

Questionnaire on criminalization and prosecution of rape – Rape Crisis Network Ireland replies dated May 2020

Definition and scope of criminal law provisions

Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.

There are two rape provisions in Irish law, one in Section 2 Criminal Law (Rape) Act 1981 as amended, which describes only “traditional” man on woman vaginal rape by penis:

2.—(1) A man commits rape if—

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

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

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

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

The second provision is gender-neutral and covers several forms of non-consensual penetration. It is known simply as “Section 4” rape: see Section 4 Criminal Law (Rape)(Amendment) Act 1990 as amended:

4.—(1) In this Act “rape under section 4” means a sexual assault that includes—

(a) penetration (however slight) of the anus or mouth by the penis, or

(b) penetration (however slight) of the vagina by any object held or manipulated by another person.

(2) A person guilty of rape under section 4 shall be liable on conviction on indictment to imprisonment for life.

Both provisions attract the same maximum penalty of life imprisonment and both should be read alongside Sections 5 and 9 of the Criminal Law (Rape) (Amendment) Act 1990 as amended, which cover consent:

Section 5:

“5.—(1) Any rule of law by virtue of which a husband cannot be guilty of the rape of his wife is hereby abolished”.



Section 9 as inserted by Section 48 Criminal Law (Sexual Offences) Act 2017:

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

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

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

(b) he or she is asleep or unconscious,

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

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

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

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

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

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

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

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

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

(6) In this section—

‘sexual act’ means—

(a) an act consisting of—

(i) sexual intercourse, or

(ii) buggery,

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

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

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

Based on the wording of those provisions, is the provided definition of rape:

- * Gender specific, covering women only NO unless specifically charged as such (Section 2);
- * Gender neutral, covering all persons YES unless it is charged as “Section 2 “or “traditional” vaginal rape by penis – see above;
- * Based on the lack of consent of victim YES in every case of Section 2 or Section 4 rape
- * Based on the use of force or threat YES but not in every case – there is an open list of circumstances in which there is no consent, and the use of force/threat is one of these. See above Section 9 Criminal Law (Rape) (Amendment) Act 1990 as amended.
- * Some combination of the above. YES
- * Does it cover only vaginal rape? NO
- * Does it cover all forms of penetration? NO. If yes, please specify.
- * Is marital rape in this provision explicitly included? YES see Section 5 Criminal Law (Rape) (Amendment) Act 1990
- * Is the law silent on marital rape? NO see last answer
- * Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES see last but one answer and statutory provisions cited
- * Is marital rape excluded in the provisions, or is marital rape not considered as a crime? NO – marital rape is not excluded – it is considered a crime like rape in any other circumstances

Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it. NO

What is the legal age for sexual consent?

17 unless the sexual acts in question could be charged as sexual assault if done with consent. In this case only the age of consent is 15.

Are there provisions that differentiate for sexual activity between peers? If so, please provide them.

Yes, there is a proximity in age exception which may apply if the other person (not accused) is over 15, the person accused is either younger or no more than two years older than that person, the person accused is not in a position of authority with regard to that person, there was actual consent to the sexual activity, and there is no evidence of an intimidatory or exploitative relationship. See Section 17(8) Criminal Law (Sexual Offences) Act 2017 as amended – full text below:

17 (8) Where, in proceedings for an offence under this section against a child who at the time of the alleged commission of the offence had attained the age of 15 years but was under the age of 17 years, it shall be a defence that the child consented to the sexual act of which the offence consisted where the defendant—

(a) is younger or less than 2 years older than the child,

(b) was not, at the time of the alleged commission of the offence, a person in authority in respect of the child, and

(c) was not, at the time of the alleged commission of the offence, in a relationship with the child that was intimidatory or exploitative of the child.”.

Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.

Any rape conviction may result in a sentence of imprisonment for life, the maximum penalty. The presumptive sentence for rape is a prison sentence and in practice sentences under 5 years are rare. Various ancillary orders are or may be made at the time of sentence also, such as: fine, compensation order (see below), post-release supervision order (supervision is provided by the Probation Service and the police working together, and all convicted rapists will become subject to the requirements of the Sex Offenders Act 2001 (they will have to notify their addresses/any change of address to the Garda station nearest where they live, give notice of any intention to travel outside Ireland, and so on). An anti-harassment order may also be made on sentence, preventing perpetrators from contacting victims and/or keeping them out of certain areas after release, for a period of up to a year.

What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?

The prosecutor may apply on behalf of the victim at sentence for an order obliging the convicted perpetrator to pay the victim a sum in compensation. The judge will set the sum and it is open to the perpetrator to apply later to pay the balance of the sum in instalments and/or to have the whole amount reduced if his circumstances do not permit him to pay it, or to stop paying it altogether. In practice he is usually in prison and/or his financial means do not allow him to pay it anyhow.

Aggravating and mitigating circumstances

Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

There is no exhaustive list because the sentencing judge can and will take the individual circumstances of the case into account. That said, if there is evidence that the rape took place within an intimate relationship, that should always be regarded as “aggravating” unless there are exceptional circumstances. Also, a conviction for a subsequent sexual offence within a qualifying period after a first such conviction may result in a presumptive minimum sentence being imposed, depending on the circumstances. See generally Criminal Law (Sexual Offences) (Amendment) Act 2019.

- * Is rape by more than one perpetrator an aggravating circumstance? YES
- * Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference) YES
- * Is rape by spouse or intimate partner an aggravating circumstance? YES, see Section 40 Domestic Violence Act 2018 (unless circumstances are exceptional).

Does the law foresee mitigating circumstances for the purposes of punishment? YES If yes, please specify.

This is at the discretion of the sentencing judge who will take the perpetrator's individual circumstances into account, so there is no closed list. Circumstances which are usually regarded as mitigating are pleas of guilty, particularly early pleas, no previous convictions, strong evidence of remorse and of serious efforts made at rehabilitation, no evidence of subsequent offending since the offence before the court, and serious mental or physical health issues on the part of the perpetrator.

Is reconciliation between the victim and the perpetrator allowed as part of a legal response? NO

Regardless of the law, is reconciliation permitted in practice? YES and what is the practice in this regard?

It is permitted strictly speaking, as in there is no express prohibition on it. However, we are not aware of any cases where it has been used as an alternative to prosecution and so far as we are aware, the Director of Public Prosecutions does not consider it to be an appropriate alternative to prosecution for rape for any perpetrator. We have heard of a very small number of cases where some form of restorative justice with skilled outside help was used once the perpetrator had been convicted and gone to jail.

Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES If yes, please specify.

If the perpetrator is under 18, he is still likely to be prosecuted, but in rare cases it may be decided that provided he admits the rape, he may be dealt with otherwise than through prosecution because of his age through referral to the Garda-run Juvenile Diversion Programme. In this case, he will not be prosecuted but will be expected to comply with a programme of supervision, education and rehabilitation overseen by members of An Garda Síochána.

- if the perpetrator marries the victim of rape? NO
- if the perpetrator loses his "socially dangerous" character or reconciles with the victim? NO

Prosecution

* Is rape reported to the police prosecuted ex officio (public prosecution)? YES

* Is rape reported to the police prosecuted ex parte (private prosecution)? NO

* Are plea bargain or "friendly settlement" of a case allowed in cases of rape of women? NO, though the prosecutor may in certain circumstances, accept a plea of guilty to a lesser offence than rape instead;

* Are plea bargain or "friendly settlement" of a case allowed in cases of rape of children? NO, though the prosecutor may in certain circumstances, accept a plea of guilty to a lesser offence than rape instead;

* Please provide information on the statute of limitations for prosecuting rape. There is none.

* Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? YES

* Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? NO If yes, please specify.

* Are there rape shield provisions aimed at preventing judges and defence lawyers from

exposing a woman's sexual history during trial? YES, see Sections 3 and 4A Criminal Law (Rape) Act 1981 as amended (see below for informal consolidated version):

3. (1) If at a trial any person is for the time being charged with a sexual assault offence to which he pleads not guilty, then, except with the leave of the judge, no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial, about any sexual experience (other than that to which the charge relates) of a complainant with any person; and in relation to a sexual assault tried summarily pursuant to section 12—

(a) subsection (2) (a) shall have effect as if the words 'in the absence of the jury' were omitted, (b) subsection (2) (b) shall have effect as if for the references to the jury there were substituted references to the court, and (c) this section (other than this paragraph) and subsections (3) and (4) of section 7 shall have effect as if for the references to the judge there were substituted references to the court.

(2)

(a) The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him, in the absence of the jury, by or on behalf of an accused person.

(b) 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.

(3) If, notwithstanding that the judge has given leave in accordance with this section for any evidence to be adduced or question to be asked in cross-examination, it appears to the judge that any question asked or proposed to be asked (whether in the course of so adducing evidence or of cross-examination) in reliance on the leave which he has given is not or may not be such as may properly be asked in accordance with that leave, he may direct that the question shall not be asked or, if asked, that it shall not be answered except in accordance with his leave given on a fresh application under this section. [...]

4A (1) Where an application under section 3 or 4 is made 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 heard in relation to the application and, for this purpose, to be legally represented during the hearing of the application.

(2) Notice of intention to make an application under section 3 or 4 shall be given to the prosecution by or on behalf of the accused person before, or as soon as practicable after, the commencement of the trial for the offence concerned or, as the case may be, the commencement of the proceeding concerned referred to in section 4(1).

(3) The prosecution shall, as soon as practicable after the receipt by it of such a notice, notify the complainant of his or her entitlement to be heard in relation to the said application and to be legally represented, for that purpose, during the course of the application.

(4) The judge shall not hear the said application without first being satisfied that subsections (2) and (3) have been complied with.

(5) If the period between the complainant's being notified, under subsection (3), of his or her entitlements under this section and the making of the said application is not, in the judge's opinion, such as to have afforded the complainant a reasonable opportunity to arrange legal representation of the kind referred to in this section, the judge shall postpone the hearing of the application (and, for this purpose, may adjourn the trial or proceeding concerned) for a period that the judge considers will afford the complainant such an opportunity.

(6) This section applies to a rape offence, “, an offence under the Criminal Law (Sexual Offences) Act 2006”, an offence under section 6 of the Criminal Law (Sexual Offences) Act 1993, and any of the following, namely, aggravated sexual assault, attempted aggravated sexual assault, aiding, abetting, counselling and procuring aggravated sexual assault or attempted aggravated sexual assault, incitement to aggravated sexual assault and conspiring to commit any of the foregoing offences.”.

* Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES. If yes, please specify.

See generally:

- Part III Criminal Evidence Act 1992 as amended especially by Section 30 Criminal Justice (Victims of Crime) Act 2017 as amended
- Sections 3, 4A and 8 Criminal Law (Rape) Act 1981 as amended
- Sections 20 and 21 Criminal Justice (Victims of Crime) Act 2017 as amended

Depending on victim's age (under 18 have more protections) and whether or not they have a mental disability (they have more protections), the following protections are more or less available, in every case at the discretion of the judge: video-link testimony, testimony from behind a screen where VL is not used, restrictions on cross-examination in person by the defendant, pre-recorded police statements being allowed to stand as evidence in the case (this applies only to under 18s and persons with a mental disability), the use of an intermediary (applies only to the questions posed, not the answers given by the witness), courtrooms being closed to the public, restrictions on questions about victim's private life which is unrelated to the offence, restrictions on questions about victim's other sexual history, victim anonymity (ie information leading to their becoming identifiable may not be made public) in respect of the most serious sexual offences. Victims are also entitled to object to the disclosure of any counselling records made, whether or not they have them in their possession.

War and/or conflict

Is rape criminalized as a war crime or crime against humanity? NO not specifically

Is there a statute of limitations for prosecuting rape in war or in conflict contexts? NO

Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? NO as there is no need for them

Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES

Data

Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.

Latest year for which there is complete data set available is 2017, accordingly 2015, 2016 and 2017 figures for rapes reported, prosecuted and resulting in conviction, are set out below.

Rape of woman or man – Number of Reported Crimes: ¹

2015	2016	2017
516	516	652

Rape of woman or man – Number of Prosecuted Cases (nb a “case” refers to only one suspect but may refer to more than one rape):²

107	114	116
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Rape of woman or man – Number of rape cases heard and resulting in conviction (including eventual convictions on lesser charge in brackets)³

69 (8)	57 (15)	31(5)
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Other

Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

While there is a distinct and very welcome trend towards specialisation in sexual violence among police investigators (through specialist units), prosecution staff, courtroom lawyers and judges, and there has also been a recent increase in the number of protective and special measures available to victims of sexual violence during investigation and prosecution, more still needs to be done to ensure that any vulnerable witness has ready access to the particular supports and protections that would enable him or her to participate fully in the criminal justice system without running a real risk of being re-traumatized by going through the process itself and more positively, to ensure that he or she can give their best evidence to investigators and to the court. There are several gaps in the patchwork of supports available, of which we will give two examples:

1. Children who endure sexual violence are not entitled as of right to access supports such as giving evidence by video-link in court if by the time the violence is reported and the case comes to court, they are over the age of 18. They can ask for most of these supports, but it is much harder to get them over that age, whereas there is a presumption in favour of these supports being used if the child is still under 18 by the time the case comes to court;
2. If an intermediary is needed so that the witness can understand the questions being put to him or her by a lawyer, that may be granted, but there is no express power in law which allows the answers given by the witness to be given to the court by the intermediary.

With regard to procedure, there is no requirement to hold a pre-trial hearing and ensure that as many practical and legal issues as possible are resolved before the case comes to trial. This means that once the matter is listed for trial and the parties assemble at court, there are often delays to the start of the trial as these issues are dealt with before the trial proper begins. Or, there are delays during the trial as

¹ Source: Central Statistics Office, drawn from police (An Garda Síochána) figures and in all cases of recorded rape figures, published under reservation. CSO’s explanation of “under reservation” may be accessed through this web-link: <https://www.cso.ie/en/methods/crime/statisticsunderreservationfaqs/>

² Source: Director of Public Prosecutions Annual Report 2018 (latest available), see this web-link: <https://www.dppireland.ie/app/uploads/2019/11/AR2018-eng.pdf>

³ As in footnote 2 above



the hearing of evidence is halted in order to address one or more other legal issues. Or, the case may be adjourned to another date altogether usually for some practical reason – often, one which could have been foreseen and addressed at an earlier preliminary hearing. Delays are lengthy anyhow as judicial time and court space are limited, and additional and avoidable delays add even more stress and uncertainty to the process for hapless victims of sexual violence.

It is fair to say that the protections available to vulnerable witnesses in the investigation and prosecution of sexual offences are now being examined by a high level Justice Committee chaired by an eminent criminal lawyer, Dr Tom O'Malley at the request of the Minister for Justice and Equality. We understand that the results of his review are expected shortly. We await them with interest.

- With regard to the accountability of **convicted** perpetrators, RCNI is aware that much preliminary work has been done by the outgoing Government on a new Sex Offenders (Amendment) Bill. This does much to expand, and improve upon, the list of supervision measures now available to An Garda Síochána and the Probation Service, who are jointly responsible for the risk assessment and risk management of released sex offenders in the community. We look forward to its speedy passing and implementation once the new Government is formed.
- The outgoing Government was also responsible for introducing a measure to provide for presumptive minimum sentences for subsequent sexual offences committed within a defined period, unless in the view of the sentencing judge, it would be disproportionate in all the circumstances to impose such a sentence (Criminal Law (Sexual Offences) (Amendment) Act 2019).
- Finally, the outgoing Government has also recently passed the Judicial Council Act 2019 which provides for the establishment of a Sentencing Guidelines and Information Committee responsible for the drafting of guidelines for discrete groups of offences, including sexual offences. This is a welcome development.

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RCNI/LPD/2

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