section 3 application itself and an entitlement to be present in Court throughout the complainant’s evidence and the hearing of all evidence pursuant to Section 3 of the 1981 Act. Our view is that no amendment to the Legal Aid legislation will be necessary to ensure that all these stages are covered by the Legal Aid Certificate issued to the separate legal representatives. However it **would** be necessary to amend the existing Section 4A of the Criminal Law (Rape) Act 1981, as inserted by Section 34 of the Sex Offenders’ Act 2001, because as it is now drafted, it refers only the complainant’s entitlement to be “*heard in relation to the application and for this purpose, to be legally represented during the hearing of the application*”.

(g) Instead of the existing Section 4A (1), we recommend the following wording be adopted instead: “*Where notice of intention to make an application under Section 3 is given by or on behalf of an*

## RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill 2014: Selected Heads

*accused person who is for the time being charged with an offence to which this section applies, the complainant shall be entitled to be advised in respect of the notice and to be legally represented during the hearing of any application for leave to cross-examine on and/or adduce evidence of, the complainant's other sexual experience. The complainant's legal representative shall be entitled to be present in Court during the hearing of the complainant's evidence and the hearing of all evidence adduced pursuant to Section 3 of the 1981 Act".*

We anticipate that this wording will cover other occasions where another issue relating to the complainant's previous sexual history arises, such as but not limited to:

- a. when the complainant is recalled after her initial examination has concluded;
- b. Where another prosecution witness is cross-examined on the complainant's "previous sexual history";
- c. Where the defence applies to the court to adduce evidence of the complainant's "previous sexual history" via the proposed evidence of a defence witness

(h) The complainant should be kept informed of all developments, and the agency for informing her of each of these should be identified clearly.

(i) Where the prosecution wishes to adduce evidence in chief via another witness of the complainant's previous sexual history, the complainant should be consulted in advance, and her wishes taken into account, to the extent that they can be accommodated within the overall statutory and prosecutorial obligations of the DPP, [and this should be framed as a requirement in the DPP's Guidelines for Prosecutors, and/or any other formal protocol document relating to the duties of prosecutors];

(j) We recommend that the ambit of the entitlement to separate legal representation be broadened by statutory amendment to include **all sexual offences**, as this is not the case at the moment.

(k) We recommend that "other sexual experience" be broadly statutorily defined and defined to include references to pregnancy, miscarriage, abortion, contraception and other indicia of sexual activity"

### 10.1 Conclusion

RCNI looks forward to seeing the Criminal Law (Sexual Offences) Bill 2015 in due course with great interest and with optimism that the concerns of victims of sexual violence who are considering reporting, or who have already reported, will be addressed in it as far as practicable.

A list of relevant RCNI Submissions already made is included as an Appendix, with weblinks included for easy reference.

### RCNI May 2015

**RCNI Observations on General Scheme of the Criminal Law (Sexual Offences) Bill  
2014: Selected Heads**

**Appendix: List of relevant RCNI Submissions including weblinks in  
chronological order:**

**2013: RCNI Submission on Sexual Violence to the Joint Oireachtas Committee on Justice, Defence and Equality**

<http://www.rcni.ie/wp-content/uploads/RCNISubmissiononSexualViolencetoJointOireachtasCommitteeonJusticeEqualityandDefenceJune2013FINAL.pdf>

**2012: RCNI Submission to the Law Reform Commission on Sexual Offences and Capacity to Consent**

<http://www.rcni.ie/wp-content/uploads/RCNISubmissionLRCCPSexualOffencesandCapacitytoConsentDec2011.pdf>

**2012: RCNI Position Paper on Previous Sexual History Evidence in Criminal Trials**

<http://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>

**2009: RCNI Submission on the Management of Sex Offenders**

<http://www.rcni.ie/wp-content/uploads/RCNIsubmissiononthemanagementofsexoffenders29thApril2009.pdf>

**2008: Consent on Sexual Contact: RCNI discussion document**

<http://www.rcni.ie/wp-content/uploads/ConsentonSexualContactRCNidiscDocu8sept08.pdf>