Protecting young people from sexual exploitation: Rape Crisis Network Ireland thinking towards effective legislation

7th June 2006

Rape Crisis Network Ireland (RCNI)'s policy position paper on new legislation in the wake of the fall of the 1935 Act Section 1.1

Section I

The Rape Crisis Network Ireland (RCNI) broadly agrees with the Law Reform provisions being currently being placed before the Dáil following the Supreme Court Judgement in: C.C. – v Ireland and ors of 23/05/2006 and the resultant declaration of the unconstitutionality of s.1(1) of the Criminal Law (Amd) Act 1935.

1. The RCNI are reassured that proposals to alter the existing age of consent (17) have been abandoned. We maintain our support for the expansion of the important protections under this new legislation to be applied equally to both genders[i].

2. The RCNI fully support the draft legislative proposal to retain the maximum sentencing provisions of the 1935 Act in respective of unlawful sexual intercourse with a child below the age of 15.

3. The RCNI acknowledge and understand the requirement of allowing for a defence of 'reasonable mistake' (as to age) following the Supreme Court ruling. We would however continue to demand that:
(i) There is a 'conclusive' presumption that a young person below the age of 17 is incapable of consent to sexual intercourse.
(ii) There is a presumption that 'special measures' are required to assist such young complainants throughout the entire judicial process[ii].
(iii) The Legislation clearly requires any 'mistake as to age' to be both honestly held by the defendant AND adjudged as objectively reasonable in order to amount to an exculpatory defence. The new Act has NOT done so, thus allowing for 'an honest held though unreasonable belief defence' this will have the effect of offering boundless scope for the cross examination of children (for the defence to establish the basis for the defendant's UNREASONABLE belief) (section 2.3)[iii].
(iv)The Legislation requires the defendant to bear both the Legal and Evidential burden in respect of any such defence.

Section II

The speed with which emergency legislation has to be enacted has militated against a wider debate and consideration of a range of legislative, practice and policy reforms urgently required in the area of sexual violence. Accordingly the RCNI are seeking the Dáil's firm commitment to address this shortfall as a priority.
The 19 points of legislative reform called for in our *Agenda for Justice* available at our website under 'publications' at www.rcni.ie **gives a complete overview of the scope of our programme of reform in particular:**

1. Consent[iv] which is not as yet defined by Statute.

2. And our continued subjective analysis of that consent[v] requiring a jury to acquit provided they find that the Defendant honestly held such a belief in consent (mistaken but honest) however 'unreasonable' that belief was[vi]. The very grave danger of requiring constructions of liability that require evidence of a subjective appreciation or 'advertent' fault in this most sensitive area of legislation is that we are failing to protect our citizens in that such a belief may be wildly mistaken, may not accord with any reasonable person's view as to what could amount to valid consent and yet would amount to full vindication. In seeking to require that a person takes 'reasonable care' to ensure they have valid consent we would be following many other common law jurisdictions, most noteably New Zealand, Canada and most recently England and Wales[vii].

3. The entitlement to full, free, legal advice, assistance and representation.

4. A complete review of the Punishment of Incest Act 1908.

5. A limitation of the 'right' of the defendant to represent themselves in person in case of sexual violence and thus cross examine the complainant in person.

6. Strengthening of the consequences of non-compliance under the Sex Offenders Act 2001.

7. Addressing the twin scourges of Under-reporting and Attrition in crimes of sexual violence.

8. A re-examination of the functioning of the agencies within our criminal justice system including:
(i) Garda training, specialisation of investigation and victim liaison.
(ii) The 'no reasons for decisions' policy of the Office of the DPP (we are calling for change to an accountable, transparent mechanism while maintaining the independence of function so important to the separation of powers principle, but that affords an explanation that solid grounds exist for prosecutorial decisions and not least to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given[viii]**.**
(iii) Judicial 'Education' on the subject of sexual violence.

Section III

IMPLICATIONS FOR OUR EDUCATION SYSTEM AND PUBLIC AWARENESS NEEDS OF ANY PROPOSED LEGISLATION REGARDING UNDERAGE SEX

The pornography and sex industries have a very vested interest in sexualizing the young. These inter-connected industries need to constantly expand their markets and thus generate "new products" and buyers. Sexualising ever younger and younger teenagers and children is one way of achieving this.

Messages our children are receiving daily

This means that our teenagers are increasingly growing up in an environment where they are exposed to sustained messages from the pornography and sex industries which amongst others include:

- that teenagers are increasingly very sexual active,
- that all teenagers are sexually active,
- that you are somehow less if you are not yet sexually active,
- that consent is in fact never an issue - it is always an assumed given in pornography - we never see it negotiated, and where it is refused obviously the woman didn't really mean it! She was merely being playful.

These messages are of course packaged alongside other much more disturbing messages about rape and group sex – seeking to equally normalise these.

So, there are very dubious and vested, high profit, interests in having the above generally believed. All of this is neatly disguised as almost championing the rights of teenagers to be free and natural against a repressive parental and state regime.

But, does the data on teenage sexual activity really back this up? And much more importantly, against the backdrop of the persistent messages in pornography, **is it acceptable, or even ethical, to lower the age of consent without mandatory programmes at all school levels which comprehensively equip teenagers to deal with consent whilst under persistent and manipulative peer pressure?**

If the age of consent is lowered, how will teenagers be taught to understand and negotiate consent? How will teenagers be taught to recognise an abusive or manipulative relationship? How will teenagers be equipped to deal with such complexities as realising that saying yes to some activities does not mean giving consent to all activities?

The sections within the current SPHE schools programme, which attempt to deal with consent, are not mandatory. It is up to the individual school which aspects of the SPHE programme are delivered. This has resulted in one in five schools not running the stay safe programme for example. We already know from Irish data that Irish teenagers struggle to understand what consent means.

The proposed legislative reform may have many implications for education of teenagers regarding sexual activity. How will such programmes be funded, evaluated and rolled out? It is not just the Department of Justice which needs to be on its toes regarding our current situation.

[i] As per our 'Agenda for Justice', published November 2005, recommendation 5, at page 4.

[ii] That all persons under 17 are automatically defined as vulnerable and as such are entitled to choose to use 'special measures' e.g. Prior recorded evidence in chief, screens, CCTV links, court support and accompaniment services. Etc. There is a wealth of examples of 'special measure provisions' from other common law jurisdictions including: New Zealand, Australia, US, England and Wales, Scotland.

[iii] 'Reasonable grounds' is contained in section 2.4 of the 2006 Act, however, the court having 'regard to the presence of or absence of reasonable grounds for the defendant's so believing' was already contained in the 1981 Sex Offences Act section 2.2, and is by no means the same as having an objectively reasonable test in section 2.3 of the 2006 Act.

[iv] Indeed the Law Reform Commission offered a statutory definition of consent way back in 1988 as 'Consent' means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to these words, consent is not freely given if it is obtained by force, threat, intimidation, deception or fraudulent means. A failure to offer a resistance to a sexual assault does not constitute consent to sexual assault' that has not been acted on. Thus we are left with common law principles (derived from case law) to discover the meaning of consent. Other jurisdictions (notably and most recently (Sexual Offences Act 2003) England and Wales have adopted a statutory definition to offer a jury the maximum 'enlightened' guidance on what real consent looks like-
s.74 of the Ac defines consent by stating that "a person consents if he/she agrees by choice, and has the freedom and capacity to make that choice" s.75 lists the circumstances in which it is presumed that the person did not make that choice, asleep, unconscious etc,.

[v] Subjective analysis of recklessness -means that notwithstanding the provisions (s.2 (2) of the 1981 Act whereby the jury may have regard to the 'reasonableness' of the grounds of such a belief in consent, but only insofar as they assist them (the jury) to find whether the defendant honestly held such a belief- if they find that he did mistakenly but honestly believe such consent was operative that belief need not be reasonable in any regard. This leaves us as a society vulnerable to the 'mistaken' beliefs of the mad, bad and sad, cruel, sadistic or just plain thoughtless. Why is it wrong to ask people to come up to a reasonable standard of behaviour and punish them for their failure to do so?

[vi] This will of course raise the lacuna of those who through disability or otherwise lack the capacity to form an objectively reasonable belief, but we have a mechanism for not prosecuting when to do so is not in the public interest. We would need to rely on that mechanism in such instances.

[vii] A very interesting thing happened in the UK when they changed the requirement[vii] that any mistaken but honest belief in consent had to be one a reasonable person would/could have made (i.e. they abandoned the subjective analysis and substituted an objectively reasonable test). The numbers of applications seeking leave to cross examine the complainant on her previous sexual history declined sharply. If you think about it the two go hand in hand. The Defendant could no longer say well I can see now that I was mistaken but I believed at the time (based on the fact that she had a history of agreeing to 'first date sex' etc. for example) that I had her consent.

[viii] R v DPP ex parte Manning & Melbourne [2000]3 W.L.R.436 at 478.