RCNI Observations on Sexual Offences against Vulnerable Persons Proposals by Criminal Law Reform Division of the Department of Justice and Equality

September 2014

Introduction

Rape Crisis Network Ireland welcomes very much the opportunity to make observations on these proposals on Sexual Offences against Vulnerable People. They should be read in conjunction with the RCNI conference paper (2012) in the Appendix hereto, and also alongside the RCNI Submission on the Law Reform Commission Consultation on Sexual Offences and Capacity to Consent, available online at http://www.rcni.ie/wp-content/uploads/RCNISubmissionLRCCPSexualOffencesandCapacitytoConsentDec2011.pdf

Introduction and Structure of this Submission

RCNI welcomes the determination of the framers of these proposals to update the law in this area to take account of the balance that there needs to be in the criminal law between preserving the rights of people with various disabilities to enjoy consensual and loving sexual relationships, and ensuring that they are protected from exploitation and abuse as much as possible. In our view, it is beyond doubt that Section 5 of the Criminal Law (Sexual Offences) Act 1993 is now very much out of date, and does not get this balance right. It should be replaced, and with this general principle we agree very strongly. We share the concern that under the current law, sex education may be denied to vulnerable persons for fear that it could be viewed as facilitating criminal offences. We also agree that it is appropriate to put the onus back on the accused to prove that someone is not a "vulnerable person", rather than focus all the attention of the court on the behaviour of the complainant. Further, we agree that it is important to widen the range of offences within the scope of these proposals, and that marriage should not be a defence to any of them. Finally, we agree that there should be specific offences for persons in positions of trust or authority who commit sexual offences against vulnerable persons.

However, we have reservations about some specific points in the proposals, and we set out the reasons for our views in relation to each proposed Head, below. Where we can, we also set out possible alternative proposals/solutions.

Under each Head, we also consider the relevant sections of the Introduction to the Proposals and the relevant Notes after each Head.

Head X.1: Interpretation:

"able to consent":

General Observation: With great respect, we are not convinced that the wording "able to consent" and/or "did so consent", or indeed, the alternative wording elsewhere in the proposals, eg ""had the understanding to consent" (X.3 (a), (c)) – avoids the issue of capacity to consent, at all. Indeed, it seems to us that whether a vulnerable person's capacity to consent is described in these words, or in terms of whether they are "able to consent", etc, is entirely an issue of form rather than substance. While capacity to consent is

explicitly avoided, it is implicit at several points in these proposals. Expressions such as "able to consent" still beg the question, "how does the court decide whether the person was able to consent or not?" In our view, the issue of a vulnerable person's capacity to consent cannot in fact be avoided by any court, and therefore, the legislation must provide some means of ascertaining what that capacity was in a given past situation.

RCNI recommends that some, perhaps slightly simplified, version of the Law Reform Commission draft Bill definition of capacity to consent is adopted in these proposals (Section 3 (1)).[1] At a minimum, it should be provided that a person has capacity to consent because s/he understands the nature and consequences of the sexual act concerned, and is able to communicate his/her decision to consent. We recommend also that the parts of this Section which allow for that decision to be communicated by "talking, using sign language or any other means" are retained, and that as in Section 3(2)(b), lack of capacity to consent may arise because of a disability, ill health, or any other reason.

If it is felt that the Law Reform Commission approach to capacity is too prescriptive, an alternative approach might be a formula such as:

"In determining whether a vulnerable person has capacity (ability) to consent, the court shall have regard to

(a) whether the person concerned understood the nature and reasonably foreseeable consequences of the sexual act in question, and/or

(b) whether s/he was able to weigh up any relevant information in deciding whether to consent to the sexual act in question, and/or

(c) was able to communicate his/her decision, and

(d) any other relevant matter.."

Specific Points:

Note 2(c) We are surprised by the reasoning in this subhead, as it seems to us that X.3 as drafted is very onerous upon the accused;

Note 2(d) On reflection, we are not convinced that it is necessary to line up any definition of capacity to consent to sexual activity in criminal legislation with the proposed definition of capacity to make a decision in the Assisted Decision Making (Capacity) Bill. We note that the criminal law is concerned with an assault in the past and its victim's capacity at that time to guard against that assault, while the civil legislation is concerned essentially with a person's **present and future** capacity to make a particular kind of decision.

[1] Law Reform Commission Report on Sexual Offences and Capacity to Consent LRC 109-2013, at page 137: Draft Criminal Law (Sexual Offences and Capacity to Consent) Bill 2013, Section 3: Capacity to consent and choosing to agree, available online at: http://www.lawreform.ie/_fileupload/Reports/r109.pdf

On another point, neither are we convinced that any definition of capacity would have to be consistent with the existing law on this point. The current Section 5 of the Criminal Law (Sexual Offences) Act 1993 provides an outdated, unscientific and **static** definition of capacity, which is at odds with modern thinking on the subject (which favours a **functional, situational** approach to capacity).

"person in a position of trust and authority":

In our view, this definition is too narrow to safeguard vulnerable people against the possibility of sexual abuse in many different community settings. More and more services and activities for people with one or more disability, take place in the community among volunteers, colleagues, acquaintances, friends and family members. Indeed, many community and voluntary organisations rely heavily on volunteers to help with various services and activities for these groups. Many volunteers are in identical professional roles to those fulfilled by paid staff. Outside these organisations, many family members are carers in positions of trust, and some such as parents of minor children, are in positions of authority also. We do not see any reason why a person in a position of trust or authority who commits a sexual offence against a vulnerable person, should not be regarded as such by the criminal law if they are not employees or contractors providing supervision or treatment relevant "to that person's vulnerabilities" but instead are volunteers, relatives in a caring role, who are "in a position of trust and authority".

We note that the Law Reform Commission in its draft Bill (Section 7) refers to "persons in position of trust or authority", and defines these (Section 7(5)), as a "parent, stepparent, guardian, grandparent, uncle, aunt, child aged 17 or over, adult nephew aged 17 or over, adult niece aged 17 or over, or any other person in loco parentis to or person who directly cares for and supports the person who does not have the capacity to consent". In our respectful submission, this draft captures a range of people in positions of trust or authority which is closer to the reality of vulnerable people's lives than the small number of people who are paid to provide services relevant to the [disabled] person's vulnerabilities.

RCNI recommends that

(i) a much broader definition of "person in a position of trust and authority" is used, such as the Law Reform Commission one. An alternative might be adapted from the UK Sexual Offences Act 2003, Section 22 (in relation to children), which lists under person in a position of trust – anyone who regularly cares for, supervises, or trains or in their sole charge[a child] unsupervised whether face to face or otherwise,[2], to which could be added, "or supports and/or treats in a professional capacity"; and

[2] http://www.legislation.gov.uk/ukpga/2003/42/section/22

(ii) the definition is reworded as "person in a position of trust and/or authority", as we would view "trust and authority" as too restrictive to reflect the everyday reality of the lives of many vulnerable people.

"sexual act":

RCNI's view is that it is entirely appropriate to include this wide range of sexual offences, and also agrees that it is appropriate to include the new offence created at X.1(f). The range of offences in Section 5 Criminal Law (Sexual Offences) Act 1993 is very narrow, and there seems to be no dissenting political, NGO and/or legal academic voice on this point.

"vulnerable person":

General Observation: It seems to us that at (a), this definition introduces the concept of functional capacity: ".[which is such nature or degree as it]

(a) may cause the person to **lack the necessary understanding** (our emphasis) to consent to sexual acts **in certain circumstances** (our emphasis)..

We take the point that the word "may" is included to make it clear that "there is no automatic inference that a vulnerable person cannot consent". In our view, this also reads as if what is envisaged is a functional assessment of capacity, although this is not stated. We think that this makes sense. However, we think that the wording "is suffering from a disorder of the mind" is not appropriate, as it does not have any scientific meaning and is not defined further. It also suggests a static mental condition with regard to consenting to sex, which may not be the case.

RCNI recommends: that the definition of a "vulnerable person" should reflect up to date scientific knowledge, and should be defined further to include as many possible bases for a lack of capacity to consent to sexual activity as possible, for instance as in the Law Reform Commission draft Bill (Section 3(2)(b) on the reasons for lack of capacity to consent: disability, ill health, or "any other reason" (e g acquired brain injury, developmental issues including autism, neurological disorders, dementia). A simple and effective formula for the definition of a vulnerable person might be as follows:

A vulnerable person is one who has

(i) lack of capacity to consent to a sexual act and/or

(ii) to guard himself or herself against serious exploitation and abuse by another.

Finally, RCNI's view is that it would be retrogressive to introduce a further criterion that a person may be vulnerable if they are suffering from a disorder of the mind OR disability which "may cause the person to be incapable of independent living".

X.2: Purpose of Provision

Our only comment on this Head is that it does not seem to be clear to which provision(s) the Head refers. In our respectful submission, this should be set out unambiguously.

X.3: Sexual Act with a Vulnerable Person

General Observations:

(i) In our view, there is no serious difficulty with the presumption that the defendant knew that the vulnerable person did not consent or was not able to consent or was reckless as to the fact, unless it is proved….that the defendant took steps to ascertain that the vulnerable person had the understanding to consent and to form the belief that the vulnerable person did so consent to the sexual act. That is, this limited reversal of the onus of proof per se has precedents elsewhere; however, we would alter the wording to read: "..that the defendant knew that the vulnerable person did not consent or was not able to consent, or **the defendant** was reckless as to the fact…" to avoid confusing the defendant with the vulnerable person. An old-fashioned solution would be to say the second time around, "or the **said** defendant was reckless as to the fact.."

(ii) However, we think that the use of the word "reasonable" in these expressions: "reasonable steps" and "reasonable belief" (X.3(a), (c)) on the part of the defendant, and the word "reasonably" in "reasonably mistaken", (X.3(f)),(h)), once again in relation to the defendant, does pose a serious difficulty. Our criminal law is concerned with the subjective state of mind of the defendant, and whether or not his/her belief is honestly held. The reasonableness of such a belief is something for the jury to consider, but not something which the defendant should have to prove, under our system. We think there is a danger that the wording would not be found to be in accordance with the Constitution (Article 38.1, the right to a trial in accordance with law);

(iii) We think that there is a similar, if not greater, difficulty with the wording of X.3(g): this introduces a further element of objectivity, in that it mandates to consider whether, "in all the circumstances of the case, a reasonable person would have concluded that the latter was not a vulnerable person". This gets even further away from the actual subjective state of mind of the defendant at the time of the offence, and to our mind, this wording if allowed to stand would attract a Constitutional challenge the first time it was used – which would succeed.

In these opinions we submit that we are supported by the conclusions and recommendations of the Joint Oireachtas Committee on the Constitutional Amendment

on Children 2nd Interim Report (May 2009)[3], and indeed, by the preceding Committee debates, which make it clear that there were serious reservations from some Committee members about using any formula which introduced the necessity for anything done or believed by the defendant to be "reasonable" – without a Constitutional amendment to provide for this possibility expressly.

We are happy to see that marriage is not taken to mean automatic consent to all sexual acts in this Head, and we note that the Head is intended to address only sexual offences committed by a non-vulnerable person against a vulnerable one.

RCNI recommends:

(i) that the words "reasonable" and "reasonably" be deleted from this Head;

(ii) that Subhead X.3(g) be deleted altogether;

(iii) that the expression "reasonable belief" be replaced by "honest belief";

(iv) that an element of objectivity could be introduced safely into this Section by adopting the formula used in the Criminal Law (Sexual Offences) Act 2006 in relation to defilement offences and the belief of the defendant that the child in question was over age:

See e g Section 2(4) thereof: "Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years, the court shall have regard to the presence or absence of reasonable grounds for the defendant's so believing and all other relevant circumstances".

X.4: Sexual Acts involving a Vulnerable Person and a person in a position of trust and authority

General Observations:

(i) As indicated at X.1 above, our view is that the reach of this Head should be much wider as far as the definition of a person in a position of trust and authority is concerned, to include explicitly all those in caring, supporting, training, supervising or treating, vulnerable persons, whether or not in a paid and/or professional capacity. Further, we think that the wording should read "person in a position of trust and/or authority", to widen the reach of this offence still further;

[3]available online at http://www.oireachtas.ie/documents/committees30thdail/jconamendchildren/reports_2008/secondinterimreport7may2009.pdf

(ii) We think that sexual assaults should be included, not least because our experience is that with sexual violence and exploitation, the offending behaviour tends to escalate over time, therefore it makes sense for the criminal law to have the power to nip that offending behaviour in the bud;

(iii) As with X.3 and for the same reasons, we think that the words "reasonable" and "reasonably" in relation to the defendant's beliefs, or the defendant's steps, or whether s/he was mistaken, should be deleted;

(iv) We strongly disagree that offences under this Head should carry only a maximum sentence of five years, because they have an element of strict liability in that consent of the vulnerable person is not a defence. We think this is illogical (abusing a position of trust and/or authority is seen generally by sentencing judges as an aggravating factor) and unfair to vulnerable people, in particular those who are the targets of predators with great power over many aspects of their life. We note that no such provision is included in the defilement legislation referred to above (Criminal Law (Sexual Offences) Act 2006)).

RCNI recommends:

(i) that the scope of the definition of "person in position of trust and authority" be broadened dramatically, as suggested above, and the phrase be reworded as "position of trust and/or authority";

(ii) the words "reasonable" and "reasonably" in relation to the defendant, be deleted in this Head;

(iii) the maximum sentences for any offence under this Head should not be less than those for people who are not in a position of trust and/or authority.

X.5: Restriction on Prosecutions:

General Observations:

In our respectful submission, this Head does not add anything to the existing law, as it is the DPP who will decide whether to prosecute any sexual offence listed in these proposals in any event.

RCNI recommends: Delete X.5 altogether.

X.6: Repeals

RCNI agrees that Section 5 of the Act of 1993 should be repealed.

Final Observations:

(1) RCNI must respectfully disagree with the framers of these proposals at paragraph 7 of their Introduction. We submit that the Law Reform Commission draft Bill does address to some extent the practical problems of prosecuting sexual offences against vulnerable people. Section 11 of the Bill makes significant amendments to the existing special measures in criminal proceedings for vulnerable people, or as they are called in the 1992 Act, those who are "persons with a mental handicap". Section 11 (1) amends the Criminal Evidence Act 1992 to allow for pre-trial cross-examination and re-examination of witnesses and defendants who are eligible under the 1992 Act for special measures in the criminal process; and Section 11(2) of the Bill expands the current limited provisions in the 1992 Act to allow for the use of intermediaries, by providing that in exceptional circumstances, the use of a suitable (but untrained) intermediary should be allowed, that the responses of a witness be conveyed also by the intermediary (very significant from the complainant's perspective), communication aids may be used with intermediaries where necessary, and that an intermediary must declare that s/he will faithfully perform the function of intermediary.

RCNI recommends that these proposals incorporate Section 11 of the Law Reform Commission draft Bill. There can be no doubt that the complainant with a disability should have the right to give her entire evidence pre-trial if s/he so wishes, properly and fully advised and subject to appropriate safeguards (for the accused); while the proposals to expand the intermediary provisions could go a long way in appropriate cases to ensure that the complainant is heard and understood fully by juries and judges.

(2) One very serious difficulty faced by sexual violence victims with an intellectual disability in our criminal courts – is that there is often an issue over whether they have the intellectual capacity to give evidence. If they are found to be competent to give evidence, the defence then asserts that therefore, they also must have had the capacity to consent to the sexual act in question at the time it happened - and did so consent. Note that:

(a) The procedure for assessing competence to give evidence is not defined[4]. It happens that experts are called who have little or no personal knowledge of the complainant and her precise communication and comprehension issues, and these experts are given priority over other supporters and service providers who may not have the same level of professional qualifications but who do have a detailed knowledge and understanding of how/what the complainant with a disability wishes to communicate;

(b) This dilemma illustrates the danger for the complainant of having a static, fixed definition of capacity which does not vary with different **functions** or **situations**. A functional definition of capacity allows for the complainant to have different capacities in relation to the sexual activity in question and to giving live evidence in court.

[4] See section 27 Criminal Evidence Act 1992, online: http://www.irishstatutebook.ie/1992/en/act/pub/0012/sec0027.html

RCNI recommends that the current law on competence to give evidence for vulnerable people, especially those with an intellectual or learning disability, be examined and revamped to ensure that victims of sexual (and indeed, other) crimes are not precluded from giving evidence of the offence(s) against them as far as possible.

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APPENDIX ONE: Sexual Violence, Disability and Justice: RCNI Perspectives (2012)

Note: this is an edited version of a paper given by RCNI staff members at a UCC Conference May 2012

Introduction

The RCNI role includes the development and coordination of national projects including expert data collection, supporting Rape Crisis Centres to reach best practice standards, and using our expertise to influence national policy and social change**.** We are the representative, umbrella body for our member Rape Crisis Centres who provide free advice, counselling and support for survivors of sexual abuse in Ireland, including a growing number between the ages of 14 and 18. Just over 5% of survivors attending Rape Crisis Centres have some disability, and of these, over four out of ten have a learning disability (43%).[5]

Rape Crisis Network Ireland (RCNI) is eager to ensure that all of our service-users, in particular those with disabilities are given every possible support to pursue a case through the criminal courts, or through another forum such as our civil courts, if that is their wish. Our experience is that current law and procedure in this area do not work for our disabled service-users. They face more challenges in reporting a sexual crime to the Guards and pursuing it to trial than other service-users without a disability, and the criminal justice system does not offer them enough protections to help them with this arduous process, or even much prospect of a conviction at the end of it all.

RCNI Ethos – Our Internal World:

Our central guiding principle is that every survivor who comes to us for support after suffering sexual violence is unique, and has unique needs, which we will try to meet as far as we can. This principle is enshrined in our *Equality and Diversity Standard on Survivor and Supporter Needs*.

How are these principles and standards put into practice?

The network structure really helps us as Rape Crisis Centre staff and volunteers, to meet individual service-user needs on a day-to-day basis. Where possible, Rape Crisis staff and volunteers have increased their own ability to communicate with service-users who have specific needs, for instance by learning sign language, or by working with appropriate techniques when counselling a service-user with an intellectual disability. Being part of a

[5] Rape Crisis Network Ireland (2011) *RCNI National Rape Crisis Statistics and Annual Report 2010*, RCNI. Available online at: http://www.rcni.ie/uploads/RCNINationalRapeCrisisStatisticsAndAnnualReport2010.pdf

national network makes it much easier for an individual Centre to find specialised help as and when needed.

Also, developing and maintaining local links with specialised services for people with various disabilities, helps us to understand better the nature and effect of different kinds of disability, so that we can provide a better service to our own service-users.

It's also important, as we think about specialised needs and services, not to lose sight of what service-users with disabilities have in common with those who are not disabled. Indeed, our research as well as our daily experience tells us that service-users who are well supported, well informed and well advised are more likely to report sexual violence to the Guards and then to maintain their complaint till the case comes to court, or there is a decision by the DPP not to prosecute. Rape Crisis Centre experience is that this applies in particular to service-users with an intellectual disability.

Also in common with survivors with no disability, this group of survivors suffers sexual violence most often at the hands of people known to them, and most often in a familiar setting. It is heartening to note that the reporting rates are similar to those survivors who are not disabled. Sadly, as we have seen, service-users with a disability are more vulnerable to sexual violence as they age, not less, and more likely to suffer more multiple incidents of sexual violence, than survivors without any disability.

Sexual Violence Against People with Disabilities: Data collection and barriers to disclosure

In 2010 RCNI received funding from the National Disability Authority to carry out research on barriers to disclosure of sexual violence for people with disabilities and examine data collection on sexual violence against people with disabilities.

The research was structured into three strands:

1. Analysis of 3 years of Rape Crisis Centre data from the RCNI Database
2. Analysis of an online survey for people with disabilities *What stops us talking about sexual violence?*, and
3. A review of 5 currently available data collection models.

In the first strand of the research data entered into the RCNI Database by 14 Rape Crisis Centres over a period of 3 years was analysed to produce the first detailed set of statistics on sexual violence against people with disabilities in Ireland. The RCNI Database is a highly secure online data collection system which equips RCNI to analyse detailed national data and deliver reliable, evidence-based findings and insights. Between 2008 and 2010, 197 people with disabilities attended Rape Crisis Centres (RCCs) for counselling and support.[6]

[6] *It is important to note that survivors do not always self-identify as having a disability and the counsellor may*

More than nine in ten of these were survivors of sexual violence (93%).

Key findings include:

- There were few notable differences in the details of the sexual violence experienced by survivors with disabilities and survivors without disabilities, however
- Survivors with a disability disclosed a lower incidence of sexual violence solely as children (48% compared with 61%) and a higher incidence of sexual violence solely as adults (42% compared with 30%) than people with no disabilities
- Female survivors with a disability disclosed an increase in vulnerability to sexual violence as they age compared with female survivors with no disability who are disclosing a decrease as they age (48% compared with 33%)
- Survivors with disabilities who attended RCC services were more likely to have been subjected to a greater number of multiple incidents of sexual violence, than those with no disabilities (39% compared with 25%).[7]
- RCNI Database is a model of best practice and the lead data collection system in the Republic of Ireland. The best way forward in Ireland is to work with this existing structure. RCNI disability indicators were updated as a result of this research and are now as in line with census questions as possible. These indicators should be implemented as standard throughout all data collection relating to sexual violence.

The second strand of this research examined the barriers to disclosing sexual violence that people with disabilities are faced with through an anonymous online survey. In total, 137 people with disabilities participated in a nine question survey with 111 respondents completing the survey.

Key findings include:

- Of the 50 respondents who identified as survivors of sexual violence, 30% were disclosing the sexual violence for the first time

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not probe into detail of a disability where not relevant to the healing process.

[7] *An incident is not necessarily a once-off act of sexual violence. It instead identifies if the sexual violence was connected by the same perpetrator acting alone or a specific group of perpetrators acting together. An incident of sexual violence may last hours, days, weeks, months or years. The RCNI Database collects data on survivor's abuse details by incident because it is the internationally recognised best practice method of doing so (Department of Health and Human Services, USA, 2009).*

- Seven in ten men and four in ten women had never received any information on where to go for support surrounding sexual violence (71% and 44% respectively)
- Seven in ten of all respondents said that nobody had ever asked whether they had suffered sexual violence (71%)
- Approximately half of all survivors would not disclose sexual violence for fear of being blamed, fear of not being believed, fear of the abuser, or fear of the legal process (54%, 52%, 48% and 44% respectively). These were the top barriers to disclosure
- Approximately one quarter of all survivors would not disclose sexual violence for fear of getting into trouble, fear of losing support, fear that telling will decrease safety, or not trusting anyone enough (26%, 24%, 24%, 24% respectively).

When speaking to our Centres about the challenges faced by their service-users with disabilities, in particular those with an intellectual disability, many of these findings were confirmed. Sometimes the challenges are really rooted in the person's life experience in a system which does not really listen to them or support them properly, and sometimes they are more directly to do with our criminal law and procedure themselves. For many people with an intellectual disability, their problem is that so many well-meaning people all around them are so anxious to speak up for them that they feel silenced and disrespected, and the counsellor or advocate has to separate her/his service-user from those people before the service-user can communicate honestly what they think or feel, or indeed, what happened to them.

These issues all resonate strongly with us, as we are well aware from Rape & Justice in Ireland (RAJI)[8] and from our general experience, that not being believed when you finally pick up the courage to tell your story, being fearful of the negative consequences of reporting, and not having the kind of positive, empowering social support which you need in a time of crisis, are all things which are associated with decisions not to report rape, or decisions to withdraw the report, having made it.

Rape Crisis Survivors with an Intellectual Disability and the Criminal Justice System:

The Reporting Stage:

To begin on a positive note, there is now a cohort of specially trained Guards (Specialist Victim Interviewers) who have undergone an intensive four-week training course to equip them to deal in a professional, informed and sympathetic way with victims of sexual crime who have an intellectual disability. Hopefully we will soon have more of them. We will also soon have more dedicated interviewing suites, away from Garda Stations at various discreet addresses around the country.

[8] Hanly, C., Healy, Dr., & Scriver, S. (2009*) Rape & Justice In Ireland, A National Study of Survivor, Prosecutor and Court Responses to Rape*, The Liffey Press.

The Prosecuting Stage and Beyond:

Our experience is that survivors with an intellectual disability, and/or a psychiatric illness or condition, appear to have their cases prosecuted significantly less often than those without any such disability or illness. Prosecutions for "Section 5" offences[9] are still uncommon, and convictions though not unknown, are rare. As other contributors have described in detail, there are huge difficulties with the "Section 5" provisions. On the other hand, as the XY case, reported in the Irish Times on 10 November 2010, shows, there are also difficulties with using "general" statutes to prosecute perpetrators of sexual crimes against people with an intellectual disability. I think the fault lies with the legislation, in terms of the offences themselves, and the "special measures" ie, video evidence and intermediaries (Sections 12, 13, 14, 15, 16 and 19 Criminal Evidence Act 1992).

The Consequences of these Criminal Justice Systems Failures for Survivors of Sexual Violence with an Intellectual Disability:

Our Centres' experience is that:

- The long delays before an investigation is completed and the DPP makes a decision whether to prosecute, are very difficult for survivors with an intellectual disability, and again, according to RCCs more so very often than for non-disabled survivors
- It is very hard for survivors with an intellectual disability to cope with the fact that the DPP can decide not to prosecute in their case, and the reality is that only a minority of cases are prosecuted anyhow, of which few are "Section 5" cases
- Expert evidence about these survivors: Sometimes evidence about a survivor's capacity to understand, etc., is sought from experts who do not know the survivor well – while others who know the survivor well over a period of years, are never asked to give their opinion. Survivors with an intellectual disability often find this particularly difficult to understand; they also find it very difficult to undergo detailed questioning about matters which seem irrelevant to them and which may indeed be of very limited relevance to any real issue in the trial.

Criminal Law and Procedure in relation to Sexual Offences committed against People with a Disability:

(A) Section 5, Criminal Law (Sexual Offences) Act 1993:

[9] Section 5 of the Criminal Law (Sexual Offences) Act 1993: 3 separate sexual offences against a "mentally impaired" person, namely sexual intercourse, buggery and acts of gross indecency against a male

- If the case does in fact get to court, there is a long list of "gaps" in Section 5 which ought to be plugged if the whole Section did not need to be repealed because of its outdated and unscientific definition of "mentally impaired" and its refusal to countenance the legitimacy of consensual sexual relations between two people not married to each other, one or both of whom has an intellectual disability, to mention only the two most obvious reasons why it should disappear permanently;

- These "gaps" in Section 5 mean that: only sexual intercourse between unmarried persons, buggery and acts of gross indecency between males are criminalised. There is no mention of sexual assault, aggravated sexual assault, or other offences of sexual exploitation. These should all be provided for as specific crimes of sexual violence against people with an intellectual disability;

- Section 5 is stuck with an outmoded static definition of capacity. As just about every other contributor has said, this needs to be replaced urgently with a functional definition of capacity. RCNI would be happy with the draft suggested by the Law Reform Commission in its Consultation Paper last year, "Sexual Offences and Capacity to Consent";

- Matrimony should not provide a defence to a sexual offence, as Section 5 ordains – despite the fact that rape within marriage has been recognised by our law since 1991, when the Criminal Law (Rape)(Amendment) Act 1990 came into force;

- We would agree with the Law Reform Commission that persons in position of trust or authority in relation to people with disabilities, should face more stringent provisions in our criminal law.

(B) The Criminal Evidence Act 1992 – So called "Special Measures"

This Act provides for video recording of an intellectually disabled person's direct evidence – while he/she must be present in Court to be cross-examined on the day of the trial, he/she does not have to give their direct evidence in person (ie, the evidence which would normally be given in response to prosecution counsel). The defence views this in advance.

The Law Reform Commission Consultation Paper referred to above asked for submissions on whether the cross-examination itself should also be pre-recorded. While this could reduce delays, in theory at least, and would be welcomed by many survivors, the question must be asked whether it would be likely to result in more convictions, or not – not least because the answer to this question is one of burning interest to survivors themselves. The popular wisdom often expressed by the legal profession and by police officers is that "juries prefer plays to television" – even if that is very costly in personal terms for the survivor/witness. On the other hand, if the defence gets an opportunity to examine every frame of the victim's video recorded statement in advance, the opportunities for prolonged and

oppressive cross-examination are likely to be increased. We suggest in our submission to the Commission that this is an area where targeted and well-designed research might provide (at least some) enlightenment.

To that we would add that an important part of the answer is also strong judicial oversight of any such pre-trial procedure, to ensure that any such new procedure results in less, not more, oppression of witnesses who face more challenges than others.

The Law Reform Commission also asked for submissions on the law on intermediaries (Section 14 of the CEA 1992).[10] At present, the law only allows for questions to be put through intermediaries, not for the responses to be made through them. To us this seems extraordinary and unfair. We think the responses should be made also through the intermediary, so that the person giving evidence has at least as good a chance to make themselves understood as any Irish or French speaker.

RCNI Agenda in relation to Survivors of Sexual Violence who have a Disability:

- Continued advocacy, both oral and written, for legal and procedural changes to improve the experience of survivors of sexual violence in our criminal courts, our civil courts, and other fora, and to enable them to speak and be heard and understood equally with non-disabled people;
- Continued contact with and education from, specialist organisations, such as Inclusion Ireland and the NDA, and advocacy for such contact and education across the whole criminal justice system;
- Continuing provision and sharing of education and information on disability issues among our Rape Crisis Centres;
- Continuing to ensure that any service-user with a specific need has those needs met by our Centre staff and volunteers as far as possible, using our national network where appropriate/necessary;
- Participation in the development of guidelines for those working in the criminal justice system, "*in identifying current obstacles and examining methods by which the participation of eligible adults in court proceedings could be enhanced in consultation with the proposed Office of Public Guardian, to be established under the proposed mental capacity legislation, and the National Disability Authority", a*s recommended by the Law Reform Commission. In our view, we can already identify some areas where these would be of value, such as the use of

[10] Rape Crisis Network Ireland (2010) *RCNI Submission on Law Reform Commission on Sexual Offences and Capacity to Consent*. Available at: http://www.rcni.ie/uploads/RCNISubmissionLRCCPSexualOffencesandCapacitytoConsentDec2011.pdf

intermediaries, and the critical issue of how to identify whether a person had the capacity to consent to sexual activity at a specified time.