RCNI Submission on Substantive and Procedural Legal Reforms in Relation to Sexual Offences

December 2012

Introduction – Rape Crisis Network Ireland

1.0 Rape Crisis Network Ireland is the national representative body for the rape crisis sector**.** It 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 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, 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. It is the RCNI Legal Director's role to advocate for legal and administrative changes to improve the experience of survivors of sexual violence as they face the legal process.

This Submission

1.1 RCNI Suggestions for Legal Reforms in relation to Sexual Offences

For convenience, this submission is made under three distinct headings, as follows:

- One **general** recommendation in relation to criminal law and procedure in the area of sexual crime;
- **Specific** substantive changes to the criminal law, and
- **Specific** procedural and evidential changes to the criminal law.

No one topic is explored exhaustively, but references are made throughout to our existing legal reform position papers and submissions, and web links to the full texts are included where appropriate in the text and also in the Appendix. With a couple of exceptions, this document is a summary of previous RCNI submissions on legal reform since 2008, assembled into one paper for convenience.

The RCNI Legal Director has chaired the Legal Issues Sub-Committee of the National Steering Committee on Violence against Women from September 2008 to date. Over the past few years, LISC has produced a number of legal recommendations and discussion documents, which have been approved by the NSCVAW and in some cases, promoted onwards through the good offices of Cosc to result eventually in legislative changes. Where this paper makes recommendations which are in accordance with those made by LISC, this is stated.

1.2 RCNI general recommendation for reform of the criminal law in relation to sexual crimes

RCNI recommends that the law on sexual offences, sentencing of sex offenders, and evidence and procedure specific to sexual offences, be re-organised and collected into one or two comprehensive statutes, to make it accessible much more readily not only to legal professionals and others concerned in the administration of justice, but also to members of the public who need to understand how the criminal justice process works for those who have to use it. At present, definitions of sexual offences, penalties, rules relating to special measures, other sexual experience, anonymity and in camera hearings, and sentencing of sex offenders, are scattered among many pieces of legislation. This presents an unnecessary difficulty for everyone affected by the criminal justice process.

2.0 RCNI Suggestions for Specific Substantive Changes to the Criminal Law

2.1 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.[1] 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[2]. This list of situations contained in this document were also put forward by LISC and adopted by the NSC (in 2009).

2.1.2 Age of Consent to "Sexual Acts":[3]

RCNI believes that it is appropriate and in the best interests of children and young people in particular, to maintain the **age of consent to sexual acts at 17** for both sexes. The medical and social risks to young people, particularly young girls, of premature intercourse are well documented. The psychological and physical risks of being sexually exploited and/or abused by an older person, perhaps in a position of trust and/or authority, are also obvious for young people. Less obvious but very important is the need for our society through our laws to set standards of behaviour which

[1] See Section 9 of the Criminal Law (Rape)(Amendment) Act 1990

[2] See Appendix IV to "Consent on Sexual Content", RCNI, 2008, available through this web link: http://www.rcni.ie/uploads/ConsentonSexualContactRCNidiscDocu8sept08.pdf

[3] As defined in the Criminal Law (Sexual Offences) Act Sections 2 and 3 as amended – ie still excluding acts which are not covered by this definition.

provide at least some shelter for young people under constant pressure from the prevailing culture, from their peers and occasionally from older people, to engage in, or be coerced into engaging in sexual activity for which they may feel unready, and which exposes them to risks which may have very far-reaching negative consequences for them.

2.2 "**Honest and Reasonable Belief?" (that someone else is consenting to sexual activity with oneself)** Our view is that the present wording in relation to belief of the accused **about consent to sexual intercourse** which would otherwise be rape as defined in the Criminal Law (Rape) Act 1981 , is too loose. It refers to subjective belief of the accused only, although it is qualified by the duty on the finders of fact to have regard to the "presence or absence of reasonable grounds" put forward for believing in consent, as well as "any other relevant matters" (see Section 2). It will readily be seen that this means that the accused's belief does not have to be objectively reasonable for it to be an effective and complete defence, if proved.

Where an accused person's belief in the consent of the complainant to a sexual act is not reasonable, he/she should surely not be allowed to rely on it. In other words, the issue for the decision maker should not be whether the belief of the accused was honest although unreasonable and mistaken, but whether a reasonable person would have come to the same conclusion. The focus would therefore be more on the conduct of the accused rather than on that of the complainant, and the standard of behaviour expected of any person in the situation of the accused would be higher[4].

Similarly, in Sections 2 and 3 of the Criminal Law (Sexual Offences) Act 2006, which contain the new defilement offences in relation to certain sexual acts with people under the ages of 15 and 17 respectively, the wording refers to the subjective belief of the accused **about the age of the complainant.** It is also qualified by wording very similar to that found in Section 2 of the 1981 Act, to the effect that the finder of fact must have regard to the "presence or absence of reasonable grounds" for holding such a belief, and any other relevant matters. As with the offence of rape under the 1981 Act, our view is that this wording is too loose. While we are aware that the second Joint Oireachtas Committee on the Constitutional Amendment on Children interim report raised concerns about the possible constitutionality of using various more objective formulations, for example expressions such as "honest and reasonable",[5] our opinion is that to import an element of objectivity into the current standard of belief might not necessarily compromise the constitutional right of the accused to a fair trial, by depriving him/her effectively of a defence based on their belief that the young person concerned was over the relevant age. However, it may be safest to deal with this issue as some Committee members argued, by way of constitutional amendment. We would therefore agree with the Committee that "consideration be given to legislative amendments designed to raise the level which the accused must reach in proving the existence of a mistake as to age in cases of prosecutions for sexual offending against children"[6], and we would further agree with the Committee that the burden of proof should remain on the accused to show that any mistaken belief about the age of the young person is honest and reasonable, and that the standard should be as they suggest, on the balance of probabilities.

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[4] Under the Criminal Code of Canada, for example, the onus is on the accused if he raises his belief in the complainant's consent, to show that he has taken reasonable steps to ascertain that the complainant was consenting. However, the Canadian model of belief is an "honest" one, rather than a "reasonable" one, as in New Zealand and in England and Wales, so that the best model to follow in this regard is New Zealand or England and Wales, rather than Canada. It also appears that the Canadian courts have tended to interpret the "reasonable steps" as meaning "any reasonable steps", thereby lowering the standard of behaviour expected of the accused.

[5] See generally Chapters 9 and 10 of the Second Interim Report of the Joint Oireachtas Committee on the Constitutional Amendment on Children (May 2009), pages 49 through 52, available on www.oireachtas.ie

[6] ibid

Accordingly we would recommend that the statutory wording in relation to **both** belief in consent to sexual intercourse which would otherwise be rape under the 1981 Act, and belief that the young person concerned was over the relevant age for sexual acts which would otherwise be defilement offences, be framed in a more objective way, and that due regard be given to any possible constitutional issues. If the best advice available is that a constitutional amendment is necessary, such an amendment should be pursued in the normal way.

We also agree with the Committee that "that the legislation enacted exclude permitting an accused charged with a sexual offence against a child, to rely on the dress and/or demeanour of the child, on consent by the child to sexual activity, or on evidence of previous sexual history of the child to establish or support a defence of mistake"[7].

2.3 **Specific Offences:**

2.3.1: **Sexual Offences against persons who are "mentally impaired",** as outlined in Section 5 of the Criminal Law (Sexual Offences) Act 1993.

We have already made submissions on this topic, through LISC recommendations which were adopted by the NSC, in person to the Law Reform Commission, and by way of written submission on the Law Reform Commission Consultation Paper on Sexual Offences and Capacity to Consent. This RCNI submission addresses the issues identified in the Consultation Paper in particular, and may be downloaded from our website via the link at this footnote[8].

In summary, RCNI recommends that the existing Section 5, which has resulted in very few prosecutions and fewer convictions, be repealed and replaced by new legislation which:

- incorporates a modern **functional** definition of capacity to consent to sexual activity, setting out the conditions for establishing when there is a lack of such capacity in terms almost identical to the one suggested by the CP, only qualifying the word "consequences" with "reasonably foreseeable consequences";
- dispenses with the outmoded, static and essentially, inaccurate definition represented by the phrase "mentally impaired";
- includes a wide range of other sexual offences besides (unlawful) sexual intercourse, buggery and indecent exposure;
- does not provide a "marital exemption";
- includes offences of obtaining sex by deception, threats, or inducements;
- ensures that the maximum penalties for each enumerated offence are commensurate with their gravity. For example, it seems to us that penetrative offences against people who lack capacity to consent should have maximum penalties in line with similar offences against people who do not lack such capacity;
- While we agree in principle that offenders in positions of authority and/or trust should not be able to avail of reasonable mistake, we remain somewhat concerned that any provisions excluding them from this defence might be subject to a defence challenge on the grounds

[7] ibid

[8] See this web link to the RCNI Submission on the Law Reform Commission Consultation Paper on "Sexual Offences and Capacity to Consent" (2011):
http://www.rcni.ie/uploads/RCNISubmissionLRCCPSexualOffencesandCapacitytoConsentDec2011.pdf

that they are unconstitutional, following the Supreme Court judgment in the CC case[9] (2006).

2.3.2: **Voyeurism or "Peeping Tom" offence:**

RCNI recommends that there be a **specific offence of voyeurism,** for example, one along the lines of Section 67 of the UK Sexual Offences Act 2003. This is the offence of "Peeping Tom" behaviour, where there is no sexual or other physical contact, but nevertheless the person being observed suffers a violation of their privacy and sexual autonomy for the sexual gratification of another. At present, such behaviour is not criminalised by our system.

2.3.3: **Specific offence of unlawful sexual activity by person in position of trust and/or authority against minors in their charge.**

At present, there is provision only for the seriousness of this kind of sexual offence to be recognized at the level of sentence. RCNI believes that legislation should be enacted to create a specific offence of abuse of position of trust by sexual activity with a child, for example in line with the provisions of the UK Sexual Offences Act 2003 at section 16.[10]

2.3.4: **"Grooming" of children:**

The existing law in this area does not contain a specific offence of "grooming". The first existing provision in relation to this kind of activity is set out below for ease of reference:

(1) Criminal Law (Sexual Offences)(Amendment) Act 2007, Section **6**.—

"Section 3 of the Child Trafficking and Pornography Act 1998

is amended by—

(*a*) the insertion of the following subsections:

"(2A) Any person who within the State—

(*a*) intentionally meets, or travels with the intention of meeting, a child, having met or communicated with that child on 2 or more previous occasions, and

(*b*) does so for the purpose of doing anything that would constitute sexual exploitation of the child, shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years".

While these provisions do purport to address the issue of "grooming" of children in order to commit sexual offences against them, it is submitted that they are unnecessarily restrictive in some ways

[9] CC vs Ireland & ors [2006] IESC 33, judgment of Hardiman J available online at http://www.courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/877f6b6773b3dcee80257177003c6586?OpenDocument

[10] http://www.legislation.gov.uk/ukpga/2003/42/section/16

and not specific enough in others, and that, as Geoffrey Shannon says in his Special Rapporteur Report of 2007 in relation to Section 6 of the 2007 Act,[11]

"the nature of the offence is ex post facto due to the fact that in all likelihood the sexual exploitation of the child would need to have been committed before a person could be prosecuted", and also: *"....". In such circumstances it might be difficult to prove mens rea until the criminal act has in fact occurred i.e. the child has been sexually exploited, a problem compounded by the fact that there is no requirement that the previous communications be sexual in nature…".*

RCNI would also agree with Geoffrey Shannon's view that an offence of grooming would be a means to punish prospective groomers if no actual sexual exploitation occurs, and would deter at least some from committing acts of sexual exploitation. As he says in his 2007 Report:

" a specific offence of grooming would act as a means of punishing those who meet or contact a child for the purpose of future sexual exploitation without actually committing the act of sexual exploitation as defined in the 2007 Amendment Act. A successful conviction for the offence of grooming would, it is submitted, act as a deterrent to committing the more serious offence of sexual exploitation under s.6…"

RCNI recommends that any specific offence of grooming should not include any restriction as to the number of any meetings and/or communications with the child, and should be broad enough to encompass situations where the child is induced to come to meet the "groomer", and also, as Geoffrey Shannon says, situations where the child is induced to travel by a third party (he gives the example of a school tour which is joined by the "groomer"), and indeed, situations where there is a chance meeting between child and prospective groomer, which is used to lay the ground for **future** unlawful sexual activity.

The other provision in relation to "grooming" activity is:

2) Criminal Law (Human Trafficking) Act 2008, Section 3 (5) (d):

Section 3 (5) "(*d*) inviting, inducing or coercing the child to engage or participate in any sexual, indecent or obscene act ..."

A danger with the wording of this particular subsection is that it is likely to be construed restrictively to refer only to any inducements or invitations which are very close in time to the act concerned, so that the criminal intent of a course of conduct otherwise innocent in nature is not recognised by this provision.

RCNI would also say that any specific provisions in relation to an offence of grooming should make it clear that it does not matter whether both communication and contact occur within the same

[11] Report of the Special Rapporteur on Child Protection (2007), available online at: http://www.dcya.gov.ie/documents/child_welfare_protection/Report_of_Special_Rapporteur_on_Child_Protection_Geoffrey_Shannon.PDF

jurisdiction. A possible model to examine is an Australian one, cited by Geoffrey Shannon in his 2007 Report, set out below minus the subsection on defences. It could be adapted to refer to sexual activity **within** as well as outside the jurisdiction.

. Australia – The Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No.2) Act, 2004

"272.15 "Grooming" child to engage in sexual activity outside Australia

(1) A person commits an offence if:

(a) the person engages in conduct in relation to another person (the ***child***); and

(b) the person does so with the intention of making it easier to procure the child to engage in sexual activity (whether or not with the person) outside Australia; and

(c) the child is someone:

(i) who is under 16; or

(ii) who the person believes to be under 16; and

(d) one or more of the following apply:

(i) the conduct referred to in paragraph (a) occurs wholly or partly outside Australia;

(ii) the child is outside Australia when the conduct referred to in paragraph (a) occurs;

(iii) the conduct referred to in paragraph (a) occurs wholly in Australia and the child is in Australia when that conduct occurs.

Penalty: Imprisonment for 12 years……..

(3) A person may be found guilty of an offence against subsection (1) even if it is impossible for the sexual activity referred to in that subsection to take place.

(4) For the purposes of subsection (1), it does not matter that the child is a fictitious person represented to the person as a real person…"

RCNI further recommends that the advice of the Special Rapporteur on Children, Geoffrey Shannon, in his Fourth Rapporteur's Report be followed. As he says, "Legislation needs to be enacted so as to **criminalise the grooming of children"** (page 20 Geoffrey Shannon 2010 Report)[12]. RCNI agrees with Geoffrey Shannon in **both** the 2007 and the 2010 Reports, that a specific offence of grooming needs to be enacted, and that this should define "grooming" in such a way as to capture its true nature, that is, the process which lays the ground for the commission of a future offence, maybe over quite a long period, as he defines it in his 2007 Report:

"... the initiation and encouragement of a relationship by an adult with a child for the purposes of sexual exploitation by that adult or others"

[12] Fourth Report of the Special Rapporteur on Child Protection (2010), available online at: http://www.dcya.gov.ie/documents/publications/Rapporteur-Report-2010.pdf

2.3.5: **Sexual Assault – Suggested Legal Reforms:**

(a) RCNI recommends that there be a statutory definition of "sexual assault". This is missing from the Criminal Law (Rape)(Amendment) Act 1990, so that cases on the older common-law offence of indecent assault must be consulted to identify its elements. This definition could include guidance on whether there can be consent to sexual assault if serious harm is caused, as at present, this is not clear. Given the statement of the Supreme Court in the recent case of *MJELR -v- Dolny*[13] there is further confusion about the role of consent in the area of assault. In that case, the court concluded that assault as defined in section 2 of the Non - Fatal Offences Against the Person Act 1997 (under which the lack of consent of the victim is a necessary proof) does not in any way refer to the separate offence of assault causing harm under section 3 of the same Act. The following is an extract from the judgment of Peart J in the High Court which was specially approved by Denham J in the Supreme Court:

"The offences created respectively by s. 2 and s. 3 of the 1997 Act, are distinct and different offences. An assault under s. 2 requires for its commission that the person assaulted did not consent to being assaulted, as well as that the assault be inflicted without lawful excuse and intentionally or recklessly. The section is clear in that regard. But the separate and distinct offence of 'assault causing harm' in s. 3, contains no such requirements. It is a separate offence, and it is not the case that s. 2 is intended to define the concept of "assault" for all purposes of the Act. There is no definition of assault contained in s. 1 of the 1997 Act, or elsewhere therein.

Section 3 provides for a freestanding offence of 'assault causing harm', as opposed to a simple assault. In order to be guilty of this offence, a person must have carried out an assault and must have caused 'harm' as defined in section 1 of the 1997 Act. In such an offence, it is not part of the offence that it occurs without the consent of the victim. That is clear from the plain meaning of the words used in the section. In section 3, the word 'assault' is not used as a term of art by reference to the provisions of s. 2, or by reference to any statutory definition of that word….

The requirement that the assault be without the consent of the victim, or that there be any mental element, is distinctly absent from the express provisions of the s. 3 offence of assault causing harm."

In light of this ruling, it is difficult to know, what if any role consent plays in a sexual assault that causes harm, which would of course include psychological harm.

(b) RCNI recommends that proceedings in sexual assault cases should attract the **same** protection for complainants as in rape and aggravated sexual assault cases. At present, there is no obligation to try a sexual assault case in camera, although Section 20 of the Criminal Justice Act 1951 allows the court to exclude the public from proceedings which are of an indecent or obscene nature. The possibility of having to give evidence in public is a serious deterrent to any complainant who will have to face a trial in a local Circuit Court.

[13] [2008] IEHC 326, [2009] IESC 48.

3.0 RCNI Suggestions for Evidential and Procedural Changes in our Criminal Law

3.1 Anonymity and "In Camera" Rules in Criminal Proceedings for Sexual Crimes:

3.1.1 Extending the existing complainant anonymity provisions

In addition to the anonymity measures for complainants in sexual cases contained in the Criminal Law (Rape) Act 1981 and the Criminal Law (Rape)(Amendment)Act 1990 (as amended both), **RCNI recommends** that neither complainants nor other prosecution witnesses should have to have any identifying information given to an accused/offender, such as home or work address details, where to disclose such information would put the complainant and/or their witness(es) at risk of harm from the accused/offender and/or others acting on his/her behalf, and that to request a direction to that effect should be the responsibility of the prosecutor in the case.

3.1.2 Extending the 'in camera rule'

Privacy and anonymity are matters of serious concern for survivors of sexual violence. The fear of people knowing what has happened to them is one of the key features in a survivor's decision not to report sexual abuse. Where that survivor makes the difficult decision to report the abuse and a prosecution takes place, the issue of privacy during the trial process is a very important one for survivors.

Many sexual offences fall into the category of 'special and limited cases' which may be heard 'otherwise than in public' under Article 34 of the Constitution of Ireland. Unfortunately, not all sexual offence cases are heard in this manner and this has a significant impact on survivors, both in relation to their decision to report the abuse and in their recovery after the trial has taken place.

The legislature has intervened by way of Section 6 of the Criminal Law (Rape) Act 1981 as amended by section 11 of the Criminal Law (Rape) (Amendment) Act 1990 provides that the judge shall exclude from the court, all persons except officers of the court, persons directly concerned with proceedings, bona fide members of the press and such other people as the court may, in its discretion, permit to remain. This provision applies to any proceedings for a rape offence or aggravated sexual assault. The purpose sought to be achieved by this provision was to safeguard the dignity of the complainant and protect that person from further victimization which would result from the trial being held in open court. However, there is no direct provision excluding members of the public from the trial of other sexual offences such as indecent or sexual assault and buggery (although no further trials can take place in respect of buggery charges since the Supreme Court decision in *DPP v M O'M and Judge Mary Devins* [2012] IESC 7). In our view, this legislative gap has a particular impact on the survivors of historical sexual abuse since there are now very few offences with which a perpetrator can be charged and the most likely charge is one of indecent assault in historical cases. Knowledge that a trial could take place in open court is a significant factor that a survivor will take into account in deciding whether or not to report abuse.

A provision exists in section 20(3) of the Criminal Justice Act 1951 empowers a court to exclude the general public from any criminal proceedings for an offence which is of an indecent or obscene nature. It appears to be open to both the prosecution and the defence to make an application under

this section. The wording of the provision may also allow the court to make the order of its own motion. Section 20(3) states:

> *"(3) In any criminal proceedings for an offence which is, in the opinion of the Court, of an indecent or obscene nature, the Court may, subject to subsection (4), exclude from the Court during the hearing all persons except officers of the Court, persons directly concerned in the proceedings, bona fide representatives of the Press and such other persons as the Court may, in its discretion, permit to remain."*

The RCNI is aware from information provided by member Rape Crisis Centres, that a number of trials for indecent or sexual assault have taken place in public. Since these offences are prosecuted in the Circuit Court, it is often the case that the trial takes place in public in the town or area in which the complainant or even the defendant resides. In light of the fact that the legislature has intervened to ensure anonymity for survivors of sexual violence, including sexual assaults[14], it is particularly difficult to justify not extending the *in camera rule* to all sexual offences.

LISC has made general recommendations to the NSC to the effect that the rules on complainant anonymity and in camera hearings should be the same for all sexual offences (2011).

3.2 Legislative ban on personal cross examination by the Defendant

Personal cross examination of the complainant by the defendant, while rare, does take place and where it does, the effect on the survivor and their recovery is significant. The courts in this jurisdiction have always strongly upheld the right of the defendant to cross-examine witnesses and have witnesses crossed examined on his/her behalf. While trial judges are under a duty to regulate cross-examination as part of their duty to control the trial, the protection offered to complainants by this is limited by the defendant's right to a fair trial since this right is considered to be a superior right to that of the complainant's. However, the right of the defendant to test the evidence against him does not necessarily extend to allowing that person to conduct the cross-examination personally. Hanly supports this view and states that the defendant's *choice* must give way to the *right* of the victim[15]. Hanly further contends that to allow the defendant to personally cross-examine the victim is to deliberately run the risk of a second round of brutalization. RCNI is of the opinion that limiting the right of the defendant in respect of the cross examination of the complainant is not inconsistent with the right to trial in due course of law both under the Irish Constitution and under Art 6 of the ECHR. In the case of *Croissant v. Germany* (1993) 16 EHRR 135, the European Court of Human Rights accepted that a provision requiring an individual to be represented by a lawyer against his will can be consistent with his right to a fair trial, providing the defendant's interests are protected. In no case would be defendant be unrepresented since a

[14] Section 7 of the Criminal Law (Rape) Act 1981 as amended by section 17(2) of the Criminal Law (Rape)(Amendment) Act 1990.

[15] Hanly, "Finding Space for Victims' Human Rights in Criminal Justice", available online through this web link:

http://www.lawsociety.ie/documents/committees/hr/conference_papers/Finding%20Space%20for%20Victim.pdf

lawyer could be appointed to conduct the cross-examination, even if the accused person was conducting the remainder of the trial personally. RCNI submits that legislation should be introduced which removes the option of personal cross-examination by the defendant of the complainant in sexual offence cases. RCNI is of the opinion that such legislation would not unduly impede on the right of the defendant to a fair trial.

3.3 Case Management and Pre-Trial Hearings

RCNI has long advocated the introduction of a system of case management and pre-trial hearings for trials on indictment, as an important means of reducing delays and uncertainty for the complainant facing the rigours of our criminal justice process, as have many others[16]. We welcome very much the Government's commitment to introducing legislation in this area, and also the pilot pre-trial procedures now beginning in the Dublin and Midlands Circuit Criminal Courts. This proposal was the subject of a detailed paper by LISC, which was approved by the NSC and promoted by Cosc during 2011. RCNI has also produced a detailed paper along very similar lines, available online.[17]

We would also recommend that **judicial case management** both pre-trial and during the trial process itself, be formalised to some extent by the introduction of court rules, founded on primary legislation, to make explicit the powers of the judge to limit the extent or terminate, any cross-examination which is **irrelevant or unnecessarily oppressive** for the complainant.

In this regard, we would draw attention to the very many complainants who must give evidence as adults about **historic child sexual violence**. Among our own clients and those of the other three crisis centres who use our database, the proportion of people reporting historic child sexual violence is now over 60%, and about a quarter of these have reported, or will report, the crime to the Guards[18]. As reported to us as advocates and counsellors, their experience under cross-examination at trial is overwhelmingly that no allowance is made by anyone for the fact that they experienced this violence **as children.** Accordingly, it regularly happens that they are cross-examined at length about their personal lives **as adults**, entirely as if the violence had happened only recently. While it is clear that cross-examination on adult **motives** for making the complaint could not be ruled out very readily, it seems to us that cross-examination of adults reporting historic sexual violence should **not** be permitted to suggest that the child's own behaviour (or dress, etc) with the accused or with anyone else, contributed to the crime in any way. We therefore suggest that as part of a general scheme of case management, rules of court should empower the trial judge quite explicitly to limit or forbid altogether this kind of questioning, and we endorse entirely the recommendations to

[16] Among them the Law Reform Commission Report on Prosecution Appeals and Pre-Trial Hearings (2006), (LRC 81-2006), available online through this web link:
http://www.lawreform.ie/_fileupload/Reports/Report%20Prosecution%20Appeals.pdf

[17] Available online through this web link:
http://www.rcni.ie/uploads/RCNICaseManagementandPreTrialHearingspositionpaperMay12.pdf

[18] See RCNI 2011 National Rape Crisis Statistics and Annual Report, available online at:
http://www.rcni.ie/uploads/RCNIARNationalStatistics2011.pdf

similar effect made in relation to child witnesses in the Second Interim Report of the Joint Oireachtas Committee on the Constitutional Amendment on Children.[19]

3.4 **Special Measures**

(a) Special Measures in relation to Complainants with a "mental handicap" – to use the terminology of Section 19 of the Criminal Evidence Act 1992: RCNI has made a submission to the Law Reform Commission already in this regard[20]. In summary, we submit that:

- It seems to us right **in principle** that complainants who have an intellectual disability should have the right to request or refuse to have, their entire evidence pre-recorded and that if for whatever reason the trial judge rules that this evidence or any part of it is inadmissible, it should then be open to that complainant to give "live" oral evidence on the relevant part(s). If pre-recording of cross-examination is allowed, pre-recorded re-examination by the prosecuting advocate should also be allowed;

- With regard to the provisions on the use of intermediaries, Section 14(1) of the Criminal Evidence Act 1992 should be amended to allow for the complainant's **responses** to be relayed via an appropriately skilled intermediary. At present, only the questions may be put through an intermediary.

(b) Special Measures in relation to Complainants who do not have a "mental handicap":

In our view, normal practice should be that special measures, such as giving evidence by video link and the use of previously recorded statements, are made available on request to **all** sexual violence complainants, regardless of their age or their capacity to understand and answer questions. At present, video link arrangements for giving evidence by complainants in sexual cases can only be provided with the leave of the court in the case of complainants over the age of 17 who do not have a "mental handicap". The argument has been made that to make these measures available might be damaging to the prosecution case, as juries prefer live action drama to watching TV – and therefore are more likely to recall evidence which is given "live". Some very recent mock juror research conducted in England & Wales suggests that this fear may not be well-founded[21]. Even if the research results indicated otherwise, we would submit that it is right in principle to allow complainants the possibility of giving evidence by video link and/or by pre-recording their entire testimony, insofar as this is possible in accordance with the rights of the accused.

Finally in this regard, RCNI submits that special measures should be made available as a matter of routine in any case where an adult complainant **gives evidence of historic child sexual violence**. This is particularly difficult for many complainants, as it forces them to remember and relive very

[19] Joint Oireachtas Committee on the Constitutional Amendment on Children Second Interim Report, May 2009, available online at: http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/secondinterimreport7may2009.pdf

[20] See full reference and web link at note 7 supra

[21] "Special Measures in Rape Trials: Exploring the Impact of Screens, Live Links and Video-Recorded Evidence in Mock Juror Deliberation", Briefing Report, November 2012 (Ellison & Munro), University of Leeds. The results indicated that the mode of presentation did not substantially impact either upon jurors' perceptions of credibility, or of trial fairness. As far as known, this research report has not been published in full yet, but copies may be obtained from the University of Leeds School of Law.

unpleasant experiences which happened when they had little or no power to remove themselves from the abuser concerned, and in many cases, had no option but to undergo multiple episodes of abuse. Having to face him or her in person remains very difficult despite the passage of time, as it makes the complainants feel like helpless children all over again. This ordeal is surely not necessary in the interests of justice, for the vast majority of cases.

3.5 **"Previous Sexual History" and Separate Legal Representation[22].**

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 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".*[9] This statutory test has been elaborated in *DPP v G.K.*[2006] IE CCA 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

[22] This is an edited extract from the RCNI Position Paper on the same topic, available online at: http://www.rcni.ie/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf

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 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.

This list is almost identical to that at the end of the LISC document on the same topic, approved and adopted by the NSC in 2011. It excludes the text in square brackets at (i).

3.6 Corroboration Warning

The common law rule that required a corroboration warning to be given to the jury in every case of a sexual nature was based on an unprincipled and unjustified wariness of all complainants in sexual cases. Corroborative evidence is independent evidence that tends to link the defendant to the crime and since most sexual offences take place in private with only the complainant and defendant present, the opportunities for finding corroborative evidence in those circumstances are limited. The net effect of the common law rule therefore was that a corroboration warning was given to the jury in every case of a sexual nature which resulted in the jury being warned that it was dangerous to convict on the basis of uncorroborated evidence. Of course, this rule developed further to the extent that even where corroborative evidence was available, the corroboration warning was still required to be given in a case of a sexual nature and failure to do so amounted to a mis-direction by the trial judge.

The legislature intervened by way of section 7 of the Criminal Law (Rape) (Amendment) Act 1990 which provides that a corroboration warning is now discretionary rather than mandatory in cases of a sexual nature. Whether or not the warning is given is a matter for the judge to decide having regard to all the evidence given at trial. RCNI is aware from its own research that the corroboration warning is given in a minority of cases[23] however RCNI is of the view that a corroboration warning is inappropriate in all sexual offence cases. When a judge warns a jury about the dangers of convicting a person on the basis of uncorroborated evidence, the net effect of this on the minds of the members of the jury is that there is some judgment on the quality of the complainant's evidence. In all cases, the jury is required to use its common sense to assess the evidence and a corroboration warning tends to put the stamp of 'unreliability' on certain evidence. In sexual offence cases, this will inevitably relate to the complainant's evidence. Since there is less likely to be corroborative evidence in sexual offence cases, this means that the issue of the corroboration warning arises most often in sexual offence cases than in relation to offences of another nature.

By way of comparison, the other circumstance in which the corroboration warning routinely arises for consideration is in the context of accomplice evidence. In that case, an accused person could be convicted on the evidence of an accomplice and given that an accomplice may have something to gain from giving such evidence, it is appropriate that a jury be warned about the dangers of convicting in such circumstances. The same situation does not pertain in the case of sexual offences since the complainant cannot benefit themselves by giving evidence against the accused person. Research has found that only a very small number of complaints of rape are false and still less are considered to be both false and malicious[24]. The evidence is therefore that complainants in sexual cases are not unreliable and the RCNI is of the view that a corroboration warning should not be given in sexual offence cases. The reliability and quality of the evidence should be a matter for the jury to decide having regard to their own good sense.

3.7 Pre-Trial Protection for Complainants:

(a) From investigation to charge:

[23] See "Rape and Justice in Ireland" (Hanly & ors, 2009, Liffey Press), cited elsewhere, at page347: the corroboration warning was given in only 3 rape cases out of a total of 173.

[24] Ibid, pages 249-250: Only 6% of reports of rape in the sample were thought to be false by either the Guards or the DPP, and only 1% of the total sample were deemed to be malicious. In no case in the sample did the DPP decide to bring a prosecution against the complainant for making a false report of rape.

This can be a lengthy period for some complainants, particularly where the investigation is a complicated one. During this period, the accused person is not charged, so is not subject to ordinary bail condition. Before he is interviewed by the Gardai, he may not have any knowledge of the allegation made against him, and if so there is much less risk to the complainant of being subjected to intimidation tactics. Once he is interviewed, however, the risk of such intimidation may increase dramatically. This is a period where the complainant may need a **preventative measure** to ensure that there is an effective sanction for such intimidation. We suggest that Section 41 of the Criminal Justice Act 1999, which sets out the offence of witness intimidation, might be amended to provide for a simple court procedure whereby such an order might be obtained reasonably quickly.

(b) **Bail - From charge to the end of the case**:[25]

As we know, the criminal court judge has responsibility for the correct application of the current bail laws and/or any bail conditions to help ensure the safety of the complainant pending and during the trial and after conviction up to sentence.

Until the Bail Act 1997 came into force, our judges could only refuse bail where there were concerns that the accused person would not appear in court for trial, and/or that he/she would interfere with evidence, witnesses or jurors in the trial, if released on bail. Since Section 2 of BA 1997 came into force, a judge may now refuse bail to a person charged with
a "serious offence" as defined by the Act, on a third ground, namely that he/she is satisfied
that "such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person".

While this provision from BA 1997, now amended by the Criminal Justice Act 2007 Sections
5 and 6, is broadly welcomed, RCNI submits that there is scope to include further restrictions in cases of rape and aggravated sexual assault, as follows:

Before Conviction:

- strict conditions which include a condition not to contact the victim and/or any other family member, directly or indirectly, except with the permission of the Court, should be the norm whenever a person is granted bail on a charge of sexual crime. In other words, the circumstances in which such conditions are not imposed should be exceptional;
- If a judge is satisfied, on application by a senior member of An Garda Siochana, that one or more incidents of victim intimidation and/or harassment have occurred while the accused person is on bail, whether carried out by the alleged offender or by others acting on his behalf, and whether against the victim or against others associated with him/her, this should result in the withdrawal of the right to bail for the accused;
- a person who is not charged with a serious offence should be refused bail, if the court is satisfied, on account of his/her criminal record and/or other matters proved against him/her, that "such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person";

After Conviction:

[25] The following section on Bail is extracted from the RCNI Legal Recommendations Position Paper, May 2012, available online at: http://www.rcni.ie/uploads/RCNILegalRecommendationsPositionPaperMay12.pdf

- At a minimum, there should be no presumption in favour of bail once an accused person has been convicted of rape and/or aggravated sexual assault pending sentence; bail should only be granted after conviction for these offences in **truly exceptional** circumstances;
- There should be an obligation on prosecuting lawyers to elicit and put forward the views of the victim on bail for the accused to the judge, after conviction;
- Any bail granted post-conviction should continue to be subject to strict conditions, as outlined above; and
- Section 2 BA 1997 should be amended further to effect these changes.

3.8 Rules governing Compensation in Criminal Cases

3.8.1 Court-Ordered Compensation From Convicted Person to Complainant under Section 6 of the Criminal Justice Act 1993: [26]

There are several difficulties about this statutory scheme from the point of view of the victim of crime:
- Section 6 of the Criminal Justice Act 1993 is not mandatory. There is no obligation on the sentencing judge and/or the prosecuting lawyer, to raise the issue of compensation of the complainant by the convicted person.
- If compensation is raised at sentence, or the judge considers it of his/her own motion, he/she must also consider the means of the convicted person who must pay it. While compensation under this Section can cover a wide range of losses, it can be paid in instalments, and the convicted person can apply at any time after the sentence to have those instalments reduced, or even abolished, if his/her means diminish.
- These limitations mean that it is questionable whether any compensation payable to the complainant under this Section for the damage caused to him/her by the crime could be described as "fair and appropriate", or as "adequate" given the extensive and varied nature of the damage caused by sexual crime;
- Section 6 takes effect before sentence is passed and therefore, is likely to impact on the sentence handed down;
- The wording of Section says compensation may be ordered "instead of" some other penalty. RCNI submits this is not appropriate, given the gravity of sexual offences and their impact on their victims;
- There is no obligation on the sentencing judge, or anyone else, to consult with the victim beforehand to ascertain her/his views on whether compensation is desired in a given case;

RCNI recommends as an interim measure that this Section be amended to introduce an obligation on the judge to consider whether compensation may be awarded in each case and to ascertain the views of the victim on compensation, and also, an obligation on the lawyer representing the DPP to seek compensation for the complainant from the judge. However, we think that there is a danger under the present compensation arrangements that some sex offenders may in effect succeed in buying themselves out of a jail sentence. It cannot be right in principle that convicted persons with more money should have a means of avoiding imprisonment which is denied to those with less money. It would be better, in our view, to separate compensation applications on behalf of the victim of crime altogether from the sentencing process.

[26] This is an edited version of the relevant extract from "RCNI Legal Recommendations Position Paper", May 2012, available online at: http://www.rcni.ie/uploads/RCNILegalRecommendationsPositionPaperMay12.pdf

We further recommend that the words "instead of" on the first line, should be removed from the existing Section CJA 1993, at least as far as sentences for sexual and other violent crimes are concerned. This recommendation was submitted by LISC to the NSC in December 2012, together with a recommendation that the views of the complainant be ascertained on compensation in any sexual case, before an order for such compensation can be made.

In the longer term, a statutory scheme should be established, by which a victim of crime may access some amount of compensation from the State where a person is convicted in the criminal courts of a crime of violence, but has no means to pay compensation to their victim. This scheme should operate quickly and simply, and it should not be necessary for the victim to instruct a lawyer to represent them.

3.8.2 Compensation for Complainants in Sexual Crime Cases under the Criminal Injuries Compensation Scheme:

This Scheme is a non-statutory means of assessing and providing a measure of State compensation to victims of violent crime, in the absence of an identified perpetrator who has been convicted. It is also questionable whether it could be said to provide either "fair and appropriate" or "adequate" compensation to these victims. It does not cover compensation for pain and suffering, and has many other limitations. At a minimum, the Scheme should be put on a statutory basis, should include compensation for pain and suffering, and should relax such exclusions and restrictions as the very short time limit (3 months after crime) and the necessity to make a report to the Guards soon afterwards, and expunge altogether the following: no compensation for some victims who shared accommodation with the perpetrator at the time of the crime, diminished or no compensation if the actions of the victim were held to cause or to contribute to the crime, and diminished or even no compensation if the Tribunal is satisfied that the "conduct of the victim, his character or his way of life make it inappropriate" [to make any or a full award].

3.9 **Sentencing Law in relation to Sex Offenders**

RCNI produced a detailed submission on sex offender issues in 2009, as part of the consultation process undertaken by the Working Group on the Integration and Management of Sex Offenders, led by the Department of Justice. This part of the present document should be read in conjunction with this submission, which is available online[27] through the link below. The following points are made in almost all cases, in addition to those already made in that submission.

3.9.1 **Penalties:** RCNI submits that the following reforms are appropriate:

- Increase penalties for the more serious cases of non-compliance with Sex Offender Orders and/or notification requirements under the Sex Offenders Act 2001, (Sections 22 and 26 of SOA 2001 respectively). Currently the maximum penalty on indictment for either type of offence is five years, which might not reflect the seriousness of a breach in a particular case;

- Increase the maximum penalty for breach of a post-release supervision order, currently 12 months (Section 33 (1) SOA 2001). This penalty therefore is unlikely to be a significant deterrent for any offender breaching his supervision order;

[27] Through this web link:
http://www.rcni.ie/uploads/RCNIsubmissiononthemanagmentofsexoffenders29thApril2009.pdf

- Align the maximum penalty for incest by an adult female from seven years with that for males (life imprisonment);

3.9.2: **Part V of the Sex Offenders Act 2001 as amended (SS 27 to 33): Post Release Supervision Orders and Related Matters**

1. Pre-sanction reports containing as much information in relation to risk assessment as possible, should be ordered by the sentencing judge wherever s/he is considering making **either** a post-release supervision order OR imposing a part-suspended sentence –

2. Part V of SOA 2001 should contain a clear definition both of what is meant by "supervision", and what constitutes a breach of a (post-release) supervision order. The difficulty is that at present under the Act, an offender can only be breached for failure to comply with a condition of the PRSO, but there is no obligation on a judge making such an order to specify any conditions. This means that an application for breach of a supervision order can fail because the nature of the breach alleged cannot be identified clearly, although the supervising officer bringing the prosecution knows very well that, for example, a particular offender has not attended his appointments/complied with other directions – but neither obligation is spelt out clearly in the original supervision order.

3.9.3: **Consecutive versus Concurrent Sentencing of Sex Offenders**:[28]

In theory, consecutive sentences may be imposed where two offences of which the offender is convicted on the same occasion do not arise out of "a single transaction". In practice, consecutive sentences are very unusual in the Irish criminal justice system. "Rape and Justice in Ireland"[29] reported that only 2% of all sentences for more than one offence in its sample were consecutive, and the proportion of consecutive sentences for sexual offences has not changed materially since then. Concurrent sentencing for sexual offences is the norm, whether or not the offences arose out of a "single transaction".

Concurrent Sentencing for Multiple Sexual Offences: What is the Victims' Perspective?
Concurrent sentences in respect of two or more different victims of the same offender can be a very bitter pill to swallow for those victims. It often seems to them that the harm done to them by the offender is not reflected adequately or fairly by a sentence which runs concurrently to another. This translates for many victims into the sense that society as a whole has not acknowledged fully the extent of that harm. Another common experience for victims is the feeling that if the offender only got a concurrent sentence after they themselves have been put through the mill of prolonged, hostile and demeaning cross-examination, - it was hardly worth putting themselves through such an ordeal. A case which illustrates this point very clearly is one cited in "Rape and Justice in Ireland", *DPP vs Byrne* (1995), in which the offender was sentenced to ten years for the rape of one woman, and ten years for the unrelated rape of another woman, the two sentences to run concurrently. Of

[28] The material under this subheading and 3.11.3 below, is an edited extract from the "RCNI Legal Recommendations Position Paper", available online through this web link: http://www.rcni.ie/uploads/RCNILegalRecommendationsPositionPaperMay12.pdf

[29] "Rape and Justice in Ireland" (Hanly et al), published by the Liffey Press in 2009, is the report in book form of the attrition research project commissioned by the RCNI and undertaken on its behalf by an NUI Galway led by Conor Hanly

course, concurrent sentencing can also arise in relation to two or more offences against the same victim. Indeed, sexual violence against a child often takes the form of a long series of offences over months or years. The effects of such abuse are extremely damaging and far-reaching for the victim. Concurrent sentencing, where only a small sample of the offending behaviour is represented, does not reflect the seriousness of these effects for many victims. It is difficult for them to feel that society has acknowledged the true extent of the wrong done to them in these circumstances, and difficult also for them to feel that their courage in coming forward has been rewarded. Such reactions are entirely valid, natural and understandable. It hardly needs saying that none of them is likely to encourage more victims of sexual violence to come forward and report what has happened to them to the Gardai.

Concurrent Sentencing for Multiple Sexual Offences

This question is more difficult. In addition to the concerns of victims, there is a public policy argument that to impose concurrent sentences in virtually all circumstances in effect encourages multiple offending, as there is little risk that each separate offence would result in a discrete sentence on conviction. While this is impossible to measure scientifically, we can say with some confidence that concurrent sentencing regardless of circumstances sends out the wrong message to prospective and actual perpetrators of sexual violence. That message is that multiple sexual violence offences, which in any event are reported and prosecuted in small numbers relative to their prevalence, can be committed without the fear of a greatly increased prison sentence as compared to that imposed for a single offence.

RCNI recommends that current sentencing practice be modified to this extent at least: where different victims are concerned, consecutive sentencing should be the norm, to vindicate and recognise the harm that has been done to all these victims. The proportionality and totality principles can then be applied to the overall length of sentence, so that individual victims can be confident that the harm done to him/her is acknowledged by our criminal justice system. It is clear from the RAJI findings and from our more recent sentencing cases that our judiciary is willing to impose a lengthy overall sentence in an appropriate case. However, the harm done to every victim concerned also needs to be recognized clearly at the sentencing stage, both in the overall length of sentence imposed and in the reasons given by the judge for his/her decisions on sentence.

Such a principle in respect of unrelated offences to different victims at least, could form part of a sentencing regime informed by **sentencing guidelines** for sexual offences. RCNI's view is that such guidelines could build in the necessary flexibility to take account of the wide range of different circumstances surrounding offences, the offender, and the victim. RCNI also recommends that any departure from consecutive sentencing for unrelated offences involving different victims should be justified and explained fully and clearly in the judge's announced reasons for his/her decisions on sentence.

The cumulative damaging effect of many offences in relation to the same victim should also be reflected in the overall length of sentence imposed and in the reasons given by the judge for his/her decisions on sentence. While American-style "multiple lifetime" sentencing is alien to the Irish system, nevertheless it is possible for our own sentencing system to reflect the increased gravity of multiple offences against a single victim, while still respecting the proportionality and totality principles. RCNI recommends that new sentencing guidelines for sexual offences should cover this situation in some detail, not least because it is a very common one. A starting point might be to consider consecutive sentencing for offences of different types against the same victim, particularly when the gravity of the offences has increased over time. This would go some way towards recognizing the extent of the harm done to the victim in the sentence.

3.9.4 The interaction between suspended sentences and post-release supervision orders

The authors of RAJI make the point that part-suspended sentences and post-release supervision orders may be imposed on the same offender, and question whether it is necessary to have two separate regimes in respect of the same need for control and supervision of the behaviour of sex offenders after release from prison. These two regimes were not designed in the first place to complement each other and when they are both imposed on the offender, the results can seem illogical. For example: if an offender is obliged to be of good behaviour during the period of suspension in accordance with Section 99 of the Criminal Justice Act 2006 which governs part-suspended sentences, does it make sense for the Court to impose a period of post-release supervision on him also? As the authors of RAJI put it,

"..if such supervision is necessary, is this not tantamount to an admission that the offender's bond to be of good behaviour is insufficient? If so, it is surely
arguable that [the offender] was an unsuitable candidate for a suspended sentence in the
first place".

Post-Release Supervision Orders and Part-Suspended Sentences Contrasted

(1) The first and most obvious answer to this charge is that it does not consider an important purpose of probation supervision in general, that is, to provide supports to the offender to help him/her in the process of rehabilitation and reintegration into society after release. In addition, the Sex Offenders Act 2001 sets out the factors which the judge must consider when deciding whether to impose a post-release supervision order on a sex offender. These include "the need to rehabilitate or further rehabilitate the offender" (Section 28(2)(d) of the Sex Offenders Act 2001 as amended).

(2) Part-suspended sentences and post-release supervision orders are different in terms of duration. A part-suspended sentence is a term of imprisonment whose length is fixed in accordance with the long-established principles of proportionality and totality described above. It is part-suspended on conditions for which the penalty is the activation of the remaining portion of the sentence. However, the original sentence cannot be extended by the imposition of a new sentence as a sanction for the breach. Post-release supervision orders, on the other hand, begin once the fixed term of imprisonment comes to an end. The sum of the term of imprisonment and the supervision period cannot exceed the maximum sentence for the offence concerned, but there is no other automatic restriction on the length of the supervision. As the offences of rape and aggravated sexual assault all carry maximum life sentences, the post-release supervision order can extend for a very long time after release.

(3) Procedure in the case of breach of each kind of sentence is different. In the case of part-suspended sentences, the procedure is flexible, in that any new conditions which suit the circumstances of the case may be imposed, and swift, in that any detected breach of conditions of the suspension can trigger a rapid hearing in front of the sentencing judge and a rapid return to prison, if the breach is proved. If a breach of a post-release supervision order is suspected, it has to be investigated, charged and tried as a summary offence. This means that the procedure on breach is slow and the sanction imposed, if any, does not necessarily reflect the seriousness of the breach. It has some flexibility, in that existing conditions may be varied or removed, but not added to. It does mean that in effect, the original sentence can be extended by a maximum of twelve months as a sanction for the breach.

The same subsection also lists the prevention of further sexual offences and the protection of the public from serious harm from the offender as other factors to be taken into account.

(4) The Probation Service is not necessarily involved when part-suspended sentences are imposed, but always is when post-release supervision orders are included in the sentence.

(5) The sentencing judge is under no obligation to consider whether any term of imprisonment involving a sex offender should be part-suspended, but he/she must consider whether to impose a post-release supervision order when sentencing a sex offender.

Part-Suspended Sentences and Post-Release Supervision Orders: Unnecessary Duplication?
It is clear that these two kinds of sentences may be imposed on the same sex offender, and that he/she could be subject to supervision on two separate bases on release from prison. Each kind of sentence can have a wide variety of different conditions attached, and there is no requirement that they be the same, or that they should complement each other. Of course in practice, a sex offender would not be expected to attend two sets of probation appointments or two identical treatment programmes, after release – even if this were desirable, the resources are unlikely to be made available for such duplication.

As in practice there would not be duplication of supervision and/or treatment resources, the issue becomes whether there is any risk management advantages to the present sentencing regime? RCNI believes that there are, and that there is also more which could be done to ensure that these two sentences work better together.

Risk Management Advantages of Part-Suspended Sentences imposed with Post-Release Supervision Orders:
(1) Continuation of supervision, treatment, and other conditions necessary to prevent further offending and to further the rehabilitation and reintegration into society of the sex offender – these two sentences when imposed together, provide a framework through which such continuation is possible if appropriate, for a lengthy period beginning from the time of release;
(2) Part-suspended sentences, like temporary release following a positive recommendation by the Parole Board, provide a powerful incentive for compliance with their conditions, as the sex offender can have the remainder of his sentence activated on proof of breach of any of these conditions, quickly and simply. As has been pointed out, the activation period of a part-suspended sentence is likely to exceed 12 months, the maximum additional penalty for breach of a post-release supervision order, in many cases. This incentive comes into play at a challenging time for most sex offenders, the period immediately after release.
(3) In turn, compliance with supervision, treatment and other conditions means that risk management should be straightforward for the Guards and the Probation Service, and that new problems can be dealt with swiftly as they emerge. This in turn will reduce the level of risk to the community in general from that offender;
(4) The flexibility of the part-suspended sentencing option means that new conditions can be added on to the original sentence if the need arises, quickly and simply. This has obvious advantages from a risk management perspective.
(5) While the current post-release supervision order regime is less flexible and more cumbersome, especially when a breach is suspected – and therefore may be less effective as an incentive towards compliance with its conditions – nevertheless it is useful from a risk management perspective, as it can extend a long time after the fixed term of imprisonment comes to an end.
(6) This also means that the overall period of judicial supervision of the sex offender can extend many years after the sentence is imposed, if necessary.

3.9.5: RCNI Summary of Recommendations in relation to Sentencing of Sex Offenders:

RCNI recommends that the following changes be made to our sentencing laws in order to ensure that effective risk management of released sex offenders is facilitated by our sentencing regime as much as possible:

(1) There should be an obligation on sentencing judges to consider whether a part-suspended sentence with appropriate conditions, should be imposed on a sex offender, in every case;
(2) In the case of sex offenders, the criteria to decide whether such a sentence should be imposed should be the same as those which the judge must consider when deciding whether to impose a post-release supervision order;
(3) Where the judge does decide to impose both a part-suspended sentence and a post-release supervision order, he/she should consider the conditions for both sentences together and make clear why he/she is imposing each condition in open Court;
(4) To enable the judge to make his/her decision on sentencing on as well-informed basis as possible, there should be an obligation on the sex offender to co-operate with any pre-sanction assessment by the Probation Service necessary for the preparation of its Pre-Sanction Report, or other pre-sanction report directed to be prepared by the judge by another person or body which the judge decides is necessary;
(5) if the offender does not comply with this requirement to co-operate, his sentence could be increased as a consequence;
(6) Any set of conditions attached to either a part-suspended sentence or a post-release supervision order, should include as standard a general condition that the offender comply with all of the specific conditions imposed

Where there is no Part-Suspended Sentence and/or Post Release Supervision Order imposed, and the Sex Offender is not subject to Temporary Release conditions:

It is important to note that there is a cohort of released sex offenders who are not subject to any supervision regime after release, but who should also be supervised and supported effectively to ensure that in their case, the risk of re-offending is also managed and if possible, reduced. RCNI recommends therefore that:

(7) All sex offenders should be subject to a minimum period of supervision on release from prison, if they have not received a part-suspended sentence and/or no post-release supervision order has been imposed;
(8) It should be possible for the Probation Service to apply to add, vary or remove any condition at any point during that period;
(9) The Probation Service should have the option to apply to have this minimum period of probation extended, in an appropriate case; and
(10) There should be appropriate penalties for failure to comply with such supervision.

These changes will mean that over time, there will be a more unified system of Court, Probation and Garda supervision of sex offenders from the point of release until many years later, if necessary.

3.10 Victims' Rights: EU Directive and forthcoming Victims' Rights Bill.

The following is an edited extract from a much fuller submission to the Victims of Crime Office on what should be included in the forthcoming Victims' Rights Bill, available online through the web link below[30]. Note that this extract excludes material which is already discussed above, and that very

[30] Available online at:
http://www.rcni.ie/uploads/RCNISubmissiononProposedHeadsofVictimsRightsBill2011June11.pdf

many of these recommendations are included in the final text of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime[31].

3.10.1 Information Rights: RCNI submits that the following should be included in the legislation:

- right of victim to be informed of the nature, availability and contact details of health, psychological and social services including Sexual Assault Treatment Unit services, where appropriate and other appropriate expert support services, such as counselling, advocacy, accompaniment and other support from Rape Crisis Centres, immediately upon reporting the crime to An Garda Siochana;
- right of victim to be informed about how and where he/she may make a formal complaint to An Garda Siochana;
- right of victim to be kept informed at all stages, of the identity and contact details of the member of An Garda Siochána in overall charge of the investigation in their case, the progress of the case itself, the role of the victim within the criminal justice process, court dates, purpose and outcome of each hearing, likely timelines as they evolve, and so on.
- right of victim in sexual cases to be informed regarding their rights to be represented where appropriate and also to access independent legal advice in all cases involving a complaint of sexual violence;
- right of victim to be kept informed of any bail applications and parole hearings and to make representations in either case;
- right of victim to be notified of the result of any bail application, terms of any bail if granted, details of any sex offender order and/or conditions of release, any release date or escape from lawful custody of the accused/offender in their case, notice of any proposal to make a deportation order against the offender, notice of discharge from hospital of the offender if he is there detained, and the date of any court or other hearing in relation to any of these matters;
- right of the victim/victim to be informed as to the circumstances in which special measures may be used (giving evidence by video link, for example) and/or other protection measures, such as bail conditions;
- right of the victim to be informed (where applicable) that s/he can make a Victim Impact Statement in the event of conviction, and have it considered by the court before sentence is passed on a convicted offender;
- right of the victim to be informed about the extent and terms on which they are entitled to compensation in the criminal justice system, including time limits for making any application (this would refer in our system in essence to Criminal Injuries Compensation Scheme claims)
- Whether the victim is resident in this country or in another Member State, they should have a right to be informed of any special arrangements available to them to protect their interests;
- The victim should be informed of all procedures for making complaints where their rights are not respected.

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[31] Available online at: http://register.consilium.europa.eu/pdf/en/12/pe00/pe00037.en12.pdf

3.10.2 Rights in Relation to An Garda Siochana

- right of victim **to be accompanied to Garda interview** for formal statement-taking by a person of their choice, unless there is a reasoned decision to deviate from this in a particular case;
- right of victim to **interact with the same Garda personnel** throughout the criminal proceedings, as far as practicable[15]
- right of victim to be **interviewed by a Garda of the same sex** on request
- right of victim to **interact with specialist Gardai who have been trained in sexual violence issues,** as far as possible;

3.10.3 Rights in Relation to Health Services:

- access to appropriate expert immediate medical treatment and forensic examination, to be carried out at their nearest SATU (Sexual Assault Treatment Unit);
- right of the victim of sexual violence to refer themselves to a SATU, irrespective of whether a complaint has been made or is intended to be made to the Gardaí;[19]
- right of victim to such specialist medical, psychological[20] and social care or help as he or she may require and to be referred to such other help or services better suited to assist her/him as appropriate;
- right to have their forensic medical samples taken and stored for a reasonable period

3.10.4 Rights in Relation to Legal Assistance:

- The State should ensure that **legal advice** is made available to complainants in sexual violence cases, regardless of means, from the time the crime takes place[21].

3.10.5 Rights in Relation to the DPP and her Agents:

- DPP's Office should have **statutory responsibility for the giving of reasons for their decisions**, where the decision is not to proceed further, subject to safeguards, and for communicating them to complainants (normally by letter, occasionally where warranted in person), and this process should communicate enough information for the victim to be able to make a reasoned decision on whether to seek a review of the decision not to prosecute.
- RCNI acknowledges the detailed Guidelines for Prosecutors (which emphasize provision of information to complainants in timely fashion and which importantly sets out the complainant's right to request a pre-trial meeting with the prosecution team) already in place, and recommends that the DPP should have a **statutory responsibility** to inform the complainant of his/her right to request a pre-trial meeting **and** to request a review of a decision by the DPP not to prosecute in their case.
- DPP, through his/her advocate or other representative, should have a responsibility to explain to the complainant **the reasons for any directed acquittal**, or other end to the trial process, as far as known;[22]
- DPP should consult the complainant on any proposal from the defence to plead guilty to a lesser charge (proposed before or during a trial)[23].

3.10.6 Rights in Relation to Court Proceedings:

- Physical setting: **separate waiting and conference etc facilities** for victims, their witnesses and supporters are important for the wellbeing of complainants in particular over the course of criminal proceedings – the Courts Service is already responsible for implementation of improvements in the fabric of court buildings. The current Strategic Plan (2008-2011) has as one of its goals improved facilities for victims and vulnerable witnesses, and also has a target of providing video conferencing facilities in all courtrooms.

- **Right of victim to protection from accidental contact with accused (and/or his/her supporters) in court precincts:** However, where separate accommodation is not yet available, the Courts Service should be obliged to ensure that there is a **general protocol** in place to avoid accidental contact between the prosecution witnesses, including the complainant, and the accused and/or any of his/her supporters, as far as possible. The responsibilities of each party to take steps to avoid the other could be spelt out by the trial judge at a pre-trial hearing, and clear directions given by him/her for their communication to anyone absent from the pre-trial hearing who will be present at Court on the day of the trial.

3.10.7 Miscellaneous Additional Rights of Victims:

- **Victims' Right to an Independent Complaints Procedure:** RCNI recommends that the forthcoming legislation on Victims' Rights should also include provision for **an independent, easily accessible procedure** through which allegations of breach of the Victims' Charter can be examined and appropriate redress measures be taken, such as a Victims' Ombudsman Office. However, overall responsibility for ongoing evaluation of victim support provisions as they are implemented in practice, and ensuring that compliance with the new legislation is being maintained must remain with the individual agencies responsible, and the performance of all these agencies should be monitored and evaluated by an overarching State authority with responsibility for the welfare of victims of crime.

- **Victims' Rights of Access to Criminal Justice Process:** Measures should be taken to ensure that the rights of victims of crime in relation to **interpretation and translation,** will be implemented by statutory obligations on all the State agencies concerned. All Criminal Justice Agencies should have express obligations to ensure that **all information** is provided as far as possible in a range of languages commensurate with their users, and in a range of modalities, so that those victims who have an intellectual disability can also access that information.

- **Right of Victims to a Co-Ordinated Response from State and non-State Agencies**

All victims of crime, whether regarded as vulnerable or not, are entitled under the new EU Directive to a co-ordinated response from State and non-State agencies[42]. RCNI submit that the creation of a **single information access point** on the progress of a case through the criminal justice system, which could be accessed by victims themselves at any stage of the process by a **unique identifying number** which remains the same from the opening of the Garda file to the final disposal of the case at trial/sentence/appeal, would be a very great advance. All the relevant State agencies (Gardai, DPP, Court Services) and non-State agencies (e g those providing accompaniment services) could feed in information under **agreed headings** into (for instance) a secure online computer system, so that at any time, the victim could put in the unique number and access that information for themselves. This would reduce the burden on the key information providers, the Gardai, (and others) as an additional and significant benefit.

There are other benefits for the victim in having a system based on a **unique identifying number** which would stay the same from the beginning of the case to the end. These are less direct of

course, but nevertheless important. These numbers could be the basis of a **data processing system** capable of tracking not the just the progress of individual cases, but also of detecting **trends** over time. These trends in turn would provide a firm **evidential foundation** on which both State and non-State agencies, working together, could build future improvements in criminal justice policy at every stage of the criminal justice process, to the benefit of victims of crime in general, and to the benefit of all groups identified as having specific needs in the new EU Directive, in particular.

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December 2012

LPD

Appendix I:

1. List of situations in which there is no consent from RCNI Discussion Document on Consent (2008)

"Appendix IV

Proposed new wording, incorporating elements from all the lists of situations in which there is no consent
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 ornot 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.""

Appendix II:

List of RCNI Position Papers and Submissions referred to in this Document, in chronological order:

1. Consent on Sexual Contact: Discussion Document (2008), available online at: http://www.rcni.ie/uploads/ConsentonSexualContactRCNidiscDocu8sept08.pdf
2. RCNI Submission on the Management of Sex Offenders (2009): available online at: http://www.rcni.ie/uploads/RCNIsubmissiononthemanagmentofsexoffenders29thApril2009.pdf
3. Reducing Delays before and during Trial: Position Paper (2011), available online at: http://www.rcni.ie/uploads/RCNIPositionPaperOnCaseManagementandPreTrialHearings.pdf
4. RCNI Submission on LRCCP on Sexual Offences and Capacity to Consent (2011), available online at: http://www.rcni.ie/uploads/RCNISubmissionLRCCPSexualOffencesandCapacitytoConsentDec2011.pdf
5. RCNI Submission on the Community and the Criminal Justice System (2011), available online at: http://www.rcni.ie/uploads/RCNISubmissionOnTheCommunityCriminalJusticeSystemAug11.pdf
6. RCNI Submission on the Proposed Heads of the Forthcoming Victims' Rights Bill (2011), available online at: http://www.rcni.ie/uploads/RCNISubmissiononProposedHeadsofVictimsRightsBill2011June11.pdf
7. RCNI Legal Recommendations Position Paper (2012), available online at: http://www.rcni.ie/uploads/RCNILegalRecommendationsPositionPaperMay12.pdf
8. RCNI Previous Sexual History and Separate Legal Representation (2012), available online at: RCNI http://www.rcni.ie/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf