RCNI Submission on

Fifth Programme of Law Reform to

Law Reform Commission

February 2018

Introduction – Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

Introduction – this Submission

Rape Crisis Network Ireland is very glad to have the opportunity to make submissions on the forthcoming Fifth Programme of Law Reform, in the interests of all survivors of sexual violence. This Submission will address each suggested topic which may be suitable for inclusion in the Fifth Programme in turn, but the topics are not listed in order of their priority for the RCNI[1]. Many matters raised in the RCNI Submission to the Law Reform Commission on the Fourth Programme of Law Reform in 2012, have now been addressed in the Criminal Law (Sexual Offences) Act 2017, and further in the Criminal Justice (Victims of Crime) Act 2017. These are omitted from this Submission.

I Hate Crime

RCNI is concerned by this issue as it affects one group of our clients in particular: members of the Lesbian, Gay, Bisexual and Transgender communities (LGBT). When we studied this group of survivors of sexual violence[2], it seemed to us that they would benefit from the existence of hate crime legislation which would be capable of recognizing and punishing perpetrators of sexual violence against them who had targeted them because of their sexual orientation or gender status, and we made a recommendation to that effect.

Separately, we are aware that specific hate crime offences, including "hate crime" versions of all the principal sexual offences, have been proposed and that more detailed new draft legislation in this area is being advocated, by the Hate & Hostility Research Group co-ordinated by faculty members at the School of Law in the University of Limerick. Our understanding is that these proposals are based on their own research findings in their

[1] **Note:** RCNI has been advised recently by the Department of Justice that it has referred the matter of the law on recent complaint in sexual cases, to the Law Reform Commission for consideration already. We had recommended to the Minister for Justice that this topic be addressed in the Criminal Law (Sexual Offences) Act 2017. Accordingly, we are very glad to learn that it is already being considered by the Commission, and therefore, it will not be addressed further in this Submission.

[2] See weblink to RCNI Report from 2016, "Finding a Safe Place" here: http://www.rcni.ie/wp-content/uploads/RCNI-Finding-a-Safe-Place-LGBT-Survivors.pdf

Report, "Out of the Shadows", published in 2014[3]. Lastly, we know that a proven element of hostility towards any victim of crime who is a member of one or more named groups, has been put forward as a possible aggravating factor which must be taken into account on sentence for any general offence.

It seems to us important that if a sexual offence is aggravated by the presence of hostility towards the victim(s) based on their membership of one or more specified group(s), this should be identified and taken into account on sentence. However, we have no fixed position on what form (if any) specific "hate crime" versions of the principal sexual offences should take. While in principle the use of specific offences may lead to increased sentences for those convicted of them, RCNI is not convinced that in the case of specific hate crime versions of sexual offences, there would be any or any significant increase in sentence length.

In short, we are not sure of the best way forward, but we are anxious that this area of law should be considered, so that any possibility for the criminal justice system to address the harm done by hate crime to survivors of sexual violence is explored thoroughly, and if appropriate, workable recommendations for legal change are put forward.

II Corroboration

While there is no longer a requirement for a judge to give a corroboration warning to the jury in a case which depends solely on the uncorroborated evidence of a prosecution witness, it seems to us that the warning is still nearly always given in sexual cases. Perhaps this is done so that both judge and prosecutor can reassure themselves that every possible and proper thing was done to safeguard the rights of the defendant, and therefore, any appeal against conviction is that much more likely to fail. From a pragmatic point of view, it is hard for us to argue with this, as it is much easier for survivors if convictions once achieved are not overturned.

However, there is another aspect to these warnings: it is very hard for a survivor to hear them given and to take in the implicit suggestion that what s/he has just said in evidence is either inherently suspect, or else reliable, but not enough to convict the defendant. After all, it is usual for this evidence to have been elicited in part through prolonged, searching, and often distressing cross-examination, and it is also usual for it to be undermined further in the closing speech for the defence. Should that not be enough? If the evidence is too weak to support a conviction, then the case should have been the subject of a defence submission and ruling by the judge at the close of the prosecution. If there was no such submission, or that submission did not succeed, that means that in the view of either defence counsel or judge, the case is strong enough to found a conviction beyond reasonable doubt.

[3] This is a link to the online version:
https://ulir.ul.ie/bitstream/handle/10344/4751/Schweppe_2015_shadows.pdf?sequence=2

RCNI questions whether there should be corroboration warnings at all. We are inclined to think that if corroboration warnings could not be given, more sexual cases might be prosecuted, and that conviction rates would either rise or remain unchanged, with the added advantage that vulnerable survivors would not have to endure hearing the trial judge undermine their case once again, to the jury. We submit that it is time for an in-depth examination of this issue, with a view to possible reform of the existing law and practice in this area.

III "Other sexual experience" of complainants in trials of sexual offences:

Defence applications for leave to adduce evidence of the complainant's "other sexual experience" are made routinely and granted most of the time, though the leave given may not in fact result in any cross-examination/introduction of other evidence designed to elicit details of the complainant's "other sexual experience". The procedure for making such applications and for accessing separate legal representation for the complainant where they are granted - is set out in Sections 3 and 4A of the Criminal Law (Rape) Act 1981[4] as amended.

These provisions have never been further elaborated by rules of court, so that much about the procedure remains either unclear or at the entire discretion of the trial judge. For instance, it is not clear whether counsel engaged to represent the complainant on the leave application may remain for, and interfere if necessary in, the remainder of the trial, or even for the remainder of the complainant's evidence. Further, the statute gives minimal guidance on the circumstances in which an application should be allowed, or on the circumstances in which a late application should be heard.

This lack of precision and clarity in the statutory provisions means that from a complainant's point of view, what happens to such an application in court depends largely on the judge's individual discretion (because it has to). Further, the existing provisions do not do enough to prevent the admission of evidence which may have little or no relevance to any specific issue in the case, but which is highly prejudicial to the complainant.

RCNI's view is that it is at least possible, if not likely, that many of these applications are granted (as with corroboration warnings), so that both judge and prosecutor may feel that the risk of a successful appeal against conviction is diminished, that is, essentially for pragmatic reasons rather than on principle. In our respectful submission, the admission of

[4]See this weblink to Section 3 of the relevant Act:
http://www.irishstatutebook.ie/eli/1981/act/10/section/3/enacted/en/html

See also this weblink to Section 34 of the Sex Offenders Act 2001, which inserted a new Section 4A into Act:

http://www.irishstatutebook.ie/eli/2001/act/18/section/34/enacted/en/html

evidence of a complainant's "other sexual experience" should be regulated as tightly as possible, having regard of course to the rights of the accused.

The position is complicated now by the enactment of Section 21[5] of Criminal Justice (Victims of Crime) Act 2017, corresponding to Article 23 (3) of EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Directive 2001/220/JHA ("the Victims' Directive"), which refers to taking measures to "avoid unnecessary questioning concerning the victim's private life not related to the criminal offence"[6]. Section 21 permits the Court to restrict the introduction of evidence, or cross-examination which "relates to the private life of a victim and is unrelated to the offence", subject to certain conditions. These conditions do not exclude the use of this Section to benefit complainants in trials of sexual offences.

RCNI has made submissions on this topic on several occasions to Government, to members of the Oireachtas and to the Law Reform Commission itself[7]. Accordingly, RCNI submits that the matter of "previous sexual experience" and the attendant legislation, should be examined in detail, with a view to producing proposals for positive change.

IV The standard of belief in consent: Rape under Section 2 Criminal Law (Rape) Act 1981 as amended

The standard of belief in consent for rape is essentially subjective, because the jury must only "have regard" to the "presence or absence of reasonable grounds" for any belief held by the defendant that the complainant was consenting to sexual intercourse. There is no requirement that they must be satisfied that he did "reasonably believe" that she was consenting, much less any suggestion that his belief must be one which would be held by a "reasonable person" in the same circumstances. See the full text of Section 2 below (as amended):

"2.(1) A man commits rape if:

(*a*) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and

(*b*) at that time he knows that she does not consent to the intercourse or he is reckless as to

[5] Available through this weblink:
http://www.irishstatutebook.ie/eli/2017/act/28/section/21/enacted/en/html#sec21

[6] Available through this weblink:

http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF

[7] See for example, RCNI Position Paper on "Previous Sexual History", May 2012, available online through this weblink: http://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf

whether she does or does not consent to it,

and references to rape in this Act and any other enactment shall be construed accordingly.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed".

Of course, this Section must now be interpreted in the light of Section 48 of the Criminal Law (Sexual Offences) Act 2017, which sets out a positive definition of consent and an open list of circumstances in which there is no consent[8].

This standard of belief is in stark contrast to the new standard of belief as to the age of the complainant in the pair of "defilement" sexual offences against children, set out in Part 2 of the Criminal Law (Sexual Offences) Act 2017 in Sections 16 –and 17[9]. In each of these offences, the standard of belief as to the age of the complainant is as objective as it is possible to be. In Section 16 (sexual acts with a child under 15), for example, the onus is on the defendant to prove on the balance of probabilities:

(a) that s/he is "reasonably mistaken" that the complainant was over the age of consent, and further

(b) that when it determines whether the defendant was or was not "reasonably mistaken" that the complainant was over the age of consent, the jury must consider whether a "reasonable person" would have come to the same conclusion as to the complainant's age in all the circumstances of the case.

Of course, a belief that a young complainant is over the age of consent is not identical to a belief that a woman is consenting to sexual intercourse. However, in both defilement and rape offences, the central issue often comes down to what the defendant believed at the time of the offence alleged, and the basis for what he believed. For one offence (rape under Section 2), his belief does not have to be objectively reasonable, strictly speaking, though the jury must "have regard" to the presence or absence of reasonable grounds for his belief that the complainant was consenting, and for the others, by contrast, not only does it have

[8] Available online through this weblink:
http://www.irishstatutebook.ie/eli/2017/act/2/section/48/enacted/en/html#sec48

[9] Available online through this weblink:
http://www.irishstatutebook.ie/eli/2017/act/2/section/16/enacted/en/html#sec16 and

http://www.irishstatutebook.ie/eli/2017/act/2/section/17/enacted/en/html

to meet an objective standard, but the onus is on him to show that he was indeed "reasonably mistaken" that the complainant was over the age of consent.

RCNI does not accept any suggestion that the reason for this disparity in the two standards of belief is that the harm caused to young victims by defilement offences is necessarily worse than that caused to under-age as well as adult victims, by rape under Section 2 of the Criminal Law (Rape) Act 1981 as amended. Accordingly, we are at a loss to identify a reasoned basis for this anomaly.

It seems to us desirable that the standard of belief in Section 2 of the Criminal Law (Rape) Act 1981 as amended, is now brought into line with the more rigorous standard of belief set out in Sections 16 and 17 of the new Criminal Law (Sexual Offences) Act 2017. That said, we are also anxious not to seek a change in the law which might have unintended and unwelcome consequences for victims of sexual offences. We are particularly anxious not to seek a change which might result in reduced numbers of prosecutions, and therefore convictions, for rape under Section 2.

As this would represent a substantial change in our current law, we submit that it is a fitting subject for further in-depth consideration by the Law Reform Commission in the Fifth Programme of Law Reform.

RCNI would be delighted to provide further information or to discuss any of the matters raised in this Submission, with the Law Reform Commission.

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