



Criminal Law (Sexual Offences) Act 2017

Briefing on the Main Substantive Law Changes

In force as from 27th March 2017 (SI 112/2017 – not yet available online as of 03/04/17)

NB: this Briefing does not cover any Procedural Law Changes in the new Act, as the necessary Regulations to bring them into force are still in preparation. These changes will be covered in a separate Briefing once the content of the new Regulations is to hand

PART 2 of the Criminal Law (Sexual Offences) Act 2017:

(a) Grooming Offences – Sections 3(1)(a), Sections 7 and 8

Section 3: Obtaining, providing etc. a child for purpose of sexual exploitation

Section 3(1)(a) refers to paying, giving, offering, promising to pay or give a child or other person money or any other form of payment, for purposes of sexual exploitation. This part of Section 3 is included under the **Grooming** heading because paying, giving, offering or promising to pay or give a child, money or any other form of payment, “for the purposes of sexual exploitation”, are all grooming behaviours. The remaining elements of Section 3 are discussed under the next heading below.

The maximum penalty for a Section 3 offence is 10 years, and **“child” in this Section means a person under 18.**

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

- The scope of Section 7 is broader than the two offences which it replaces, 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 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 (Section 10 CLSOA, see below) and broadened in its reach. **In this Section, “child” is defined to mean a person under the age of 17 years.**

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

This Section creates two new ICT offences. The first, Section 8(1), concerns anyone who:

- Communicates with another, including a child, via ICT in order to
- Facilitate the sexual exploitation of a child by the sender or someone else.

In these circumstances, the person who communicates via ICT with another in order to facilitate the sexual exploitation of a child, **in this Section meaning a person under the age of 17**, is guilty

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of an offence and if convicted, faces a maximum penalty of 14 years. The second offence, Section 8(2), concerns any person who:

- Sends sexually explicit material via ICT to a child under 17 years – this person would 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: While either offence may be committed by a person of any age over the threshold for criminal liability, **no proceedings may be brought against a person under 17 years except by, or with the consent of, the Director of Public Prosecutions.**

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(b) Sexual Exploitation of Children Offences – Sections 3(1)(b) and (c), Sections 4, 5, 6 and 10 (definition of “sexual exploitation”)

- **“Sexual Exploitation” is defined in Section 10**, this definition also replaces that in existing amended Section 3 Child Trafficking and Pornography Act 1998 – and is broader; it now covers *“inviting the child to engage or participate in any sexual, indecent or obscene act which, if done, would involve the commission of an offence against the child”*
- **Section 3 (1) (b) (c) Obtaining, providing etc. a child for purpose of sexual exploitation:** apart from the grooming behaviours described in the last section, this offence also covers providing, offering, promising to provide, obtaining, or accepting or agreeing to accept, a child “for the purposes of sexual exploitation of a child”. Further, it covers accepting or agreeing to accept money or anything else, for a child provided or offered or promised or obtained. It covers causing or attempting such an offence, and the maximum penalty is 10 years. **As with Section 3(1)(a) offences, “child” in this Section means under 18 years.**
- **Section 4: Invitation etc to Sexual Touching:** An important gap is closed by this offence, which covers inviting, inducing, counselling or inciting, a child “for sexual purposes” to touch someone (not necessarily the person inviting, etc) with a body part, or object. There is a 14 years max penalty, and **note that “child” in this Section means someone under the age of 15;**
- **Section 5: Sexual activity in presence of a child:** “for the purpose of obtaining sexual gratification or corrupting or depraving a child”. Note that the sexual activity need not involve more than one person, that it must be engaged in intentionally when the child is present or in a place from which the activity can be seen, and the child is known or believed to be aware, or intended to be aware, that the “person is engaging in sexual

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activity” – so it is quite wide-ranging. The maximum penalty is 10 years, and **“child” in this Section means a person under 17.**

- **Section 6: Causing child to watch sexual activity:** “for the purpose of obtaining sexual gratification or corrupting or depraving a child”, is an offence when a child is intentionally caused either to watch a person engaging in sexual activity, or an image of a person engaging in such activity. This offence carries a maximum penalty of 10 years, and **“child” in this Section means a person under 17.**

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(c) “Child Pornography” Offences – Sections 9, 11, 12, 13, 14

These Sections: expand current laws against child pornography – to include children under 18 as victims, and create *new offences* of organisation of child prostitution and organisation of child pornography at Section 11.

Note that new offences, or new elements added to existing offences, are represented by italics below. Each Section referred to below amends the existing Child Trafficking and Pornography Act 1998.

- **Section 9: amends Section 2 CTAPA 1998:** Expands definition of visual representations in original definition of child pornography (S2(1) (a) CTAPA 1998) – *“real or simulated sexually explicit activity,the genital or anal region of a child or of a person depicted as being a child..”*. Section 9 also makes it clear that the expression **“child” in any one of these Sections 9 to 14 inclusive, covers anyone under the age of 18.**
- **Section 11: adds new Section 4A to CTAPA 1998: *Organising etc child prostitution or production of child pornography*** – maximum penalty on indictment is 14 years and/or fine. “Etc” in this offence covers not just organizing child prostitution or production of child pornography, but also: knowingly gaining from either activity, compelling, coercing, or recruiting a child to take part in either activity, directing or controlling the activities for either purpose, and inciting or causing a child to become involved in either activity;
- **Section 12: New Section 5 inserted into CTAPA 1998 (replacing old S5): *Producing, distributing, etc. child pornography*:** Knowingly producing, distributing, *transmitting, disseminating*, printing, publishing, importing, exporting, selling, showing, *supplying or making available* child pornography, knowingly advertising it, encouraging, causing or facilitating any of these activities, knowingly possessing any child pornography for distribution, etc – are all offences under this Section. Maximum penalty is 14 years.

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- **Section 13: New Section 5A added to CTAPA 1998: Participation of child in pornographic performance.** Note that this offence includes not only inviting, inducing, causing, coercing, compelling and recruiting a child to take part in a pornographic performance, but also knowingly attending such a performance, and attending a pornographic performance includes both watching performances live-streamed by ICT and “viewing the performance by means of information and communication technology”. Maximum penalty is 10 years.
- **Section 14: New Section 6 inserted into CTAPA 1998 (replacing old S6): Possession of child pornography, now means:** knowingly *acquiring*, possessing, *accessing child pornography by ICT means*. Note the new ICT element in the offence, and its broadening to include acquiring and accessing child pornography as well as possessing it. There are limited defences to this Section, covering investigators, censors, prosecutors, and bona fide researchers. The maximum penalty is 5 years.

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(d) Reworded “Defilement” Offences (sexual acts with children)– Sections 15, 16, 17, 18

- **Section 15: Replaces definition in Section 1 of the Criminal Law (Sexual Offences) Act 2006,** defining a person in authority quite broadly to include former specified roles (step-parent, foster parent eg) and anyone who “is or has been responsible for the education, supervision, training, care or welfare of the child”;
- **Sections 16 (replaces Section 2 of the CL(SO)A 2006, 17 (replaces Section 3 of the CL(SO)A 2006, 18 (replaces Section 3A of the CL(SO)A 2006:** These Sections cover “sexual acts” with a person under 15, 17 and by a person in a position of authority with a 17 year old, respectively. The definition of “sexual act” has not changed, and the “age of consent” remains 17 years;
- **Sections 16, 17, 18:** Each one of these “defilement” offences is transformed as far as the standard of belief is concerned. It is now much more objective: a person must have been “reasonably mistaken” that the child concerned was over age, and in assessing whether he or she was reasonably mistaken that the child was over age, the court must consider whether in all the circumstances, a “reasonable person” would have concluded that the child was over age;
- **Section 17(8):** If the person accused of a sexual act with a person under the age of 17 is younger or less than 2 years older than that person, is not in a position of authority over that person, and was not then in a relationship with the child which was “intimidatory or exploitative”, he/she cannot be prosecuted except by, or with the consent of the DPP.

The child in respect of whom the offence is said to have been committed, must be over 15 at the time of the offence.

- **Section 18 (6)** provides an extra defence for a person in authority; he/she will not commit an offence under this Section if s/he can show that s/he had “reasonable grounds” for believing that s/he was not in a position of authority over the child in question.

Part 3: Sexual Act with Protected Persons – Sections 21 and 22 (regular offences and by a person in authority respectively)

Section 21: Sexual Act with Protected Person. This Section criminalises sexual acts (broadly defined) with any “protected person”. In this Section, a “protected person” means someone who does not have the capacity to consent to a sexual act. Lack of capacity is defined at Section 21 (7) as an incapacity because of a “mental or intellectual disability or mental illness” to understand the nature or reasonably foreseeable consequences of the [sexual] act, to evaluate relevant information in order to decide whether or not to engage in that act, or communicate his or her consent to that act, by “speech, sign language, or otherwise”.

The accused person must either know that the other person is a protected person, or be reckless as to whether s/he is a protected person or not; note also according to Section 21 (3), it must be presumed “unless the contrary is shown” that the accused either knew that, or was reckless as to whether, the other person was a protected person.

The penalty varies according to the nature of the sexual act: for offences of sexual intercourse (in traditional sense), buggery, aggravated sexual assault or “Section 4¹” rape, the maximum penalty is life imprisonment; for offences of sexual assault, the maximum is 14 years, and for offences of inviting, inducing, counselling or inciting any one of the sexual acts listed in this Section, the maximum penalty is 10 years.

Section 22: Offence against relevant person by person in authority: This offence differs from Section 21 in that the maximum penalties are lower (sexual intercourse, buggery, or “Section 4” rape have a maximum of 10 years, sexual assault has a maximum of 5 years), and the defence of being “reasonably mistaken” as to whether the other person is a relevant person as defined in the Section, is available to persons in authority. Note that there is no presumption that the person acted knowing that the other person was a relevant person, or being reckless as to whether that person was a relevant person or not.

Section 22(8) defines both “person in authority” and “relevant person”. Note that the definition of “person in authority” is very different to that in Sections 15 and 17: it is narrower, being

¹ This can take one of two forms: (a) penetration, however slight, of the vagina by an object held or manipulated by another person, or (b) penetration of the anus or mouth, however slight, by the penis; in Section 4, it is clear that either form of the offence is committed when it is done without consent.

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confined to people who are either employees or independent contractors, responsible at the time for the “education, supervision, training, treatment, care or welfare of the relevant person”; also, note that the definition of “relevant person” is quite different to that for “protected person” in Section 21. A “relevant person” is defined in this Section as one who has a “mental or intellectual disability or mental illness” such that it would “severely restrict” that person’s ability to guard himself or herself against serious exploitation.

Part 4: Purchase of Sexual Services - Sections 25, 26

- **Section 25: Payment etc. for sexual activity with prostitute (adds new Section 7A to Criminal Law (Sexual Offences) Act 1993 and makes other amendments to it)** Paying anyone, including a prostitute with money (or any other consideration) for sexual activity with a prostitute is now criminalised. This is a *new offence*; it is summary only (non-arrestable); the only penalty is a modest fine, but the amount escalates after the first offence. Sexual activity is defined broadly in this Section. Note that it also includes an offence of failing to comply with a direction to “move on” (ie stop loitering in order to solicit someone), without reasonable excuse, which carries a maximum penalty of 6 months imprisonment.
- **Section 26: Amends Section 5 Criminal Law (Human Trafficking) Act 2008 - Sexual activity with trafficked person.** This broadens the scope of the original offence from “soliciting or importuning” a trafficked person, to paying, giving, offering or promising money or any other [consideration] to anyone, including a trafficked person, for sexual activity with a trafficked person. The maximum penalty for this offence is 5 years.

[Parts 5, 6 (Criminal Evidence) and 7 (Jurisdiction)] will be covered in a separate document], together with the balance of Part 8 (Miscellaneous)

PART 8: Miscellaneous

Consent to Sexual Activity: A Positive Definition – Section 48, amending Section 9 Criminal Law (Rape)(Amendment) Act 1990:

Section 48: Amends Criminal Law (Rape)(Amendment) Act 1990 by replacing Section 9 with the following – the whole Section is quoted in full:

“Section 9(1): A person consents to a sexual act if he or she freely and voluntarily consents to engage in that act.

(2) A person does not consent to a sexual act if—

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(a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person,

(b) he or she is asleep or unconscious,

(c) he or she is incapable of consenting because of the effect of alcohol or some other drug,

(d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,

(e) he or she is mistaken as to the nature and purpose of the act,

(f) he or she is mistaken as to the identity of any other person involved in the act,

(g) he or she is being unlawfully detained at the time at which the act takes place,

(h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.

(3) This section does not limit the circumstances in which it may be established that a person did not consent to a sexual act.

(4) Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place.

(5) Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.

(6) In this section—

‘sexual act’ means—

(a) an act consisting of—

(i) sexual intercourse, or

(ii) buggery,

(b) an act described in section 3(1) or 4(1) of this Act, or

(c) an act which if done without consent would constitute a sexual assault;

‘sexual intercourse’ shall be construed in accordance with section 1(2) of the Principal Act.”

As RCNI had advocated since 2008, this is an open list which allows for other unforeseen circumstances to preclude consent. This list covers mistake, deceit, unconsciousness, intoxication (whether voluntary or not), threat or use of force, unlawful imprisonment, and apparent consent (only) from a third party. It covers all the areas listed in the RCNI Discussion Document on Consent to Sexual Activity from 2008, and relied on since in other submissions. See Appendix 1 for the original RCNI wording and a reference to the 2008 document.

Note also that the Section also preserves the old Section 9 failure to resist provision, and makes it clear that consent can be withdrawn at any time before the act begins or during the act itself.

(b) Sex Offenders Act 2001: Amendment in Section 51

Section 51(a) : Amendment to the Act of 2001 [Sex Offenders Act 2001

Section 29 of the 2001 Act is amended by a clarifying subsection, which says that every post-release supervision order made after this Section comes into force, shall include a condition requiring the sex offender to attend all appointments with his/her probation officer and to comply with the “lawful instructions” of that officer.

As of 3rd April 2017, neither Section 51(b) nor Section 52 has been commenced. Section 51 (a) was commenced on 27th March 2017.

€ A Bill amending the Sex Offender Act 2001 is planned for end 2017.

€

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RCNI/LPD 2

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Appendix 1:

RCNI Proposed Form of a Positive Definition of Consent:

RCNI had recommended 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>