

## RCNI briefing: Criminal Law (Sexual Offences) Bill 2015

Rape Crisis Network Ireland (RCNI) welcome the Sexual Offences Bill and its many positive sections. However, we wish to bring to your attention two critical amendments that we hope you can agree with and champion.

### 1. Section 33 amending section 19 of the 1992 Criminal Evidence Act: Disclosure of third party records in sexual abuse cases

**RCNI recommends that it should not be possible to avoid these provisions on consent of the victim/witness.**

The relationship of trust and confidentiality between a counsellor and a victim of sexual violence is critical to his/her recovery and it is in the public interest to preserve same. In balancing the interests of a victim and the State's need to prosecute while upholding a defendant's rights under the Constitution, the State should only as a matter of necessity in the interests of justice, undermine that relationship in any way.

Section 33 sets out a new statutory basis for the disclosure of sensitive and private records in an investigation or prosecution. This section is broadly welcomed as it has been intolerable that vulnerable victims have not had statutory protection in this matter to date. However, in our view, there is a very serious flaw in the draft Bill.

The final Subsection 19A (17) says that none of the statutory procedures and protections of this Bill relating to disclosure of counselling records shall apply if the victim/witness waives their right to same. RCNI are clear that this paragraph undermines the rest of the Section as it means that victims of sexual violence who are prosecution witnesses will remain the target of pressure by State agents and others, to waive their protections. There is no obligation on the State to provide the victim/witness with representation or information regarding such a waiver. This subsection should be deleted.

RCNI recommends that it should not be possible to avoid these provisions on consent of the victim/witness. 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"). The issues raised by the admission of confidential material are at least as serious for the victim/witness as those raised by admission of evidence of her "other sexual experience", and accordingly, it should not be possible to circumvent them on consent.

[Other recommended amendments to section 19 are listed in the notes below]

*"I just found that you're extremely vulnerable and you're very broken and you're extremely sensitive ... you have to defend ... because the way the criminal justice system is ... you have to defend yourself from the minute it happens"*  
(RAJI)

## 2. The Bill should include a Definition of Consent

**RCNI have been advocating for the law to include a positive definition of consent to sexual activity supported by a list of situations in which there is no consent.**

The absence of consent is what distinguishes sexual violence from sexual activity. This Bill makes numerous references to consent yet it is not defined. In an ideal world consent would be a shared concept that required no elaboration. We live far from that ideal which is why RCNI have been advocating for the law to include a positive definition of consent to sexual activity supported by a list of situations in which there is no consent. Such a definition would aid investigators, prosecutors, juries and witnesses as well as act to set a clear standard of behavior amongst sexual or potential sexual partners.

Consent **must** be present during every sexual encounter, and if not, a crime is being committed. Having a list of situations in which there can be no consent provides a way to assess the behaviour of participants in a sexual act. Of course, it will not always be easy to decide whether someone consented to sex (for example) when s/he was drunk but still conscious or indeed, whether the belief of the other person that s/he had consented was an honest one in circumstances where that person was in a similar state. The list is intended rather to identify the most obvious, clear-cut situations in which there can be no consent.

RCNI's position on Consent is set out in some detail in "Consent on Sexual Contact" (2008). Here is the weblink for easy reference: <http://www.rcni.ie/wp-content/uploads/ConsentonSexualContactRCNidiscDocu8sept08.pdf>

RCNI would also bring to your attention that legislation to amend Section 5 of the Criminal Law (Sexual Offences) Act 1993 as amended, (offences against those quaintly defined in the Act as "mentally impaired"), has been omitted from this Bill. We trust that if it is not included, separate legislation will be brought forward to amend the 1993 Act as soon as possible.

RCNI urge you to ensure that the timeline for the publication of these Bills be clearly set out and adhered to by government.

For further information:

**Caroline Counihan, BL, RCNI Legal Director 087**

**Clíona Saidléar, PhD, RCNI Strategic & Programme Executive**

**RAPE CRISIS NETWORK IRELAND**

*"I felt that because people would view our relationship as being on a strictly sexual basis then the Gardaí wouldn't believe that I hadn't consented or that it wasn't me leading him on"*  
(RAJI)

## Notes

Section 33 recommended amendments

**19A (1):** Definitions: [...]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".

**19A (4):** 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

**19A (5):** RCNI would put responsibility on the court, or 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.

**19A (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 Section might be reworded to read for example, no one or more of the following assertions shall be sufficient to establish [likely relevance etc]."

**19A(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

**19A(11): (i)** 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.

**(ii)** 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. [...]