



## RCNI Criminal Justice (Sexual Offences & Human Trafficking) Bill GS 2022 Submission to the Joint Oireachtas Committee on Justice 10/22

### **Introduction – Rape Crisis Network Ireland**

Rape Crisis Network Ireland (RCNI) 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 such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

### **Introduction – This Submission**

RCNI welcomes very much this opportunity to make submissions to the Joint Oireachtas Committee on Justice on this General Scheme of the forthcoming Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022<sup>1</sup>. Part 2 (Sexual Offences) which implements some recommendations made in the O'Malley Review Report<sup>2</sup> on the supports for vulnerable witnesses in the investigation and prosecution of sexual offences, is the focus of most of our submissions. Head 3 in this Part also addresses changes recommended by the Law Reform Commission in its Report on Knowledge or Belief Concerning Consent in Rape Law (2019)<sup>3</sup>.

While we welcome Part 3 on the National Referral Mechanism on Victims of Trafficking on the basis that it sets out a clear structure for the referral and recognition of trafficked people by the State, we do not have the detailed knowledge of sexual trafficking issues needed for cogent comment on this aspect of the General Scheme.

**Please note that subsequent to this written submission the RCNI engaged in a number of further consultations and analysis. On many points, including on how best to frame the objective reasonable test, developed further beyond the positions explored in this submission. Further activity included an oral hearing to the Joint Oireachtas Committee on Justice, further research with practicing counsel, further written follow up and engagement with the Dept. around their further research and analysis following the outcomes of the JOJC report.**

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<sup>1</sup> Full text: [General Scheme of the Criminal Justice \(Sexual Offences and Human Trafficking\) Bill 2022](#)

<sup>2</sup> Review report itself: [Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences \(justice.ie\)](#), and Supporting a Victim's Journey (the implementation plan for the O'Malley RR recommendations): [Supporting A Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases - The Department of Justice](#)

<sup>3</sup> Accessible [here](#)

## Structure of this Submission

As requested, this submission is set out on a “Head by Head” basis. Our comments are set out in order under the relevant Head in numbered paragraphs. Our list of recommendations under each Head is at the end of the document. The text of each relevant Head is set out below in **contrasting type** for ease of reference.

### Head 3 Amendment of section 2 of Act of 1981

Provide that: The Act of 1981<sup>4</sup> is amended by the substitution of the following section for section 2

– “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—

(i) knows that she does not consent to the intercourse, or

(ii) is reckless as to whether or not she consents to the intercourse, or

(iii) does not reasonably believe that she consents to the intercourse, and references to rape in this Act and any other enactment shall be construed accordingly.

(2) If the question of reasonable belief that a woman consents to the intercourse arises in a rape trial, the jury shall have regard to the following circumstances related to the accused’s personal capacity –

(a) any physical, mental or intellectual disability of the man,

(b) any mental illness of his, and

(c) his age and maturity.

(3) If the question of reasonable belief that a woman consents to the intercourse arises, the jury is also to have regard to the steps, if any, taken by the accused to ascertain whether the woman consented to the intercourse.

(4) It shall not be a defence that the accused was so intoxicated by the effect of alcohol or some other drug that he did not have the capacity to understand whether the woman was consenting; but, where his level of self- induced intoxication was such that he did have the capacity to understand whether the woman was consenting, the jury shall determine whether the man’s belief was reasonable by reference to whether his belief would have been reasonable if he had not been intoxicated.”

#### RCNI Commentary on Head 3:

1. The Law Reform Commission (LRC) wording in its draft Bill at the end of its 2019 Report on

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<sup>4</sup> Here is a link to the consolidated online text of the 1981 Act for easy reference: [Revised Acts \(lawreform.ie\)](https://www.lawreform.ie/Revised-Acts)

this topic<sup>5</sup> is tighter, creating a causal link between a lack of capacity to understand whether there was consent because of any disability or mental illness the man had at that time, or because of the age and maturity of the man at that time: “The circumstances referred to in subsection (2)(a) are where the man, at the time the intercourse occurred, lacked the capacity to understand whether the woman was consenting or not by reason of— (a) any physical, mental or intellectual disability the man had at that time, or (b) any mental illness the man had at that time, or (c) the age and maturity of the man at that time. [our emphasis];

2. LRC recommended that with regard to the question of reasonable belief in the woman’s consent, the jury should consider only this closed list of factors potentially affecting the personal capacity of the accused to understand whether the woman was consenting at the time of the intercourse, and nothing else other than any steps taken by the accused to ascertain whether there was consent. RCNI’s view is that this is the right approach.
3. In relation to 2(2) (a) and 2(2)(b) above: RCNI’s view is that the wording of the LRC in its own Draft Bill is preferable and should replace this wording, however omitting Section 2(2)(c) for the reasons set out below.
4. With regard to Section 2(2)(c) above: “his age and maturity”: RCNI’s view is that this ought to be deleted. If an accused person is over the age of criminal responsibility and the DPP has consented to the prosecution going ahead, that means that he has the necessary understanding to be aware that initiating or continuing intercourse either knowing she did not consent or being reckless as to whether she did or not – is an offence, and a very serious one. After all, ignorance of the law is not a defence. There should be no possibility that some well-developed boy of 13 or 14 can argue that he was not old enough or mature enough to know what he was doing – and therefore is not guilty of rape. Leaving in this limb would open the door to uncertainty through arguments about how old or mature one would have to be to understand what rape is. Age and maturity are different from the other limbs: they are not about mental capacity. They are about knowing right from wrong and taking responsibility for one’s actions.

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<sup>5</sup> LRC Report (2019) on Knowledge or Belief Concerning Consent in Rape Law, accessible online via this web-link: [LRC 122-2019 Knowledge or Belief Concerning Consent in Rape Law.pdf \(lawreform.ie\)](https://www.lawreform.ie/LRC-122-2019-Knowledge-or-Belief-Concerning-Consent-in-Rape-Law.pdf)

## Head 5 Amendment of section 4A of the Act of 1981<sup>6</sup>

Provide that:

Section 4A of the Act of 1981 is amended by the substitution of the following two subsections for subsection (6):

“(6) Where the judge has given leave in accordance with section 3 or 4 for any evidence to be adduced or question to be asked in cross-examination, the complainant shall be entitled to be heard in relation to the evidence and, for this purpose, to be legally represented in the proceedings for the duration of the evidence or, as the case may be, question concerned.

(7) This section applies to a sexual assault offence.”

### RCNI Commentary on Head 5:

5. Now that Preliminary Trial Hearings (PTHs) are in force, alongside relevant Circuit Court and High Court rules<sup>7,8</sup> the recommendations in our own Position Paper<sup>9</sup> that the Section 3 application for leave procedure should be tighter have been largely addressed.
6. However, RCNI’s view is that any notice of intention to seek leave to adduce evidence as described in Section 4A CLRA 1981 should also as we recommend at page 8 of the Paper at (b) “.....indicate clearly the categories of questions to be asked, the reasons for asking them, and the parameters of the questions to be asked;...” and we would add, – “and/or the nature and rationale for seeking to adduce any other defence evidence about the complainant’s other sexual experience”;
7. The scope of legal advice and assistance for the complainant in Section 4A should be clear – from service of notice of intention till end of evidence at trial (ie not confined to PTH) whether through cross-examination of complainant or other defence evidence, not omitting examination of complainant in chief as implied here;
8. The opportunity should be taken to tighten the wording of Section 3 Criminal Law (Rape) Act 1981 so that the meaning of “other sexual experience” is clearer, as recommended at page 8 of our Paper at (k): [references to the complainant’s other sexual experience should] “include references to pregnancy, miscarriage, abortion, contraception and other

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<sup>6</sup> Criminal Law (Rape) Act 1981: the full consolidated text may be accessed via this web-link: [Revised Acts \(lawreform.ie\)](https://www.lawreform.ie)

<sup>7</sup> [S.I. No. 122/2022 - Rules of the Superior Courts \(Criminal Procedure Act 2021\) 2022, \(irishstatutebook.ie\)](https://www.irishstatutebook.ie) – link to CCC rules

<sup>8</sup> [S.I. No. 453/2022 - Circuit Court Rules \(Criminal Procedure Act 2021\) 2022 \(irishstatutebook.ie\)](https://www.irishstatutebook.ie) – link to CC rules (similar)

<sup>9</sup> See list of recommendations at pp of this RCNI Position Paper on Previous Sexual History [here](#).

indicia of sexual activity”.

9. The new Section 4A should be amended to the effect that the prosecutor has a duty to supply the legal representative for the complainant with a copy of that complainant’s statement(s), where leave is sought to adduce defence evidence or put questions in cross-examination, under Section 3;
10. Head 5(7) is very welcome – as sexual assault is by far the highest volume sexual offence in this country.

#### **Head 6: Amendment of section 6 of the Act of 1981**

Provide that:

Section 6 of the of the Act of 1981 is amended –

- (a) in subsection (1), by the substitution of “sexual assault offence or an offence under section 21 or 22 of the Criminal Law (Sexual Offences) Act 2017<sup>10</sup>” for “rape offence or the offence of aggravated sexual assault or attempted aggravated sexual assault or of aiding, abetting, counselling or procuring the offence of aggravated sexual assault or attempted aggravated sexual assault or of incitement to the offence of aggravated sexual assault or conspiracy to commit any of the foregoing offences”, and
- (b) by deleting subsection (4).

#### **RCNI Commentary on Head 6:**

RCNI broadly welcomes this provision.

11. On subsection (a): As already indicated, sexual assault is the most commonly charged sexual offence. At present, exclusion of the public is not automatic but at the discretion of the court. From survivors’ perspective, the stress of giving evidence in a sexual assault trial will be much less if it is known from the outset that the court will be held in private. Accordingly, this provision is very welcome.
12. On subsection (b), our view is that generally, it will be helpful to survivors to have both verdict and sentence delivered in courts which are closed to the public, provided always that there is no provision inserted either here or elsewhere to the effect that the anonymity of the accused should remain after the accused has been found guilty or pleaded guilty.

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<sup>10</sup> Here is a link to the consolidated online text of the Criminal Law (Sexual Offences) Act 2017: [Revised Acts \(lawreform.ie\)](http://lawreform.ie)

## **Head 7 Amendment of section 7 of the Act of 1981**

Provide that:

### **Section 7 of the Act of 1981 is amended –**

(a) by the insertion after “sexual assault offence” in each place where it occurs of “or an offence under section 21 or 22 of the Criminal Law (Sexual Offences) Act 2017”, and

(b) by the substitution of the following subsection for

subsection (7) — “(7) In this section—

‘broadcast’ means the transmission, relaying or distribution by electronic communications network of communications, sounds, signs, visual images or signals, intended for direct reception by the general public whether such communications, sounds, signs, visual images or signals are actually received or not;

‘publication’ includes a film, sound track or any other record in permanent form (including a record that is not in a legible form but which is capable of being reproduced in a legible form) but does not include an indictment or other document prepared for use in particular legal proceedings.

‘published’ means published to any person, and includes published on the internet;

‘written publication’ includes a film, sound track or any other record in permanent form (including a record that is not in a legible form but which is capable of being reproduced in a legible form) but does not include an indictment or other document prepared for use in particular legal proceedings.”

### **RCNI Commentary on Head 7:**

12. (a): This provision increasing the reach of complainant anonymity to “protected” and “relevant” persons is very welcome. In our view, it would be useful and appropriate for complainant anonymity to be extended further to include any child or young person named in offences under Sections 3, 4, 5, 6, 7 or 8 Criminal Law (Sexual Offences) Act 2017<sup>11</sup> (all child sexual exploitation offences), whether or not they are still a child when the matter comes to Court.

13. (b): See the expression: “or any other record in permanent form” under the definition of both “publication” and “written publication” above: RCNI is concerned that this definition *might* exclude online written material which is impermanent, that is, designed not to remain online for very long before it disappears and becomes irretrievable. If we are correct in this, the provisions need to be amended so that they can include this kind of material.

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<sup>11</sup> Link to the consolidated 2017 Act may be found at footnote 10 above

## **Head 11 Repeals**

Provide that:

The following are repealed –

- (a) section 2(2) of the Criminal Law (Incest Proceedings) Act 1995;
- (b) section 8(3) of the Criminal Justice (Female Genital Mutilation) Act 2012;
- (c) section 29(2) of the Criminal Law (Sexual Offences) Act 2017.

### **RCNI Commentary on Head 11:**

14. On each one of these subsections, (a), (b), (c): As indicated in respect of Head 6 above, the RCNI view is that generally, it will be helpful to survivors to have both verdict and sentence delivered in courts which are closed to the public, provided always that there is no provision inserted either here or elsewhere to the effect that the anonymity of the accused should remain after the accused has been found guilty or pleaded guilty.

## **Head 12: Interpretation for Part 3 [single definition only]**

Provide that: [.....]

“sexual exploitation” means, in relation to a person—<sup>12</sup>

- (a) the production of pornography depicting the person either alone or with others,
- (b) causing the person to engage in sexual activity for the purpose of the production of pornography,
- (c) the prostitution of the person,
- (d) the commission of an offence specified in the Schedule to the Act of 2001 against the person; causing another person to commit such an offence against the person; or causing the person to commit such an offence against another person, or
- (e) otherwise causing the person to engage or participate in any sexual, indecent or obscene act; [.....]

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<sup>12</sup> Apparently taken from Section 1 Criminal Law (Human Trafficking) Act 2008 [here](#).

**RCNI Commentary on Head 12** [extracted text only]:

15. In relation to (a) above, RCNI's view is that it would be helpful to include an additional phrase so that "deep-faked" images are included in the definition of pornography. Section 1 (a) of the Harassment, Harmful Communications and Related Offences Act 2020<sup>13</sup> could be used as a model for this purpose.

**RCNI Recommendations: Head 3**

Replace the proposed new text of Section 2 Criminal Law (Rape) Act 1981 with a text much closer to that proposed by the LRC in its draft Bill at the end of its Report<sup>14</sup>, omitting Section 2(3)(c) thereof:

"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— (i) knows that she does not consent to the intercourse, or (ii) is reckless as to whether or not she consents to the intercourse, or (iii) does not reasonably believe that she consents to the intercourse [...].

(2) If at a trial for a rape offence, the jury has to consider whether the man reasonably believed that, at the time of the alleged commission of the offence, the woman was consenting, the jury shall have regard to—

a) the circumstances referred to in subsection (3), and only those circumstances, and

(b) the steps referred to in subsection (4).

(3) The circumstances referred to in subsection (2)(a) are where the man, at the time the intercourse occurred, lacked the capacity to understand whether the woman was consenting or not by reason of—

(a) any physical, mental or intellectual disability the man had at that time, or

(b) any mental illness the man had at that time.

(4) The steps referred to in subsection (2)(b) are the steps, if any, taken by the man to ascertain whether the woman consented to the sexual intercourse"

[LRC Section 5 is omitted as RCNI has no comment to make on that].

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<sup>13</sup> Accessible online [here](#)

<sup>14</sup> See web-link to full text of the Report at footnote 1 above (pages 99,100).



## Head 5

### **I Amend Section 4A by adding this subsection:**

“(2A): The notice of intention shall indicate the categories of questions to be asked, the reasons for asking them, and the parameters of the questions to be asked, or the nature of, and rationale for seeking to adduce, any other defence evidence about the complainant’s sexual experience other than that which is the subject of the charge or charges before the court”;

### **II Amend Section 4A by substituting this text for the text at subsection (6) set out above:**

“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”;

### **III Amend Section 4A by adding this subsection after subsection (3):**

“(3A): The prosecution shall provide the complainant or his or her legal representative with a copy of his or her statement(s) as soon as practicable after notice of intention to adduce evidence or seek leave to cross-examine the complainant in relation to his or her sexual experience other than that to which the charge before the court relates, has been received”, and make any consequent amendments in the following subsections”:

### **IV Amend Section 3 Criminal Law (Rape) Act 1981 as amended, by adding this subsection after S3(1)(c):**

(1A): “References to any sexual experience (other than that to which the charge relates) of a complainant with any person shall include in this Section, in Section 4 and Section 4A shall include references to miscarriage, abortion, contraception and other indicators of sexual activity”.

## Head 7

**V a): Amend Head 7 by the insertion after “sexual assault offence” in each place where it occurs of “or an offence under section 3,4, 5, 6, 7, 8, 21 or 22 of the Criminal Law (Sexual Offences) Act 2017”, and**

**VI (b): Consider carefully whether the following wording under the definition of both “publication” and “written publication” does include online written material designed not to be accessible or retrievable after a brief interval, and amend these definitions if the conclusion is that they may not, or do not: “or any other record in permanent form (including a record that is not in a legible form but which is capable of being reproduced in a legible form)”**

## Head 12

- VII Amend (a) so that it reads: “the production of pornography depicting the person, or purporting to depict the person, either alone or with others” (The additional text is emboldened).

### **Proposed Additional Heads to be added under Part 2:**

VIII **Create a new Digital Rape Offence.** At present, digital penetration without consent of a person’s anus, vagina or mouth in a sexual context is not defined as rape but as sexual assault in our law. If Ireland adopted the proposed EU Directive combating violence against women and domestic violence<sup>15</sup>, the current range of rape offences would have to extend to include digital rape, under the proposed Article 5. This Bill is an opportunity to make this change;

IX **Create at least one new offence of voyeurism which covers voyeuristic activities of which the victim is not aware at the time at which they are taking place**, ie which go beyond the scope of Section 45 Criminal Law (Sexual Offences) Act 2017<sup>16</sup>. A precedent which could be adapted is at SS.67, 67A and 68 in UK Sexual Offences Act 2003<sup>17</sup>.

X **Devote at least one Additional Head to the following Special Measures to make it easier for complainants and other witnesses to give evidence:**

- (a) Create a prohibition on defence cross-examination of the complainant on, or any defence evidence about, any aspect of her appearance at the time of the offence, which is led solely in order to advance the case that her appearance is evidence of consent and for no other reason;<sup>18</sup>
- (b) Amend Section 16 of the Criminal Evidence Act 1992<sup>19</sup> to allow for pre-recorded evidence of adult victims and witnesses with full capacity, including those who were victims of offences as children and whose evidence was recorded while they were still children – to stand as their evidence in chief at trial;
- (c) Amend Section 16 of the Criminal Evidence Act 1992 to allow for the pre-recording of cross-examination and re-examination of victims of and witnesses to, sexual offences and for such pre-recordings to stand as their evidence at trial. Section 28 UK Youth Justice & Criminal Evidence Act 1999<sup>20</sup> as amended may be a

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<sup>15</sup> See full English text of the proposed Directive [here](#)

<sup>16</sup> See web-link to text of the Act at footnote 10 above

<sup>17</sup> See this web-link to the full text of the Act as amended: [Sexual Offences Act 2003 \(legislation.gov.uk\)](#)

<sup>18</sup> See further on this topic RCNI Report (2018) [here](#) and RCNI Submission on Criminal Justice System and Survivors of Sexual Violence (2021) [here](#)

<sup>19</sup> The full text of Part III of the consolidated version of the Criminal Evidence Act 1992 may be accessed here: [Revised Acts \(lawreform.ie\)](#)

<sup>20</sup> [Youth Justice and Criminal Evidence Act 1999 \(legislation.gov.uk\)](#)

useful precedent in this regard (now both in force and operational across England & Wales);

- (d) Amend the special measures provisions of the Criminal Evidence Act 1992 as amended, the Criminal Justice (Victims of Crime) Act 2017<sup>21</sup>, the Criminal Law (Sexual Offences) Act 2017<sup>22</sup> and the Domestic Violence Act 2018<sup>23</sup> to treat all victims and witnesses as if they were under 18, ie to create a presumption in favour of the grant of special measures to all victims of and witnesses to all sexual offences and all otherwise violent offences at least, whether or not any victim or witness is under or over 18;
- (e) Amend Section 14 of the Criminal Evidence Act 1992 on the use of intermediaries to provide for:
  - The use of intermediaries wherever a victim or witness over 18 has some form of physical disability affecting their ability to communicate their evidence in court but has no “mental disorder”; and
  - The extension of the use of intermediaries to the answers given by the witness being assisted as well as to the questions put to the witness.
- (f) Amend Criminal Justice (Victims of Crime) Act 2017 to provide for a generally worded provision akin to the inherent jurisdiction of the High Court, which would allow a judge at Circuit or District Court level to allow the use of any novel measure(s) in order to assist the witness to give evidence, at least in relation to any violent or sexual offence, provided that the use of any such measure was in the view of the court, not contrary to the interests of justice. An example of such a measure is the use of Court Dogs ( e g USA).

## **In Conclusion**

This Submission is a brief summary of several topics which are developed in much more detail in a number of RCNI policy papers, reports and submissions. The most relevant among them are listed under References at the end of this submission.

This is an important Bill from the point of view of survivors of sexual violence. RCNI would be happy to assist the Committee in any way it can as it gives this new legislation its detailed attention in pursuit of our common goal of ensuring that legislation in this area is as clear, robust and effective as it can be.

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<sup>21</sup> [Revised Acts \(lawreform.ie\)](http://lawreform.ie)

<sup>22</sup> Accessible via web-link at footnote 10 above

<sup>23</sup> [Revised Acts \(lawreform.ie\)](http://lawreform.ie)

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**References – List of selected RCNI submissions with web-links (2012-2022)**

1. [RCNI Position Paper on Previous Sexual History and Separate Legal Representation](#) (2012),
2. [RCNI Submission to LRC on Knowledge or Belief Concerning Consent in Rape Law](#) (2018)
3. [RCNI Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings](#)
4. [RCNI General Commentary on Tom O’Malley Review \(2020\)](#)
5. [RCNI Submission on Victims’ Testimony to Joint Oireachtas Committee on Justice](#) (2021):