Rape Crisis Network Ireland Submission to the

Joint Committee on the Constitutional Amendment on Children

January 31st 2008

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1. Introduction

1.1 Rape Crisis Network Ireland (RCNI) is the national umbrella body of Rape Crisis Centres (RCCs) which provides a strong voice for survivors and is a catalyst for social change as we work towards a society free from sexual violence. Our membership encompasses 16 RCCs with approximately 130 staff and volunteers serving the needs of survivors of sexual violence across Ireland. Last year our members delivered a direct service to thousands of survivors and supporters. The Network enhances the resources of the individual centres and proactively promotes their agenda through partnership with government and civil society in Ireland.

1.2 Given the task in hand and the urgency of reaching all-party agreement, the RCNI is mindful of the pressures on the Committee. Our submission is therefore targeted rather than exhaustive.

1.3 The RCNI will confine detailed comment to the points of the amendment of specific interest to us that is 5.1 and 5.2, the so called soft information and strict liability clauses.

1.4 Much good work has already been delivered on the issues under discussion and are available to the Committee – principally the Joint Committee on Child Protection Report, Nov 2006, and the two reports of the Child Rapporteurs, Prof. Finbarr McAuley and Mr Geoffrey Shannon. Our position will be outlined succinctly where we believe the debate has been fully rehearsed elsewhere.

1.5 Any debate about this referendum will inevitably include discussion of the legislation that may follow. **The RCNI recommend** that the Committee gives serious consideration to urging the Oireachtas that heads of Bills should be prepared in conjunction with the amendment to better inform people of the impact this amendment is likely to have.

2. Referendum Wording

2.1 Please note the RCNI is aware that there remains discussion about the precise legal meaning of the terms strict and absolute liability. In the interest of clarity the RCNI will use the terms in the way laid down by the government of the day when publishing the Bill under discussion in February 2007.

2.2 **Clause 5.1**

Twenty-Eight Amendment of the Constitution Bill 2007
5. 1° Provision may be made by law for the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law.

Order of reference of the Committee b (vi)
The provision of legal authority for the collection and exchange of information relating to the risk or actual occurrence of child sexual abuse;

2.3 The RCNI strongly advocates the collection and use of soft information for the purpose of child and vulnerable adults' protection from people known to be a danger to them. Further we see it as the duty of the State and the right of the vulnerable person. However, the RCNI has serious concern regarding the current wording. The current wording is altogether too broad. It is conceivable under this wording for everyone in Ireland to be subject to vetting.

2.2 We also understand that specific clauses such as this tend to be seen to override more general safeguards within the Constitution. This means that the prospect of a requirement for a harmonisation with the existing protections in the Constitution or elsewhere being relied upon to limit excessively broadly framed legislation arising from this amendment is limited.

2.3 'Relating' is open to very wide interpretation. It allows any degree of secondary or tertiary potential contact with a child to be the criteria for being vetted. **The RCNI recommend** that a word/s of more limited scope such as 'specifically concerning' should be considered to replace 'relating'.

2.4 We would ask the Committee to consider whether 'endangerment' needs to be included. Currently 'risk thereof' covers endangerment to sexual exploitation and sexual abuse. 'Endangerment' where it is currently placed in the amendment would allow for the sharing of soft information for other forms of child endangerment. This perhaps goes beyond the original intention of the amendment and acts to unnecessarily broaden the parameters. **The RCNI recommend** the word 'endangerment' be deleted.

2.5 In addition the phrase 'children and other persons', opens up the possibility for the legislature to widen without limit the persons on whose

behalf vetting will be actioned; notwithstanding the legal practice of the spirit of the first class of persons 'children' in this instance, influencing the second 'other persons'. **The RCNI would recommend** replacing 'other persons' with 'other vulnerable persons'.

2.6 Clause 5.2

Twenty-Eight Amendment of the Constitution Bill 2007
5. 2° No provision in this Constitution invalidates any law providing for offences of absolute or strict liability committed against or in connection with a child under 18 years of age.

Order of reference of the Committee b (vii)
That no provision in the Constitution should invalidate any law providing for absolute or strict liability in respect of sexual offences against or in connection with children;

2.7 The RCNI understand the spirit and intention of this clause to be first and foremost preventative. We understand it as a clear statement by the people in their Constitution of the rights and freedom conferred on all to bodily integrity. It sets the standards we expect from all parties with reference in particular to the bodily integrity of someone rendered vulnerable by virtue of youth, or otherwise.

2.8 In that light the RCNI feel that the omission on the word 'sexual' from this clause in the Bill is mistaken. There are arguments for the word to be left out on the basis that other offences such as child neglect or physical abuse can also be treated as strict liability offences. Current public understanding of this amendment is that it is to address shortcomings in statutory rape laws. More importantly sexual crimes are widely understood to have unique features. We cannot conceive of the issues of contested consent or a defence of honest mistake as to age arising in cases of child abuse other than sexual abuse. Therefore, we would not anticipate the omission of the word 'sexual' having any enabling impact on legislation or any positive impact on the holding to account of those guilty of physical abuse or neglect or other such offences against children. We can, however, see how its omission will add to the weight of the arguments against the referendum. **The RCNI recommend** that the word 'sexual' be inserted into the amendment.

2.9 **The RCNI considered but rejected** the insertion of the word 'adult' so as to limit absolute liability responsibility to offences committed by adults against children or other vulnerable persons, thus exempting child defendants from this high threshold of responsibility. While this is an important consideration the impact would be to compromise the spirit of the amendment. One of the key functions of strict liability in statutory rape cases for the RCNI is in communicating clear and specific standards and boundaries. In addition some child victims would not be afforded absolute liability protection by virtue of the age of the perpetrator.

2.10 **The RCNI suggest** the committee consider adding 'or vulnerable adults' in the interest of allowing for the protection of adults who are deemed to have no capacity to consent.

3. Concerning Potential Legislation

3.1 The Sexual Offences Act (2006) set the bar for the defence of statutory rape at an honest mistake as to age. **The RCNI ask the Committee** to call for the urgent reform of this legislation to ensure the bar is set at its highest level requiring an objectively reasonable defence of mistake as to age.

3.2 The Sexual Offences Act (2006) widened the offence of statutory rape to defilement. Previously statutory rape had been confined to the rape of a girl. The RCNI see the value of statutory rape legislation being first and foremost about prevention and deterrence. **The RCNI would agree** with McAuley's **call** to legislate to limit absolute liability to the most serious offences. **The RCNI would also recommend** that the legislature give consideration, in such a re-codification, to gender neutrality and the inclusion under its remit of the rape of boys.

3.3 **The RCNI recommends** a system of *Amicus Curiae,* as outlined by McAuley, to the Supreme Court when it is considering the constitutionality of a law.

3.4 **The RCNI do not recommend** an age proximity clause. The intention to exempt normal teenage sexual experimentation by such a clause may not be realised. Moreover it is certain to result in unacceptable unintended consequences.
Exempting sexually active children within two years of age of each other from strict liability is intended to ensure that strict liability in statutory rape cases would not unduly criminalise that which common sense tells us is not gravely exploitative or criminal activity.
However, the RCNI must agree with the Minister for Justice, Brian Lenihan that to do so raises the issue of consent.
In addition the effect of an age proximity clause could result in a child sexually exploited by another child being faced with the prospect of aggressive cross examination as to consent, simply by virtue of the age of their assailant.
The precise protection being afforded by absolute liability in statutory rape cases to young people would be denied those who had suffered at the hands of a perpetrator who happened to be within two years of age to them. This would be unacceptable.

There are a number of filters

- Narrowing the offences subject to absolute liability,

- Strict liability in relation to those over the age of absolute liability but under the age of consent
- prosecutorial discretion,
- judicial discretion in sentencing and
- special measures for the child offender as outlined in detail in the Joint Committee on Child Protection Report,

which combine to ensure that absolute liability is not brought into disrepute through the criminalising or aggressive penalising of children and young people who did not gravely exploit a child in their conduct. These filters have and can suffice.

3.5 The Codification of Sexual Offences

There are a number of questions that arise around the plethora of laws dealing with sexual offences and the gaps and redundancies evident to many. These gaps include but are not limited to:

- a very limited criteria for those who are liable to incest charges.
- An incomplete delineation of grooming activities.
- The setting of the bar for statutory rape in Sexual offences Act 2006, at honest mistake rather than objectively reasonable mistake as to age.
- The absence of a statutory definition of consent
- The blanket prohibition on all those with a learning disability to sexual consent.

3.6 **The RCNI recommend** that the Committee await the Law Reform Commission's (LRC) imminent review of sexual offences and urge the Oireachtas to act promptly when the LRC's conclusions and recommendations are finalised. The RCNI consider that Shannon's call for a specific Offence of Child Abuse and the detailed consideration of grooming legislation gaps should be forwarded to the LRC for their consideration.

3.7 Notwithstanding the LRC's important undertaking in reviewing sexual offences and in light of the time frame required for such an undertaking, we would ask the Committee to consider recommending to the Oireachtas that a number of measures are urgently required in the interregnum. **The RCNI would recommend** that interim legislation urgently required should deal with the raising of the bar in statutory rape cases to an objectively reasonable mistake as to age, a statutory definition of consent and the widening out of those considered under incest legislation.

3.8 RCNI position and recommendations as to ages to be set

The RCNI does not think that more specifics ought to be entered into the Constitution itself. It is appropriate that it would be the legislature of the day who would set the ages of consent, strict and absolute liability and strict liability for authority figures.

3.9 The RCNI remains of the opinion that the age of consent as set out in existing legislation at 17 is adequate and appropriate. In addition current public opinion on this matter has been explored and has confirmed this standard as appropriate.

3.10 The age at which absolute liability is to be set is of particular concern to the debate on this referendum. The RCNI feel the government should not allow an impression that this will be set unreasonably high damage the likelihood of reintroducing this measure of protection. **The RCNI suggest it would be advisable** for the government give some indication at what age they would expect to set absolute liability.

3.11 Setting this age is primarily a child protection and deterrence measure. The key determinants will be considerations of child development and capacity combined with an assessment of social realities based on fact and not myth and our legitimate aspirations for our society with regard child protection.

3.12 **The RCNI recommend** that the age for absolute liability be set at 15 and under. In discussion across rape crisis centres, involving, schools educators, counsellors and those involved in child protection policy the consensus arrived at was 15 and below.

4. The facts about underage sexual activity relevant in Child Protection

4.1 The RCNI would like to offer the following facts, analysis and rape crisis expertise for the benefit of your deliberations:

4.2 Underage sexual activity: the facts

- The mean age for first sex amongst young people in Ireland today is 17[1].
- A minority, albeit an increasing percentage, of children are having first sex younger, with 22% of women under 25 having had sex before 17.[2]
- An unacceptably high level of men, 47% and almost double that number of women, 78%, expressed regret at first sex that happened too early (under 15).[3]

[1] [1] *Irish Study of Sexual Health and Relationships*, (ISSHR) Crisis Pregnancy Agency, 2006
[2] ISSHR, 2006
[3] ibid

- A 1998 prevalence study in the US found that of women who had been raped at some point in their lifetimes, 32.5% had been raped between the ages of 12 – 17; 21% when they were still under 12.[4]

- Education and social class are significant factors in determining the likelihood of engaging in younger sex.[5]

- Young people experiencing first sex before the age of 17 were almost 70% more likely to experience a crisis pregnancy[6] and three times more likely to report experiencing sexually transmitted infections.[7]

- The SAVI Report[8] found that a quarter of perpetrators of child sexual abuse were themselves juveniles. A rape crisis study of teenage survivors of sexual violence showed that in 33% of the cases the perpetrator was themselves a child.[9]

- In the same study it was found that 25% of teenage victims are raped by peers, 25% by family friends and 25% by strangers.

- The rape crisis counsellor to those teenagers who conducted the analysis above concluded that teenagers were particularly vulnerable to being targeted by male predators who know that teenage girls are 'easier' to rape and the odds are that they will get away with it.

4.3 Societal attitudes to both perceived and real underage sexual activity:

- There is little vocal sympathy or concern for young people who are sexually active. Social commentary tends to treat the issue of underage sexual activity in a casual manner, as 'disgraceful' behaviour by teenagers or as inevitable given modernity rather than as a child protection issue.

- Victim blaming is still widespread. The 'she was asking for it' attitude persists particularly in acquaintance rape cases and/or cases where alcohol or other drugs were consumed.

- Young people are particularly vulnerable to being stigmatised for sexual activity rather than protected. Prevailing attitudes of the 'fallen' girl/woman, or in more modern terminology 'slag' continues

[4] Prevalence, incidence and consequences of Violence Against Women report, US Dept. of Justice, Office of Justice Programme, Nov. 1998
[5] ibid
[6] 224 underage girls gave birth in 2005 and 654 in 2004
[7] ISSHR, 2006
[8] *Sexual Violence and Abuse in Ireland: A national Study of Irish Experiences, beliefs and attitudes concerning sexual violence*, Hannah McGee et al, Royal College of Surgeons in Association with DRCC, 2002 p. 89
[9] Mayo Rape Crisis Centre, analysis of teenage clients 13-18 years, between 2002 and 2005.

amongst Ireland's young people.[10] Prevailing attitudes about narrowly prescribed forms of acceptable masculinity are still very strong.

- Pornography continues to be the primary location for young boys and increasingly girls to 'learn' about 'sexuality'. In a study of 13 to 19 year olds in 1998, 68% of girls and 94% of boys had been exposed to pornography with 24% of boys having seen lots.[11]

- In all recent research a serious lack of information and education for young people about sex, has been identified.

- There is a Red C poll exploring attitudes to sexual consent which will be published in the Irish Examiner mid/late February 2008 which may further illuminate these attitudes.

4.4 All of these attitudes combine to discourage the naming or reporting of sexual crimes. This silence, denial and ignorance only adds to the vulnerability of young teenagers and puts an onus on the State to legislate fully for a zone of protection for them.

5. Vetting legislation

5.1 Nothing must impede the State's ability to carry out its duty to protect children and vulnerable adults from those it reasonably knows to present a credible risk. The criminal justice system is a vital tool in deterring and punishing sexual offenders. It is also a reality that those who are a danger to our children and vulnerable adults will over time become known to the authorities but some will fail to be convicted. This amendment and subsequent legislation should not be permitted to fail because the risk of causing miscarriages of justice and an unacceptable trammelling of civil liberties is too high.

5.2 It is for this reason the RCNI are concerned about the broad enabling scope of the amendment wording as outlined above. It is desirable as Shannon argues that those being vetted would be knowingly seeking employment in an area which requires special safeguards. Our fears are that those subject to vetting could be so all encompassing that this would not be the case. Legislation must clearly delineate those positions which will reasonably be subject to vetting. The **RCNI recommend** that the amendment narrows the scope of vetting and that subsequent legislation must fully delineate the vetted and those on whose behalf vetting is conducted.

[10] 62% of girls aged 13 – 19 felt girls they were thought less of and called 'sluts' if they had multiple partners. Teenage Tolerance: the hidden lives of young Irish people: a study of young people's experiences and response to sexual violence and abuse,' Irene McIntosh and Aisling Griffin, research commissioned by Women's Aid, 1998.

[11] ibid

5.3 The RCNI see little if any benefit to the widespread public dissemination of soft or hard information on sex offenders. Rather it is our opinion that what is commonly referred to as Megan's Law style legislation is harmful and lessens our ability to control and monitor those who are a danger. **The RCNI recommend** that the Committee is clear in its intent to the Oireachtas that soft information is not intended for public dissemination purposes but for tightly controlled and limited sharing.

5.4 Soft information should only be concerned with information that has been brought to the attention of the Gardaí or the HSE.

5.5 The scale and range of people likely to be placed on the register with hard and soft information pertaining to sexual offences can be roughly estimated as 2,000 per annum.[12]

5.6 While Shannon's report outlines much with regard this legislation the RCNI cannot feel confident in the recommendations laid down with regard the use and control of soft information. We feel these do not adequately protect the person's rights. It is unacceptable that under this recommended vetting regime a person would only become informed of their status upon the activation of the vetting process by an employer.

5.7 We would suggest that when the Oireachtas looks at drafting its legislation it should frame vetting in such a way as to give individuals the right to know and to appropriately appeal the limits being set upon them prior to any vetting action involving a third party.

5.8 One way the legislation could do this is through a list system[13]. Such a vetting system might have the following features:

1. set down the criterion of a number of bands or lists of decreasing severity. These need to be very clearly and thoroughly delineated with the different grades of restrictions, review and time limits for remaining on this register, outlined.
2. clearly delineate the criteria for being placed onto a particular list.
3. require that the person upon being entered onto a list should be immediately informed to allow for:
    a. an opportunity to appeal,
    b. to give notice which would inform him/her clearly of the types of employment or responsibilities from which they will be barred and
    c. inform them of what length of time they are to remain on that list.

[12] Only 1 in 10 people reported a sexual offence to the Gardaí[12]. Some cases not brought to the attention of the Gardaí may however, come to the attention of the HSE. Roughly 2,000 sexual offences are reported to the Gardaí annually. We must assume some of those offences were committed by the same person either during the one incident or through repeat offending. We must also assume a level of re-offending from year to year. In the UK, by 2006 there were 30,000 people on their sex offenders register.

[13] There is amble international best practice to draw upon, it is also important to consider how a system being constructed in Ireland will be combatable with regimes in other countries.

5.9 Only after a person has been fully informed and formal steps allowing for appeal have been completed can that name on the register become subject to active vetting.

5.10 The RCNI agree that the Garda Central Vetting Unit (GCVU) is the appropriate body to hold list information and to conduct vetting. With a list system in place the job of vetting should be a largely automated exercise limiting the risk of undue access to this sensitive information. There should be an independent body which monitors the vetting process, through which appeals are conducted and keep lists under review to ensure those eligible for removal are removed promptly.

5.11 The list system, with the authorities dealing directly and openly with those on the list, would give someone the right to defend themselves prior to any impact on their freedoms. It would also have the benefit of acting as a deterrent for those so notified from attempting to access positions for which they are deemed unsuitable.

5.12 Considerations for constructing such a list system:

- Weight given to **types of information** - is it information about a conviction, a prosecution, a book of evidence, an investigation which was abandoned and why etc
- **Type of allegation/offence** – was it sexual? What level of violence was involved? Did it involve children if so of what age?
- Pertinent information about the **relationship between the alleged perpetrator, the witness and/or the victim**.

5.13 it is envisaged that lists would differ in terms of:

- **Type of contact and responsibility to a child or vulnerable adult which is not permitted.** Contact within a group setting only? One on one contact? What level of responsibility to the care of the child does the position entail? What level of dependence will the child have on this adult?
- **Length of time a person's name can remain on a list**
- **Formal and regular reviewing schedule** as appropriate
- **Appeal capacity.** For example a convicted sex offender would be automatically set on the highest list and would have no grounds for appeal. However, other lists of much softer information must be subject to a formal set of automatic notification and appeal structures and systems.
- Where limited restrictions apply how and what is to be communicated to the enquiring agent/agency.

5.14 Safeguards within such a system would include:

- Criteria for inclusion to be delineated by legislation and a matter of public record.
- Automatic and formal notification of inclusion, of the impact of inclusion and of the methods and rights to appeal inclusion.

- Clear safeguards, limits and controls monitored by an independent body, on how the GCVU gains, stores, reproduces and accesses information.
- Legislation to make clear that vetting information thus gathered and stored can only be used for child and vulnerable adult protection in accordance with the State's duty therein.
- Statutory obligation on a receiving agency or employer not to store or disseminate vetting results disclosed to them by the GCVU beyond the strictly necessary and severe penalties for any breach.
- Clear legislation that would permit a person under limited restrictions to contest discrimination where he/she feels the employer acted above and beyond that which was required by the vetting list.
- Legislation to outline clearly how international vetting is to be conducted and the standards in other jurisdictions we would deem necessary for us to facilitate exchange requests.

6. Popular myths surrounding this debate

6.1 In the RCNI analysis there are a number of widely accepted 'truths' that are informing the current debate. If left unchallenged and indeed if used unconsciously by those promoting a referendum they will make it difficult to convince the public to vote yes.

6.2 **Myth 1. 'Rights are Zero-Sum. Our task is to find balance'.**

6.3 This is not a referendum about competing rights. The widespread automatic assumption that the enhancement of one right necessitates the dilution or degrading of another's is erroneous. Yet this assumption permeates and is the un/spoken foundation of many of the arguments against the referendum Bill as currently proposed.

6.4 While some of the measures may be correctly understood as requiring balance between two parties, rights are not de-facto a zero sum commodity. We would respectfully suggest that the language of 'balance' is unhelpful as it reinforces the myth that gain in one area is loss in another. For example the enhancement of a child's rights does not and should not necessarily require the degrading of a parent's rights. In fact parents who have the best interest of their child at heart will more often than not find their rights enhanced by the enhancement of their child's rights.

6.5 **Myth 2. Absolute liability means there is 'no defence'**

6.6 There are a number of defences available to the defendant. The short-hand treatment of the phrase 'no defence of honest mistake as to age' to 'no defence' risks the wider public being given the impression that absolute liability removes *all* defence options.

6.7 **Myth 3. An adult who has sexually exploited a teenager can be 'morally blameless.'**

6.8 The RCNI would support the case as laid out by McAuley (3.16) that those who choose to embark on actions they know to be high risk are not morally blameless when things go wrong. It is reasonable for society and the law to expect them to face the consequences when their action causes harm.

6.9 The concept of legal responsibly in the event of partaking in risky behaviour or negligence is widespread throughout our law and unproblematic for much of society. Yet when it comes to the context of sexual consent involving a child many argue it is an inappropriate responsibility. The RCNI feel strongly that this is wrong, a neglect of our duty of care and effectively an abandonment of our children when it comes to sex.

6.10 **Myth 4. 'We know the facts of the Mr C case'**

6.11 Mr C admitted to statutory rape. He knew she was under age. He claimed in his statement to Gardaí that she had told him that she was 16.

6.12 Mr C's version of events that the child initiated the sex, that it was factually consensual and that she lied about her age, have never been tested in court. It is unsound to utilise his version of events as fact when we have never heard the victim's version of events. We do not know if these assertions are agreed or contested.

6.13 Following McAuley (3.40), the consideration of the case by the Supreme Court and subsequently in public debate as that of 'consensual relations between an adult and an underage person' rather than framing it as a case concerning an adult 'having sex with a girl who might be underage' was regrettable and should not continue.

6.14 **Myth 5. 'It is acceptable to Irish society for a 14 year old to be sexually available'**

6.15 On the vexatious and delicate issue of what to do about teenage behaviour, it has *not* been agreed by Irish Society that they sh ould be abandoned to their fate whatever that may turn out to be. Yet much of the debate is conducted as if it is so. For the RCNI this is the principal question and core value at the heart of this referendum.

Summary of Recommendations

1. The RCNI recommend that the Committee gives serious consideration to urging the Oireachtas that heads of Bills should be prepared in conjunction with the amendment

2. The RCNI recommend that in clause 5.1 a word/s of more limited scope such as 'specifically concerning' should be considered to replace 'relating.

3. The RCNI recommend that in clause 5.1 the word 'endangerment' be deleted.

4. The RCNI recommend that in clause 5.1 'other persons' should be replaced with 'other vulnerable persons'.

5. The RCNI recommend that in clause 5.2 the word 'sexual' be inserted into the amendment.

6. The RCNI suggest that in clause 5.2 the committee consider adding 'or vulnerable adults'.

7. The RCNI ask the Committee to call for the urgent reform of the sexual offences act 2006 to ensure the bar is set at its highest level requiring an objectively reasonable as opposed to 'honest' defence of mistake as to age.

8. The RCNI recommend the committee call on the legislature to limit absolute liability to the most serious statutory rape offences and to make it gender neutral.

9. The RCNI recommend a system of *Amicus Curiae* to the Supreme Court when it is considering the constitutionality of a law.

10. The RCNI recommend that the Committee supports the Law Reform Commission's (LRC) imminent review of sexual offences but **The RCNI would recommend** that interim legislation urgently required should deal with the raising of the bar in statutory rape cases to an objectively reasonable mistake as to age, a statutory definition of consent and the widening out of those considered under incest legislation.

11. The RCNI recommend the government give some indication as to what age they would expect to set absolute liability.

12. The RCNI recommend that the age for absolute liability be set at 15 and under.

13. RCNI recommend that clause 5.1 be narrowed to limit the scope of vetting and that subsequent legislation fully delineate the vetted and those on whose behalf vetting is conducted.

14. The RCNI recommend that the Committee is clear in its intent to the Oireachtas that soft information is not intended for public dissemination purposes but for tightly controlled and limited sharing.