RCNI Submission

On Draft General Scheme of the

Criminal Justice (Withholding Information on Crimes against Children and Vulnerable Adults) Bill 2011

September 2011

1.0 Introduction

Rape Crisis Network Ireland **is the national representative body for the rape crisis sector.** It is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects including expert data collection, supporting Rape Crisis Centres to reach best practice standards, and using our expertise to influence national policy and social change**.** We are the representative, umbrella body for our member Rape Crisis Centres who provide free advice, counselling and support for survivors of sexual abuse in Ireland, including a growing number between the ages of 14 and 18.

Rape Crisis Network Ireland broadly welcomes this legislation, with certain reservations, set out below. It sends a clear signal that the withholding of information on crimes against children without reasonable excuse will incur potentially severe legal consequences. The welfare of children and vulnerable adults is paramount here. However, we must all do our best to ensure that legislation to protection vulnerable people does not have any unintended consequences which could make those very people even more vulnerable.

Rape Crisis Network Ireland works from the position that effective primary prevention of sexual violence is best achieved with a survivor centred and perpetrator focused approach. The RCNI recognise that one of the greatest supports to a perpetrator of sexual violence is silence. This legislation seeks to remove that support of silence from perpetrators of these crimes.

However, it is imperative that the legislation takes into full consideration that the continuation of silence and secrecy in relation to sexual violence rests on a number of factors which ensure that breaking the silence often has negative consequences for victims. It is usual for the perpetrator to have power and/or authority in some form over the victim and to rely on a set of family, community, professional and societal consequences for the victim, to maintain their silence. The RCNI therefore strongly submit that to break a victim's silence without due consideration for how to support and protect that victim from negative consequences would be ultimately self defeating.

RCNI will submit further observations as and when further information on the proposed legislation emerges, such as a more detailed General Scheme, and/or the Bill itself.

RCNI submits generally that it is important that this legislation dovetails appropriately with the other forthcoming pieces of legislation on the protection of children and vulnerable adults, such as the National Vetting Bureau Bill 2011 and the Children First Bill, when it appears – so that they do not contradict each other but work together as a seamless whole.

1.1 Head One: Interpretation

"sexual offence": This definition is cumulative, and appears to refer to all those sexual offences which are punishable by a term of five years or more AND are sexual offences within the meaning of the Sex Offenders Act 2001.

(a) For the avoidance of doubt, we submit that this definition should state explicitly that those sexual offences which are triable summarily **or** on indictment, are **included.** These would include for example, possession, production and distribution of child pornography under the Child Trafficking and Pornography Act 1998 as amended.

(b) It is imperative that a list of the sexual (and other) offences which would trigger liability under this proposed Act, be well-publicised and readily available, so that it is easy for any person receiving information in good faith to check easily and quickly whether they have any obligation to pass it on to An Garda Siochana under this legislation.

"arrestable offence:"

(c) Similarly, it is important that anyone checking whether they must pass on information is able to identify easily and quickly what the phrase "arrestable offence" means. For this reason, we submit that a definition of what constitutes an arrestable offence should be available also under Head 3, the one which lists the elements of the offence itself.

"vulnerable adult":

(d) RCNI submits that this definition is problematic, and queries what is meant by "legal mental capacity?" It appears at odds with the definition of mental capacity in the General Scheme of the Mental Capacity Bill 2008[1]. Modern definitions of capacity reflect a functional and situational view of a person's capacity to do a particular thing at a particular time. Head 2 of the General Scheme of the proposed Mental Capacity Bill 2008 embodies this principle. RCNI submits that in

[1] The definition in Head 2 of the General Scheme of the Mental Capacity Bill (2009) reads as follows: "(1) Subject to this Head capacity means the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made, hereinafter referred to as "the capacity to make a decision".(2) For the purposes of this head a person lacks the capacity to make a decision if he or she is unable -(a) to understand the information relevant to the decision,(b) to retain that information,(c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his or her decision (whether by talking, using sign language or any other means) or, if the decision requires the act of a third party to be implemented, to communicate by any means with that third party.(3) A person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances (using simple language, visual aids or any other means).(4) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him or her from being regarded as having the capacity to make a decision.(5) The information relevant to a decision includes information about the reasonably foreseeable consequences of -(a) deciding one way or another, or (b) failing to make the decision.(6) Any question as to whether a person has capacity shall be decided on the balance of probabilities".

relation to the definition of **intellectual capacity**, wording similar to the Head 2 wording, which has been approved by the National Disability Authority in their two submissions cited below[2], should be adopted.

Head 3: Withholding Information

(1)(a) RCNI submits that it is appropriate to limit the effect of this section to those offences which are known or believed **to have been committed**, as issues surrounding a person's knowledge or belief that such offences might happen in the future will be covered once the current Children First Guidelines are given statutory effect. On a different point, we assume that the obligation not to disclose will apply regardless of **when** the victim was a child, or vulnerable adult, that is, it covers historic child (and vulnerable adult) sexual abuse as well as more recent crimes. Finally, RCNI submit that it is also appropriate to limit criminal liability for withholding information to what a person **knows or believes** (as opposed to surmises, suspects, conjectures or assumes). 'Belief' in this context should be defined as a belief honestly held in good faith by the holder of the information. It is submitted that requiring that the belief be reasonably held would impose too high a standard on the reporter thereby discouraging such persons from reporting.

The proposed new offence of withholding information appears to be one of strict liability insofar as no mens rea is prescribed in the proposed legislation. It appears that the offence is committed when a person withholds information that might be of material assistance to the Gardaí in investigating or prosecuting an arrestable offence. This would apply where the person knows or believes that an arrestable offence has been committed against a child or vulnerable adult. This knowledge or belief is part of the actus reus of the offence rather than the mens rea ie that the person withholds information within their knowledge or belief. The legislation does not prescribe whether this failure to disclose should be carried out intentionally or recklessly, thereby creating a strict liability offence. The status of strict liability offences which are serious in nature has already been the subject of a successful constitutional challenge in CC v Ireland (2006) therefore the RCNI submits that the draft provision in its current composition, could be vulnerable to constitutional challenge.

Overlap with s.176 Criminal Justice Act 2006

There appears to be an overlap between this proposed offence and that of 'reckless endangerment of children' under s.176 of the Criminal Justice Act 2006. That section makes it a criminal offence for a person, having authority or control over a child or an abuser to intentionally or recklessly endanger a child by:

[2] Ie, the NDA Submission on the General Scheme of the Mental Capacity Bill (2009) and in the NDA Submission on Capacity to Consent to Sexual Activity (2009). These two submissions are available online at ww.nda.ie.

(*a*) causing or permitting any child to be placed or left in a situation which creates a substantial risk to the child of being a victim of serious harm or sexual abuse, or

(*b*) failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation,

'Sexual abuse' in that context refers to those offences set out in the Schedule to the Sex Offenders Act 2001 (as amended) however it specifically excludes offences under sections 5 and 6 of the Child Trafficking and Pornography Act 1998. These offences are respectively producing, distributing, etc., child pornography and possession of child pornography. This means that such offences are not 'sexual abuse' for the purposes of s.176. Under the proposed 'withholding information' offence, the term 'sexual offence' is used rather than sexual abuse and is defined as including all offences set out in the Schedule to the Sex Offenders Act 2001, which would include producing/distributing of child pornography as well as possession of child pornography.

Undoubtedly, the same set of circumstances could give rise to criminal liability under both s.176 above and the proposed 'withholding of information' offence. It is very important therefore that the provisions dovetail and do not conflict in any way. On that note, the penalty for an offence under s.176 is an unlimited fine and/or 10 years imprisonment whereas the new proposed offence attracts a maximum penalty of 5 years imprisonment or an unlimited fine. Both offences can be prosecuted on indictment only however, in the case of s.176, it is provided in subsection (3) that where a person is charged with an offence under that section, no further proceedings in the matter (other than any remand in custody or on bail) shall be taken except by or with the consent of the Director of Public Prosecutions.

If the proposed new offence is to be effective, the potential conflicts with this existing provision need to be addressed.

Furthermore, the proposed legislation can only have prospective effect thereby criminalising withholding information from the date of the commencement of the legislation. However, if a person has information in their possession prior to the commencement of the new section, such a person could still be prosecuted under s.176 above, most especially under s.2(b) 'failing to take reasonable steps to protect a child from such a risk while knowing that the child is in such a situation'. Section 176 was commenced on 1st June 2006 therefore persons in authority or with control over children (or the abuser) possessing such information since that time are obliged to disclose such information. While the new proposed offence is much broader insofar as it applies to any person having such information (and not just persons in control or with authority over the child or abuser), the potential overlap with s.176 should be noted.

(1)(b) **Generally:**

***** RCNI submits that the language of this subsection needs to be much simpler and clearer to be understood by the people who must comply with it. The two phrases **"material assistance"** and **"securing the apprehension"** would not have any clear meaning for most people. They need to be recast to be readily understood by general readers.

* Another difficulty with the phrase "**might be of material assistance**" is that it implies that the person passing on the information must weigh it up to decide whether it really might be helpful to the Guards or not. Should he/she not simply report it anyhow, just to be sure that he/she has done all that the law requires of them? The safest answer to this question would appear to be "yes". It may be simpler to replace the whole phrase, "might be of material assistance" with a simpler one such as, "is or may be useful".

Failure to Disclose – Its Exact Meaning

* RCNI submits that it is vital to clarify in this subsection what is meant exactly by **failing to disclose** to the Guards. For the person with the information, there is a big difference between passing on intelligence to the Guards which is known or believed in good faith to be useful or possibly useful to enable arrest/investigation/prosecution and/or conviction, and making a **formal statement which may involve him/her as a prosecution witness in criminal justice proceedings** on the other. From the general tenor of the Draft General Heads, it seems likely that the former is intended as the mechanism through which criminal liability can be avoided, not the latter, but RCNI would be grateful for clarity on this point, as if what is intended is to impose criminal liability for any failure to make a formal report, it seems to us that there are very serious potential consequences for anyone receiving a report of sexual (and indeed other) crimes. Assuming that the new provision requires passing on of information only, it would be useful to clarify what steps exactly must be taken by the holder of the information in order to disclose such information eg should it be in writing only? A statutory definition of the term 'disclose' might be useful in this context.

It would also be useful to have clarification in terms of the subject of the disclosure. Is it intended that the term disclosure would include disclosures by a victim to a counsellor or other professional of crimes committed against **others?** Of course, this would mean that professionals and others receiving such information about third parties would still have to comply with their Children First obligations.

* Further on this point, RCNI would be very concerned to ensure that potential supporters as well as victims themselves, are not put off seeking support whether from a trusted friend or family member or a service such as a Rape Crisis Centre to share their experience of sexual trauma and/or seek much needed specialised support, for fear of becoming entangled in the criminal justice process where neither victim nor supporter has

any wish (or indeed very often, ability) to engage with the criminal justice process. We would submit therefore that **it is not in the interests of justice** to impose criminal liability on any person receiving a report of a crime for failure to make a **formal statement which may involve him/her as a prosecution witness in criminal justice proceedings.**

For our Member Centres' staff and volunteers, such a law would mean that every aspect of therapeutic work would be overshadowed by the criminal justice process. This would damage the integrity and confidentiality of the counselling process to an unacceptable degree, as attention is focussed perforce on the forthcoming criminal justice process, and would also lessen the availability of counsellors for their role as their time is taken up by making statements, Court appearances, and so forth.

The counselling process is built on trust. Rape Crisis services works from a principle of the empowerment of the survivor in recovery. If this legislation required a supporter and/or a counsellor to disregard survivor wishes and needs[3] this would compromise fundamentally a survivor's right to support and healing. If the unintended consequence of this legislation was that significant numbers of survivors would decide never to disclose the sexual violence to anyone, for fear of uncontrollable consequences to themselves and to those around them then this legislation will have not only have failed in its principal objective, to protect children, but will have caused harm.

Furthermore, the draft European Directive on establishing minimum standards of rights, support and protection for the victims of crime (2011) does not support a position of compelling victims to report crime. Article 7 of that Directive proposes a right to access victim support services, a right which will apply whether the crime has been reported or not.

In addition to adverse consequences for survivors' psychological recovery, there is likely to be a dramatic effect on their reporting rates to the Guards if such a law is passed. The available research suggests that with support, survivors are more likely to make and maintain a formal complaint to the Guards, and our own National Statistics have shown a dramatic upward trend in reporting to the Guards in the last couple of years. **It would be an enormous shame if this were to change as a result of this legislation.** Indeed, it would have potentially catastrophic consequences for the aims of the National Strategy on Domestic, Sexual and Gender-Based Violence generally, as diminished reporting leads to diminished levels of conviction and imprisonment of those responsible for sexual crimes. Ultimately, the danger is that we would regress towards a culture of near-impunity for sexual crimes.

[3] Children First obligations are of course a separate matter. RCNI is very conscious of the importance of compliance with such obligations.

"Reasonable Excuse"

Reasonable excuse becomes of the first importance if the aim of this legislation is to impose criminal liability to make a **formal statement** to the Guards. RCNI submits that it is appropriate that there should be a detailed, clear and **open** list of situations which would constitute a **"reasonable excuse"** whichever interpretation of failure to disclose is the correct one. For example, the following should be considered for inclusion:

(1)(b) RCNI submits that the phrase **"reasonable excuse"** should include any situation where the person with the information **or** a close family member or friend, has **good reason** to be afraid of the consequences from the alleged perpetrator for their own health, safety and well-being for themselves or that family member or friend, if he/she does disclose the information to the Guards. A maximum prison sentence of five years would seem to many people with vital information about a known member of a violent gang, for instance, to be a risk well worth taking when set against a very real risk of immediate and perhaps fatal violence to themselves and/or their loved ones.

(1)(b) RCNI submits that the phrase "**reasonable excuse"** needs more elaboration generally, with an open list of situations which do provide a reasonable excuse, such as instructions from the victim that he/she does not want the information to be given to the Guards. What about situations where the victim her/himself says that the matter has already been reported to the Guards? Does the duty to disclose remain where the victim has given assurances to the person receiving the information that the crime has indeed been reported to the Guards? Of course, this concern would only arise in relation to adult survivors of adult sexual crime, since Children First reporting obligations arise in relation to both children reporting recent sexual crime and adults reporting historic child sexual abuse.

(1)(b) RCNI submits that consideration needs to be given to the issue of whether to allow the known resolution of a domestic (which may include sexual) violence situation through a barring order or safety order in the Family Law Courts, to be regarded as a **"reasonable excuse"** not to report it to the Guards.

(1)(b) RCNI submits that the phrase **"reasonable excuse"** should certainly include situations where a parent or guardian (other than the alleged perpetrator), and indeed any person or organisation acting in loco parentis in good faith, decides **not** to make a formal report to the Guards about the crime in the best interests of the child victim. This kind of situation may be difficult to resolve of course if the expressed wishes of the child differ from the views of the responsible adult, and in our submission, the forthcoming legislation should address that situation by providing some means through which these competing rights may be balanced. Again, compliance with Children First guidelines in relation to the dangers to **others** is a separate matter.

(1)(b) RCNI submits that it is entirely right and appropriate that the list of what constitutes **"reasonable excuse"** should include the situation where the victim does not wish to make a report to the Guards on their own account. It cannot become a requirement to force victims of crime to undergo the rigours of our criminal justice system against their will, and any semblance of such compulsion is likely to a swift and steep decline in numbers reporting crime- which would in turn lead to increased offending, a catastrophic collapse of public faith in the criminal justice system and eventually, to a culture of criminal impunity. This **"reasonable excuse"** does not mean of course that existing administrative and eventually, statutory Children First obligations should not apply to the person and/or organisation hearing the information. RCNI submits that it would be helpful if the statute spelt this out.

(2) RCNI welcomes this subsection, as we think it entirely wrong in principle to impose any such criminal liability for withholding information on any child, vulnerable adult, or most particularly, on any victim of sexual crime.

(3) RCNI submits that there are circumstances in which a higher maximum penalty than five years would be justified fully, and that the legislation should provide for a higher penalty to be imposed in any case in which the person withholding the information was in a position of trust, authority and responsibility over children and/or vulnerable adults. In fact, this would reflect the higher penalties adopted under s.176 of the Criminal Justice Act 2006 in respect of the offence of reckless endangerment of children since this offence applies to person in authority or who have control over the child or the abuser. It is appropriate that such persons would have greater liability than persons who obtain such information in other less proximate situations. The penalty under s.176 is 10 years whereas the draft provision proposes a maximum term of 5 years.

Consideration could be given to the creation of a separate offence of instructing others to withhold the same or similar information. This offence should attract a higher penalty than a simple failure to disclose such information.

LPD RCNI

3 October 2011