

THE LAW ON SEXUAL OFFENCES

A DISCUSSION PAPER

Department of Justice, Equality and Law Reform

May, 1998

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Foreword by the Minister for Justice, Equality and Law Reform

I am pleased to publish this *Discussion Paper on the Law on Sexual Offences*.

The need for a review of the law in this area has become more pressing than ever. While the overall crime rate has fallen, we have seen a steady increase in the number of sexual offences recorded. Whether this is due more to a greater readiness to report offences of a sexual nature than to an increase in crime actually committed is not entirely clear. What is clear though is that it is timely to take stock of our legislative response to dealing with sexual crimes.

This Paper brings together detailed information on the existing criminal law on sexual offences. Some of these laws date back generations; others are relatively recent. The Paper recognises that even as regards the most recent of laws, there is always scope for change and improvement.

It is important that change should only come about after full public consultation. That is why this Paper is rightly concerned with obtaining views and opinions on a wide range of issues raised by the debate on sexual offences. Those views will be taken fully into account in the framing of any new legislation which will ensue from this Paper.

John O'Donoghue, T.D.
Minister for Justice, Equality and Law Reform

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Chapter 1



Introduction

Chapter 1

Introduction

- 1.1 This Discussion Paper represents an important stage in the process of evaluating the need for further reform of the law on sexual offences. Its purpose is to stimulate debate on the laws relating to sexual offences and to encourage interested groups and individuals to respond with their considered views on changes they would like to see made to those laws. In so doing the Paper's purpose is consistent with one of the key areas developed in *Delivering Better Government*, the programme for change for the civil service under the Government's Strategic Management Initiative.
- 1.2 There have been many welcome and positive changes to or affecting the laws relating to sexual offences in recent years. Those changes arose from a greater awareness of the problems of sexual abuse and violence and reflected the widely held view that the laws dealing with sexual offences were, in many respects, out of date. Society was developing in a way that allowed for greater and more open public debate and comment on those problems and that, combined with a very real sense of anger and injustice, provided the impetus for many of the legislative changes that were put in place.
- 1.3 This Discussion Paper provides an opportunity for legislative stock-taking. Having come so far in reforming the laws relating to sexual offences, it is an appropriate time to reflect on what has been achieved and to plan for what remains to be done. It is intended that this Paper will act as a catalyst for a vigorous and wide ranging discussion which will result in the final pieces being put in place in what will be a modern, responsive and comprehensive set of laws on sexual offences. The Paper is designed to focus on criminal law and while this involves touching on the sociological issues involved, the Paper is not intended primarily to address these issues.
- 1.4 Issues are raised in the Paper that are relevant and contentious. Questions are asked and, for convenience, these are highlighted at the end of each Chapter. The purpose of such a lay-out is not to limit the extent or parameters of the consultative process or the discussions; it is simply to draw particular attention to important issues on which views are sought. Careful consideration will be given to all views expressed on any aspect of the laws governing sexual offences.
- 1.5 Sexual offences have been the subject of numerous books, articles and reports in recent years. It would be pointless and self-defeating to repeat the level of detail provided in those documents (except where essential to do so) in an effort to produce an all-embracing Paper. Instead, this Discussion Paper should be regarded as a distillation of the issues that are still relevant.
- 1.6 One issue relevant to sexual offences that is not discussed in this Paper is the mandatory reporting of child abuse. Mandatory reporting is a commitment in the Programme for the Millennium. A broadly based Working Group has been established by the Department of Health and Children, who have the primary role in this area, to review the 1987 and 1995 Child Abuse Guidelines as a first step in creating an environment which will help to facilitate the reporting of

child abuse. The terms of reference of the Working Group are contained in *Appendix 1*.

- 1.7 Submissions on the Discussion Paper should be made by 28 August, 1998 and should be addressed to: The Secretary, Sexual Offences Review, Department of Justice, Equality and Law Reform, 72-76 St. Stephen's Green, Dublin 2. If you wish to FAX your views the number to use is Dublin (01) 6785786. The E-mail address is: discpap@justice.irlgov.ie

This Paper is also being made available on the Internet at <http://www.irlgov.ie/justice>

Chapter 2



Background

Chapter 2

Background

- 2.1 Two judgments of the Central Criminal Court delivered during 1995 had the effect of preventing information relating to a hearing of a prosecution for an incest offence from being disclosed. The first judgment, in the case of *the Director of Public Prosecutions v W.M.*, ruled that the words “*in camera*” in section 5 of the Punishment of Incest Act, 1908, must be taken to mean that all proceedings under that Act must be held, to quote the Court,
- “in total privacy and secrecy with the admission of no person, other than the immediate parties, including the Press with the community at large not being entitled to know even of the happening of the case, let alone any sentence which might be imposed.”
- The second judgment, in connection with the same case, followed an approach to the Court by the Eastern Health Board. The Court ruled that it was precluded by section 5 of the 1908 Act from disclosing whether the accused had been sentenced.
- 2.2 The judgments necessitated early legislative action to ensure that persons from the caring agencies such as social workers and other persons or bodies with a genuine interest in the outcome of incest proceedings would continue to have access to the information they required to safeguard the welfare of children. Accordingly, what was to become the Criminal Law (Incest Proceedings) Act, 1995 was introduced to deal with the immediate issue of publicity in relation to incest proceedings. That Act followed the publication of a Private Members’ Bill in the Dáil, the Criminal Law (Sexual Offences) Bill, 1995. The 1995 Act provides that access and reporting arrangements in incest cases are subject to the same access and reporting provisions as apply to rapes and sexual assaults under the Criminal Law (Rape) Act, 1981, as amended by the Criminal Law (Rape) (Amendment) Act, 1990.
- 2.3 The judgments also highlighted the need to examine what the access and reporting arrangements should be in the area of sexual offences generally. The policy and legislative considerations involved made it impracticable to produce legislative proposals which would fully deal with all the relevant issues within the short period of time available while the 1995 Act was being prepared. The intention was to address the outstanding matters in a discussion paper in order to give persons with expertise in the area of offending against children an opportunity to give their views. *Chapter 4* of the Paper is devoted to such publicity related issues.
- 2.4 During the course of the debates on the Bill to the 1995 Act it became clear that incest-related issues which went beyond issues raised in the Central Criminal Court case also needed to be examined. One such issue concerns sexual offences against children by persons such as adoptive parents, step-parents, etc., who fall outside the scope of the Incest Act. This issue is examined in *Chapter 7*.
- 2.5 More recently a number of wider issues have arisen in relation to sexual offences generally. One such issue is whether there is a need for a specific offence of child sexual abuse. This matter is addressed in *Chapter 8*. *Chapter 10* deals with

issues surrounding another question which has arisen in recent times in the context of sexual offences against children — the question of establishing a paedophile or sex offenders register.

- 2.6 Other recent developments include the Report of the National Women's Council of Ireland's Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence Against Women and Children and the Report of the Task Force on Violence Against Women. Those reports include many recommendations concerning rape and sexual assault and they are dealt with in *Chapters 5 and 6*.
- 2.7 Recent developments in Europe are also relevant. Since the discovery of the Belgian paedophile ring in August, 1996 and the Stockholm World Congress against the Commercial Sexual Exploitation of Children the same month, an EU Joint Action on Trafficking in Human Beings and the Sexual Exploitation of Children has been adopted. That Joint Action calls on EU Member States to review their national laws on trafficking in human beings and the sexual exploitation of children. The text of the Joint Action is *Appendix 2* to this Paper.
- 2.8 This Paper, therefore, covers a wide range of issues relevant to sexual offences. It has expanded substantially from the original intent and now takes account of the Reports and Papers to which reference has already been made as well as topics of current interest and concern. Many of the matters discussed raise difficult and complex issues, such as those covered in the Law Reform Commission Reports on Child Sexual Abuse and Offences Against the Mentally Handicapped. The preparation of the Paper has not, however, prevented progress being made on important issues. Recent initiatives include the Sexual Offences (Jurisdiction) Act, 1996, the "stalking" provision in the Non-Fatal Offences Against the Person Act, 1997 and the Child Trafficking and Pornography Bill, 1997. The Children Bill, 1996 will provide protection for children against sexual abuse by those persons in whose custody, charge or care they are.

Chapter 3



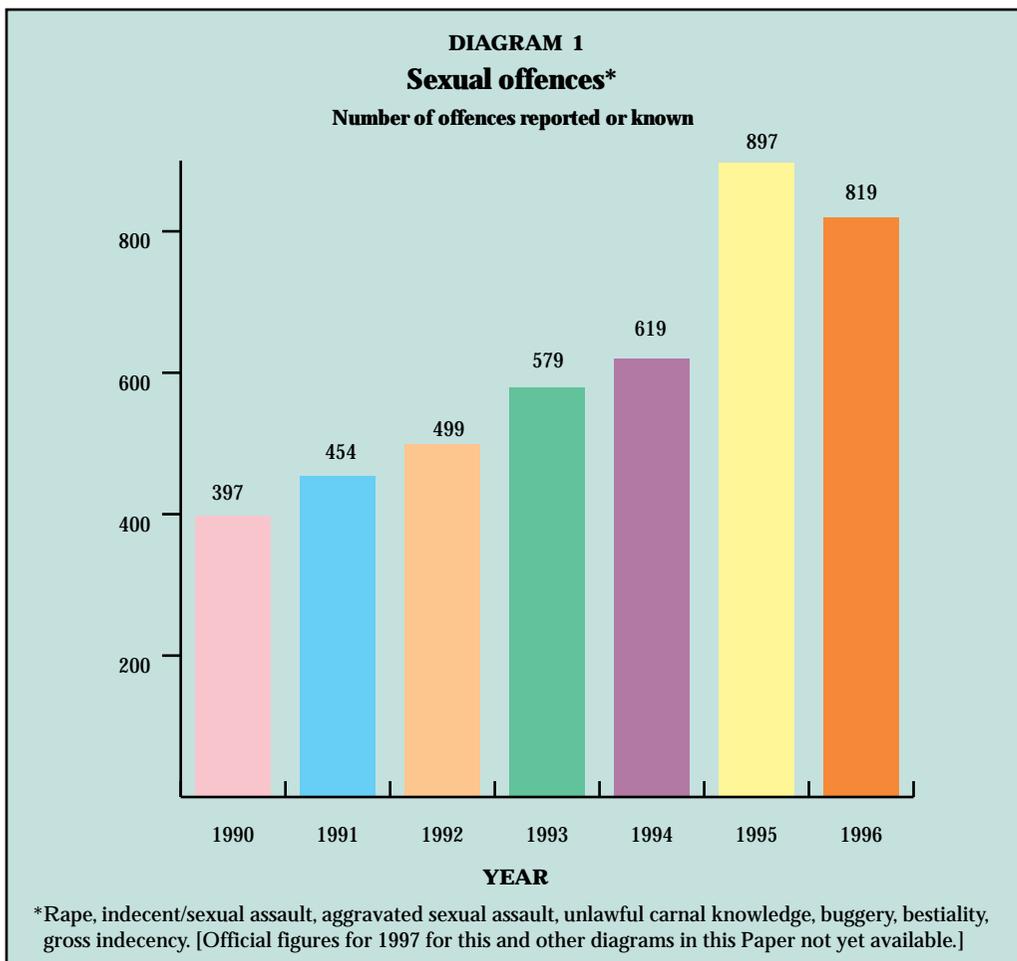
The Law in Relation to Sexual Offences

Chapter 3

The Law in Relation to Sexual Offences

3.1 Introduction

- 3.1.1 The criminal law already provides for a wide range of sexual offences and for severe penalties on conviction for those offences (see *Appendix 3*). A number of important developments have taken place in this area of the law in recent years which represent significant progress towards updating the law to reflect modern conditions.
- 3.1.2 From the foundation of the State to 1981 there was little change in the law on sexual offences. The only significant piece of legislation during that period that dealt specifically with sexual offences was the Criminal Law Amendment Act, 1935 which changed the law in relation to the protection of young girls and the law on prostitution. From 1981 onwards, however, several important pieces of legislation in this area of the law were passed by the Oireachtas.



- 3.1.3 The post-1981 reforms in the law have been significant and have represented a positive response to changes in the values and attitudes within our society. Typically the reforms followed a period of reflection and consultation. In many cases that process involved consultation papers and reports by the Law Reform Commission. This Paper is a continuation of that process.

The Law on Sexual Offences

- 3.1.4 There follows a brief outline of the laws governing sexual offences. This is not meant to be a comprehensive recital of those laws but rather a statement of those that are most relevant to the purpose of this Paper.

3.2 Criminal Law Amendment Act, 1935

- 3.2.1 Much of the 1935 Act has been repealed but, of the provisions still in operation, sections 1 and 2 form the bedrock of the protection given by the law to girls under 17 years of age. Section 1 of the Act provides a penalty of up to life imprisonment on conviction for unlawfully and carnally knowing a girl under 15 years of age. Section 2 provides maximum penalties of 5 years imprisonment in the case of a first conviction and 10 years in the case of second or any subsequent conviction for unlawfully and carnally knowing any girl under 17 years of age. The relevant ages prior to the 1935 Act were 14 and 16 years respectively.
- 3.2.2 Section 14 of the 1935 Act specifies 15 years as the age below which no consent can be given (by either sex) to any act alleged to constitute an indecent (now sexual) assault.

3.3 From 1981 to 1993

Criminal Law (Rape) Act, 1981

- 3.3.1 The Criminal Law (Rape) Act, 1981 was the first statute in recent times to amend the law in relation to sexual offences. The main features of the Act are as follows:
- it introduced a statutory element into the meaning of rape,
 - it provided that evidence of a complainant's past sexual history cannot be adduced in court without the leave of the judge,
 - it made it an offence to publish any information which would identify the complainant (except as otherwise directed by the judge),
 - it made it an offence to identify the accused (except after he has been convicted of the offence), and
 - it increased the penalty for indecent assault on a female to a maximum of 10 years imprisonment.

Criminal Law (Rape) (Amendment) Act, 1990

- 3.3.2 The Criminal Law (Rape) (Amendment) Act, 1990 further updated the law in relation to rape and other sexual offences in the light of recommendations in the 1988 Report of the Law Reform Commission on Rape. That Act:
- replaced the offence of indecent assault on a male or female with offences of aggravated sexual assault (maximum penalty: life imprisonment) and sexual assault (maximum penalty: five years imprisonment),
 - created a new offence of "rape under section 4", a sexual assault which includes penetration of the mouth or anus by the penis or of the vagina by an object manipulated by another person (maximum penalty: life imprisonment),

- provided for the removal of doubt as to whether a husband could be prosecuted for raping his wife,
- provided that cases of rape, rape under section 4 and aggravated sexual assault would be heard in the Central Criminal Court and that the public (but not the Press) would be excluded,
- extended to “sexual assault offences” (as defined) the provisions of the Criminal Law (Rape) Act, 1981 which relate to anonymity and the restriction on evidence in relation to the complainant’s past sexual experience,
- removed the rule by which males under 14 years of age were considered physically incapable of committing an offence of a sexual nature, and
- provided that the warning to the jury about the danger of convicting on the uncorroborated evidence of the complainant, instead of being mandatory, would henceforth be at the judge’s discretion.

Criminal Evidence Act, 1992

3.3.3 Part III of the Criminal Evidence Act, 1992 amended the law of evidence in criminal proceedings by making it easier for witnesses to give evidence in physical or sexual abuse cases by providing for evidence to be given by them by live television link. The evidence of a witness under 17 years of age may be given by live television link in those cases, unless the court sees good reason to the contrary. Other witnesses (over 17 years of age) may give evidence through a television link, provided that the leave of the court is obtained. The witness does not have to be the victim of the offence.

3.3.4 In the case of witnesses under 17 years of age, the 1992 Act introduced a number of further changes:

- wigs and gowns are no longer normally worn by the judge or by the barristers or solicitors concerned when evidence is being given through a live television link,
- questions to children may be conveyed through a competent intermediary appointed by the court,
- the videorecorded evidence of a person under 17 years of age at the preliminary examination of an offence is admissible at the trial as if it were direct oral evidence given at the trial, and
- videorecordings of statements made by persons under 14 years of age, who are alleged victims of sexual or physical abuse, during interviews with members of the Garda Síochána or other competent persons are similarly admissible (see *paragraph 3.3.8* below).

The operation of these provisions is subject to the control of the court and any evidence must be excluded if, in the interests of justice, it ought not to be admitted. Any witness who gives evidence by live television link may not have to identify the accused in court.

The Law on Sexual Offences

- 3.3.5 The 1992 Act also enables the court to receive the evidence of children under 14 years of age otherwise than on oath or affirmation if they are capable of giving an intelligible account of relevant events.
- 3.3.6 The above provisions of the 1992 Act apply also to persons with mental handicap.
- 3.3.7 The Act abolishes the requirement that a child's unsworn evidence be corroborated, along with the mandatory requirement that the jury be warned about convicting on a child's sworn but uncorroborated evidence.
- 3.3.8 Section 16(1)(b) of the Act and a number of consequential technical provisions are not yet in operation. Section 16(1)(b) makes admissible at the trial in certain circumstances out-of-court videorecordings of statements made during interviews with a member of the Garda Síochána or other competent person by victims under 14 of physical or sexual abuse. Prior to commencing the section standard practice guidelines for those who will videorecord the victims' statements are required. To this end, consultation with relevant interests is underway.
- 3.3.9 Under Part IV of the 1992 Act a spouse or former spouse is competent in all cases to give evidence for the prosecution and for the defence. A spouse is compellable to give evidence for the prosecution only if the other spouse is accused of violence against the spouse or of violence or a sexual offence against a child of either spouse or any other person under 17 years of age. A former spouse is compellable for the prosecution for those offences and also for any other offences committed outside the period during which the marriage subsisted. A spouse or former spouse is compellable for the accused. A spouse or former spouse is compellable for a person co-accused with the accused spouse only if compellable for the prosecution but this provision is without prejudice to the power of a court to order separate trials of persons charged in the same proceedings.
- 3.3.10 These provisions do not apply where the spouse or former spouse is charged with the accused in the same proceedings. The Act repealed the existing privilege for certain marital communications but there is a saver for any right of marital privacy.

Criminal Justice Act, 1993

- 3.3.11 The Criminal Justice Act, 1993 enables the Court of Criminal Appeal to review unduly lenient sentences. It also requires a court, when determining the sentence to be imposed for violent or sexual offences, to take into account any effect (whether long-term or otherwise) of the offence on the victim. Where necessary it can receive evidence or submissions on that issue. Where the victim applies to the court to give evidence as to the effect of such a sexual or violent offence on him or her, the court is obliged to accede to the victim's request and hear that evidence.

The Criminal Law (Sexual Offences) Act, 1993

- 3.3.12 This is the legislation that decriminalised homosexual acts between consenting adult males. It abolished the common law offence of buggery between persons but made it an offence to commit an act of buggery with persons of either sex

under 17 years of age or a mentally impaired person. The Act also replaced the offence of gross indecency with a new offence of gross indecency by a male with a male under 17 years of age and it updated the law in regard to the protection of the mentally impaired from sexual abuse. In addition, the Act made some necessary changes to the law on prostitution, details of which are set out in *Chapter 11*.

3.4 Recent Developments

The Criminal Law (Incest Proceedings) Act, 1995

- 3.4.1 This Act provides for the application to incest cases of provisions similar to the 1990 Rape Act in relation to the exclusion of the public from certain proceedings. *Bona fide* representatives of the Press, and others at the judge's discretion, are allowed to be present. The Act also provides for the verdict and sentence being announced in public.
- 3.4.2 The 1995 Act also increased the penalty for incest by a male with a female over 15 years of age from a maximum of 20 years imprisonment to a maximum of life imprisonment. The penalty for that offence had been a maximum of 7 years imprisonment under the Punishment of Incest Act, 1908 (as amended by the Criminal Law Amendment Act, 1935) but was increased to 20 years in the Criminal Justice Act, 1993. The maximum penalty for a male convicted of incest with a female under 15 years of age is life imprisonment and the maximum penalty for a female over 17 years of age convicted of incest is 7 years.

Sexual Offences (Jurisdiction) Act, 1996

- 3.4.3 Arising from increased awareness of the problem of child sex tourism in recent years together with concern about the rapid spread of the problem, a Private Members' Bill, the Sexual Offences (Jurisdiction) Bill, was tabled in the Dáil in 1995.
- 3.4.4 The Government gave its backing to the Bill. The outcome is the Sexual Offences (Jurisdiction) Act, 1996 which has two main purposes. First, it targets the child sex tourist by providing that Irish citizens or persons ordinarily resident in Ireland who engage in sex with children abroad can be dealt with by the Irish courts. Second, the Act targets organisers of sex tourism by making it an offence to arrange transport for, or actually transport, child sex tourists or to publish information on child sex tourism.

Criminal Justice (Miscellaneous Provisions) Act, 1997

- 3.4.5 Although there are many statutory provisions empowering the courts to issue search warrants to enable the Garda to search premises for various items including stolen goods, firearms and many other specific items such as video recordings and racist material, there was no general statutory provision for the issue of search warrants in relation to the commission of serious offences, including sexual offences.
- 3.4.6 Section 10 of the Criminal Justice (Miscellaneous Provisions) Act, 1997 rectifies the position by providing for the issue of a search warrant for the search of any place and any person found at that place where a judge of the District Court is

satisfied that there are reasonable grounds for suspecting that evidence of certain specified serious offences is to be found at that place. This, *inter alia*, enables the Garda to search for and seize evidence in relation to cases of rape and other specified sexual offences.

3.5 Proposed Legislative Changes

3.5.1 Although the following provisions in current Bills are not yet law, they are referred to in order to give as complete a picture as possible of the legislation, both enacted and in the pipeline.

Children Bill, 1996

3.5.2 Section 206 of the Children Bill provides for increased penalties for allowing children under 17 years of age to reside in or frequent brothels. (The present penalty maxima of £25 and/or 6 months imprisonment are being increased to £500 and/or 6 months imprisonment). The purpose of the section is to protect children from being in a morally questionable environment and from being in the company of prostitutes, brothel keepers, etc.

3.5.3 Section 207 of the Children Bill updates the offence of causing or encouraging the seduction or prostitution of a young girl. The new provision takes account of changes in the law on sexual offences in recent years and includes causing or encouraging the commission of sexual offences against children under 17 years of age *of both sexes*.

Child Trafficking and Pornography Bill, 1997

3.5.4 Following the Stockholm World Congress against the Commercial Sexual Exploitation of Children, the Belgian paedophile case and the subsequent E.U. Joint Action on Trafficking in Human Beings and the Sexual Exploitation of Children, it was clear that a review of the law relating to child pornography was urgently required. The Child Trafficking and Pornography Bill represents the outcome of that review. The main features of the Bill are as follows:

- it will be an offence to knowingly produce, print or publish child pornography or to advertise it (this includes using children to make child pornography),
- it will be an offence to knowingly import, export or distribute child pornography,
- it will be an offence to knowingly possess child pornography for personal use, and
- it will be an offence to allow children to be used to produce such pornography.

The maximum sentences of imprisonment following conviction on indictment will range from 5 years to 10 years, depending on the offence. All forms of child pornography — photos, films, videos or material in written or auditory form — will be covered as will the use of the Internet to knowingly distribute such pornography.

The Law in Relation to Sexual Offences

- 3.5.5 The Child Trafficking and Pornography Bill also makes it an offence to traffic children into, through or out of Ireland for the purpose of their sexual exploitation or to take or detain children for that purpose. Penalties of up to life imprisonment (trafficking) and 10 years (taking or detaining) are proposed.
- 3.5.6 These child trafficking and child pornography measures will give effect to provisions of the EU Joint Action on Trafficking in Human Beings and Sexual Exploitation of Children, so far as it applies to children.

Chapter 4



Publicity

Chapter 4

Publicity

4.1 Introduction

4.1.1 A number of issues surround the question of the public administration of justice and they are by no means straightforward. They can involve difficult questions such as what exactly is covered by the expression “the administration of justice”. Issues raised by the Central Criminal Court rulings (referred to in *paragraphs 4.3.4 to 4.3.7*) are among the issues of concern and include two main ones: restrictions on attending court hearings and restrictions on reporting cases.

4.2 The Law in relation to Administration of Justice in Public

4.2.1 Article 34.1 of the Constitution provides that the law should be administered in public except in special and limited cases prescribed by law. The text of Article 34.1 is as follows—

“Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.”

4.2.2 There are quite a few statutory exceptions to the administration of justice in public; the following are some examples:

Section 20(3) of the Criminal Justice Act, 1951 gives the courts a general discretionary power in any criminal proceedings “of an indecent or obscene nature” to exclude all persons from the court except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and such other persons as the court, in its discretion, permits to remain.

Section 45 of the Courts (Supplemental Provisions) Act, 1961 provides that justice may be administered other than in public in the following cases:

- (a) Applications of an urgent nature for relief by way of habeus corpus, bail, prohibition or injunction,
- (b) matrimonial cases,
- (c) lunacy and minor matters, and
- (d) proceedings involving the disclosure of a secret manufacturing process.

4.2.3 A number of other Acts of the Oireachtas contain provisions for hearings other than in public and they include the Companies Act, 1963 (section 205) as well as the Companies (Amendment) Act, 1990 (section 31), the Status of Children Act, 1987 (section 36), the Bankruptcy Act, 1988 (section 134), the Judicial Separation and Family Law Reform Act, 1989 (section 39), the Child Care Act, 1991 (section 29) and the Patents Act, 1992 (section 96).

4.2.4 In so far as sexual offences are concerned, the law provides for the exclusion of the public (in certain circumstances the Press will be excluded) in cases involving rape offences, offences of aggravated sexual assault and incest. These provisions,

which recognise the sensitivities surrounding the types of cases in question, are contained in section 6 of the Criminal Law (Rape) Act, 1981, as substituted by section 11 of the Criminal Law (Rape) (Amendment) Act, 1990 and in section 2 of the Criminal Law (Incest Proceedings) Act, 1995. They provide for the exclusion from the court of all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press and other persons at the discretion of the judge or the court. The provisions also provide that, in the proceedings concerned, the verdict and sentence (if any) shall be announced in public. In the case of an application to introduce evidence or cross-examine a complainant about his or her previous sexual experience, all persons are excluded from the court except officers of the court and persons concerned in the proceedings.

4.3 Incest and the Background to the Central Criminal Court Rulings

4.3.1 Any discussion on incest requires an examination of the rulings of the Central Criminal Court which gave rise to the Criminal Law (Incest Proceedings) Act, 1995 and to the practice prior to the rulings. But first some general points need to be made about incest.

What is incest and when is it charged?

4.3.2 The offence of incest was created by the Punishment of Incest Act, 1908. Under section 1 of the Act it is an offence for a male person knowingly to have sexual intercourse with his granddaughter, daughter, sister or mother. Consent is not a defence. Under section 2 of the Act it is an offence for a woman aged 17 years or older to knowingly permit her grandfather, father, brother or son to have sexual intercourse with her.

4.3.3 A charge of incest can arise in a number of circumstances. Strictly speaking the only situation where a charge of incest would be the only appropriate charge would be consensual intercourse between adult family members. In such a case both parties would be liable to prosecution. If there was no consent on the part of the woman, rape would be the appropriate charge. If the girl was under age, then it might be appropriate to charge the accused with an offence under section 1 or 2 of the Criminal Law Amendment Act, 1935, in addition to rape and/or incest. In practice the vast majority of incest cases brought to trial include a charge of rape.

The rulings

4.3.4 In February, 1995, the High Court sitting as the Central Criminal Court held in the case of the *Director of Public Prosecutions v W.M.* that section 5 of the Punishment of Incest Act, 1908 continued to have full force and effect. Section 5 of the 1908 Act provided that all proceedings under that Act are to be held *in camera*.

4.3.5 The accused in that particular case had been charged with two cases of rape and two of incest. He pleaded guilty to the incest charges and the rape charges were not proceeded with. The issue of the application of section 5 of the 1908 Act only arose in the context of passing sentence with respect to the incest charges and the judge held that the proceedings relating to the passing of sentence must be held *in camera* and the press excluded.

- 4.3.6 The ruling seemed to envisage that *in camera* proceedings must be heard “in total privacy and secrecy with the admission of no persons, other than the immediate parties, including the press. ... with the community at large not being entitled to know even of the happening of the case let alone any sentence which might be imposed.”
- 4.3.7 Later in the same month a further ruling was given on the issue. The Eastern Health Board sought to establish whether or not the person in question had been convicted and sentenced to a term of imprisonment as they were concerned about the need to initiate wardship proceedings if he was released so as to protect the safety and welfare of one of his children. The judge ruled that he was precluded by the 1908 Act from revealing to the Health Board the verdict and sentence (if any) in the case.

Practice prior to these rulings.

- 4.3.8 Where a person is charged with both incest and rape/aggravated sexual assault the trial takes place in the Central Criminal Court (rather than the Circuit Court) and the practice had been to apply the provisions of section 6 of the Criminal Law (Rape) Act, 1981, as substituted by section 11 of the Criminal Law (Rape) (Amendment) Act, 1990. This provides for the exclusion of the public from proceedings in a rape case but allows *bona fide* representatives of the Press, and others with the court’s permission (subject to the limited exception already mentioned — see *paragraph 4.2.4*), to remain and further provides that the verdict and sentence must be announced in public.
- 4.3.9 Where an incest charge is not associated with a charge of rape or aggravated sexual assault the trial is held in the Circuit Court. The practice in the Circuit Court prior to this judgement, at least in some instances, was to exclude the public — but the Press could attend subject to certain restrictions on reporting.

The Criminal Law (Incest Proceedings), Act 1995

- 4.3.10 With the changes already referred to introduced by the Criminal Law (Incest Proceedings) Act, 1995, access to incest proceedings and publication of verdict and sentence now follow the practice in rape cases.

4.4 Issues Discussed in this Chapter

- 4.4.1 The issues discussed in this Chapter are, on the face of it, closely related. However, they are separate and are dealt with in succeeding sections, as follows—
- (1) Restricting public access in the case of certain sexual offences other than rape and incest (*section 4.5*).
 - (2) Anonymity in the case of sexual assault offences (*section 4.6*).
 - (3) Anonymity in cases other than sexual assault offences (*section 4.7*).
 - (4) Anonymity in non-rape (consensual) incest (*section 4.8*).
 - (5) Reporting of sexual offences (*section 4.9*).

4.5 Restricted Access in the Case of Certain Sexual Offences

- 4.5.1 The question arises whether specific statutory provisions are needed to provide for restricted public access in the case of other sexual offences, particularly the following relating to offences against children and the mentally impaired.
- (a) Unlawful carnal knowledge of a girl under 15 years of age (section 1 of the Criminal Law Amendment Act, 1935).
 - (b) Unlawful carnal knowledge of a girl under 17 years of age (section 2 of the Criminal Law Amendment Act, 1935).
 - (c) Buggery of persons under 17 years of age (section 3 of the Criminal Law (Sexual Offences) Act, 1993).
 - (d) Gross indecency with a male under 17 years of age (section 4 of the Criminal Law (Sexual Offences) Act, 1993).
 - (e) Sexual intercourse or buggery with a mentally impaired person (section 5 of the Criminal Law (Sexual Offences) Act, 1993).
- 4.5.2 Similarly, there are no specific provisions restricting public access to trials for sexual assault of a male or female.
- 4.5.3 In considering the issue it should be borne in mind that the courts already have a general discretionary power to exclude persons from criminal proceedings of an indecent or obscene nature (see *paragraph 4.2.2*). The provision concerned, however, makes no specific reference to the publication of the verdict and sentence. Nor does the provision prevent the identification of the parties involved; this is addressed in *section 4.6* below.
- 4.5.4 The main argument in favour of having specific statutory measures to restrict public access to a wider range of sexual offence related trials is that while rape and incest will usually represent the most harrowing sexual offences, any offence of a sexual nature is distressing for those concerned and it is artificial to attempt to draw distinctions between the various types of such offences. Statutory intervention would also bring an element of consistency to the law for all sexual offences.
- 4.5.5 The main argument against specific statutory provision is that the courts already have a general power to exclude persons, essentially the public, from trials dealing with matters of an indecent or obscene nature, which they can exercise at their discretion. Also, having regard to the provisions of Article 34.1 of the Constitution, any departure from the norm must be confined to “a special and limited case”. It would seem that mere consistency of the law, i.e., treating all sexual offences the same, would not be a sufficient reason to depart from the norm that justice be administered in public.
- 4.5.6 A preferable approach could be to provide specific statutory measures governing restricted access to some sexual offence trials and not others. The issue is: which, if any, of the cases mentioned at (a) to (e) in *paragraph 4.5.1* can be regarded as being so special as to warrant restricted access?

4.6 Anonymity

- 4.6.1 Another issue under the heading of publicity is the extent to which the identity of participants in court proceedings in sexual cases should be protected. Two

principal issues arise in this context: the anonymity of the complainant and the anonymity of the accused. The law in this area has been updated in recent years in relation to incest and other sexual offences cases. This section and the next section of the Chapter briefly set out the law in relation to anonymity in sexual assault cases, as well as cases involving children, before going on to consider cases involving other sexual offences.

Anonymity of the complainant for sexual assault offences

- 4.6.2 Section 7 of the Criminal Law (Rape) Act, 1981, as amended by section 17 of the 1990 Act, prohibits the publication of matters likely to lead members of the public to identify the complainant in sexual assault offence cases, though it gives the court discretion to waive the anonymity requirement in certain circumstances. It is an offence for any matter to be published or broadcast in contravention of this provision, even if a complainant wishes to waive his or her anonymity and “go public”, unless it is done following a direction obtained from the court. There are two reasons for prohibiting publication, even where complainants wish to disclose their identity:
- (a) In 1981, when the concept was being introduced for the first time, it was considered that a blanket provision was necessary on the basis that if anonymity could be waived at the instigation of a complainant this could sow confusion in the minds of complainants generally as to whether they could protect their identities in a rape prosecution. It was felt that any such confusion could deter women from reporting rape.
 - (b) It could, in addition, be argued that complainants should be protected from pressure or inducement to allow their identity to be revealed.
- 4.6.3 The question arises as to whether the law should now be changed to allow publication in sexual assault cases where complainants wish to identify themselves. It could be argued that the reasons for the inclusion of the prohibition in 1981 are no longer valid in that the anonymity provision is so well established that any potential complainant would be aware of the entitlement to anonymity.
- 4.6.4 One possible approach put forward for consideration would be to allow the complainant to be publicly identified where the complainant so wishes and the court does not object. In such a scenario the court would have to be satisfied that the complainant, for whatever reason, including mental capacity, was fully aware of the potential consequences of being publicly identified as a complainant and was not under undue pressure or inducement (e.g. monetary) to do so. While the focus rightly should always be on the informed wishes and best interests of the complainant (including any psychological benefits that would accrue to the complainant by being able to acknowledge publicly that he or she had been the victim of a sexual assault), would any decision on waiving anonymity need to take account of the possible disturbing effects that that could have on his or her family and community.
- 4.6.5 The 1981 provisions relating to the anonymity of complainants were extended to all sexual assault offences, as defined in the 1990 Act, to include rape offences, aggravated sexual assault and sexual assault offences.

Anonymity of children

- 4.6.6 In the case of children who are complainants (or other witnesses), the practice generally has been not to publish the name of the child; it does not appear to be an offence to do so and this is something which is addressed in the Children Bill, 1996. Section 209 of that Bill will prohibit the publication of reports or pictures of a child complainant or witness, or any particulars leading to the identity of the child, in any proceedings in a court. The section will, however, also give the court power to lift the prohibition if it is satisfied that it is appropriate to do so in the interests of the child. Where the prohibition is lifted, the court will have to explain in open court why it is satisfied it should do so.

Anonymity of the accused for sexual assault offences

- 4.6.7 Section 8 of the Criminal Law (Rape) Act, 1981 provides for the anonymity of a person accused of a rape offence but that protection is lifted if the accused is found guilty. This was introduced as a counter balance to the anonymity provision for complainants in the event that the complaint was unfounded. It was considered that in the case of an allegation of rape an unscrupulous complainant could hide behind the anonymity provision while destroying the character of an innocent accused person if anonymity were not also granted to the accused unless and until found guilty.

4.7 Extension of Anonymity Provisions to Other Sexual Offences

Anonymity of the complainant

- 4.7.1 The offences listed at *paragraph 4.5.1* are all offences where consent is not a defence on the basis (a) that either the victims, because of their age or mental incapacity, are unable to give an informed consent or (b) of public policy grounds. The complainants in such cases are obviously in a very vulnerable position and the question arises whether similar anonymity provisions to those that apply in cases of sexual assault offences should also apply in these cases?
- 4.7.2 In practical terms, the detailed provisions in section 209 of the Children Bill, 1996 in relation to the anonymity of children in court proceedings will apply in the case of most of the offences in *paragraph 4.5.1* and if that section becomes law the question in relation to child complainants will become redundant. In addition, the offences in question will not normally be the only offences charged. It will be usual for other sexual offences (such as rape or sexual assault) to be charged and these will attract the anonymity provisions under discussion. Section 209 of the Children Bill will not, however, apply in the case of all mentally impaired persons (i.e. those over 18 years of age) so that in a case dealt with under section 5 (sexual intercourse or buggery with a mentally impaired person) of the Criminal Law (Sexual Offences) Act, 1993, where no other offence is charged, there may be an argument in favour of applying anonymity to the complainant.

Anonymity of the accused

- 4.7.3 Anonymity is provided for an accused only on a charge for a rape offence but that protection is lifted if the accused is found guilty. The question arises as to whether anonymity should be provided for an accused in the case of other sexual offences i.e., that the extension of the anonymity provisions for complainants to sexual assault offences, as defined under the 1990 Act, should be reciprocated

in the case of the accused. There is also an issue as to whether the anonymity of the accused should apply in the case of the offences listed at *paragraph 4.5.1*. It can be argued that, if anonymity is afforded the complainant in these cases, the accused needs similar protection against unfounded allegations. It can be further argued that rape is different from other sexual offences in that in certain cases the issue will not be whether intercourse took place but whether there was consent on the part of the complainant. In these cases, apart from the rape itself, there may be no other violence and the issue may revolve around one person's word against another. Although rape is intrinsically a violent crime, it may not necessarily always be accompanied by additional violence and to that extent rape can be distinguished from other sexual assaults. Rape can also be distinguished from the other offences listed at *paragraph 4.5.1*. In none of those cases is consent an issue so that the arguments that apply to the accused's anonymity in the case of rape would not apply in these cases either.

- 4.7.4 Are there any other circumstances where the anonymity of an accused should be maintained for any of these offences? For example, the circumstances of some of the offences concerned, such as unlawful carnal knowledge of a girl under 17 years of age, might not be straightforward and, indeed, the offence might not be an offence in other jurisdictions. If anonymity was afforded a defendant in such cases (or, in any other sexual offence cases, apart from rape) might it not be difficult to argue against its extension to other areas of the law where publicity could be a major embarrassment?

4.8 What Regime Should Apply to Non-Rape (Consensual) Incest?

- 4.8.1 As far as anonymity is concerned, the approach taken in the Criminal Law (Incest Proceedings) Act, 1995 is that the person charged and the person in relation to whom the offence is alleged to have been committed remain anonymous in all circumstances. The offence of incest can be committed between consenting adults in such circumstances that both parties are in effect offenders and there may not be a "victim". Anonymity for the complainant was introduced in rape and subsequently in sexual assault cases and extended to incest cases in order to protect the complainant and ensure that any actual or perceived barrier to a complainant coming forward on account of possible publicity would be removed. The question might legitimately be raised as to whether identity should be protected where there is no victim.
- 4.8.2 In favour of anonymity it can be argued that even in incest cases where rape is not an issue one party may well be in a position of domination over the other, a domination that may extend well into adult years. It can also be argued that publication of the names of the parties involved does not serve any public interest and would be a cause, at the very least, of embarrassment and distress to the entire family concerned. Against that is the argument that there may be no "victim" to protect in the consensual cases at issue and, accordingly, the full rigours of the requirement that justice be administered in public should apply. A possible solution might be to leave the court discretion to decide in each case whether the anonymity of such offenders should be protected.

4.9 Detailed Reporting of Sexual Offences

- 4.9.1 The provisions in the Rape Acts relating to access to and the reporting of hearings are intended to strike a balance between the requirement that justice be administered in public or the public's need to know and the need to protect

the complainant. Recent commentators have suggested that the balance struck might need to be re-assessed to take account of the impact of detailed reporting of sexual offences on society in terms of the imitative effect which it may produce, especially among impressionable young people, and in terms of its potential to lead to an acceptance of perverse or violent sexual activity as normal.

4.9.2 The Director of Public Prosecutions, Mr. Eamonn Barnes, put this view very strongly in an address he gave at the Burren Law School in 1995. The following is an extract from Mr. Barnes' address.

“Concern has been expressed at a recent court judgement to the effect that incest cases have to be heard in camera. I know I will be accused of wanting to sweep things under the carpet when I say that personally I am very inclined to think that that was an excellent development to which should be added many other cases of a similar nature. One matter on which the experts seem to be agreed is that violence is imitative and sexual violence is especially imitative. I wonder do our media managers, particularly in the print media, realise how widespread is the revulsion at the retelling, in the most salacious and perverted detail, of the quite disgusting actions of persons whose trials for child abuse are being so fully reported. It is of course important that the public knows that rape, incest, sexual assaults and child sexual abuse are as widespread as in fact they are. It is not, in my opinion, important or necessary or desirable that such cases be reported in terms which dwell, indeed concentrate, on the most revolting detail. I used to think, I still do actually, that money would not pay me for having to read such material in files. Newspaper editors however seem to think that their average reader wants and enjoys it. Perhaps they are right. If they are, I dread for our country's future. Constant saturation in depravity produces first a general mentality hardened to depravity, leading to its acceptance as part of normal human behaviour. Above all, in a small but important minority consisting of people especially susceptible to the malign influence of such behaviour, it produces imitative sexual offences. My personal conviction is that the public should be informed as fully as possible regarding the extraordinarily brutal and depraved crimes which are regularly committed in our country — I am referring not just to sexual crimes — but that this information should be imparted in a manner which alerts people to the danger rather than one which ultimately dulls the perception of the evil of the violence in our midst.

In 1995 it is singularly incorrect politically to make any suggestion which might smack of censorship. There is however a price in life for anything worthwhile and I do not think that many of the people and groups who are genuinely concerned with women's and children's rights and with their protection from attack realise that our new cultural freedoms may be militating against those very rights and protections. It is with genuine regret — because by instinct I would be generally opposed to censorship — that I feel that the time has come when, as a society, we have to look carefully at the public ethos and standards of behaviour which we are showing to our youth, while simultaneously expecting them to behave according to standards of another generation. The sad truth is that some of the breaches of Section 1 of the Criminal Law (Amendment) Act 1935, i.e. offences with

girls under 15, are committed consensually by boys who themselves are well under 15 years. They are getting very bad example from the preceding generation.’’

- 4.9.3 It would also be interesting to receive views on the effect or effects of detailed media reporting of sexual offences on complainants. It has been argued that it is helpful to a complainant to have public condemnation of the acts committed against him or her and that media coverage provides an important channel for such condemnation. However, a question which might be asked is whether it is in the public’s best interests to have unrestricted reporting on the *details* of sexual offences and, if not, how might the issue be addressed? More generally it has to be asked whether lurid detailed reporting of sexual offences is itself a form of unacceptable reporting?

4.10 Questions

- 4.10.1 Many questions have been raised in this Chapter which are important for the proper administration of justice. They strike at the very heart of our legal system. Nothing in the law should discourage victims of sexual crimes from reporting those crimes. Similarly, legal procedures should not encourage unfounded accusations of sexual offences. This Chapter has set out the present law on publicity generally in the case of sexual offences and has raised some relevant topics for discussion.

- 4.10.2 The principal issues on which views are invited are—

Is further statutory provision needed to provide for restricted public access to proceedings in the case of sexual offences, particularly offences relating to children and the mentally impaired?

Should the identity of the participants be protected in the case of non-rape (consensual) incest?

Is it in the complainant’s best interests to have unrestricted reporting on the details of sexual offences and if not how might the issue be addressed?

Should the anonymity of a complainant be lifted if the complainant so wishes?

Should the anonymity of the accused — now confined to rape offences (or where revealing his/her name might identify the complainant) be extended to any other sexual offence?

Chapter 5



Trial of Sexual Offences

Chapter 5

Trial of Sexual Offences

5.1 Introduction

- 5.1.1 Before referring to a number of issues relating to the trial of sexual offences, the purpose of criminal trials needs to be borne in mind in examining the issues.

Purpose of trials

- 5.1.2 The main parties to a criminal trial are the State, which of course prosecutes the case, and the accused, who defends the case. The essential purpose of such trials is to establish whether or not the accused is guilty of the offence charged. Alleged behaviour on the part of the accused is at the nexus of the criminal trial and it is the accused who, if found guilty, will be liable to serious consequences in the form of criminal sanctions, in some cases up to life imprisonment.

Role of complainant

- 5.1.3 While it has always been the case that the effect of a crime on the complainant has been an aggravating factor when it comes to sentence determination, it may be that our adversarial legal system did not always afford sufficient consideration to the part the complainant plays in the criminal justice process. Over recent years, however, the role of the complainant has been given greater attention and this has been reflected in the number of complainant-related changes that have already been made in the law.

5.2 Onus of Proof

- 5.2.1 The Working Party on the Legal and Judicial Process recommended that in rape trials, where consent is an issue raised by the defendant, the onus of proof should shift to the defendant to prove that he sought and obtained the consent of the complainant to sexual intercourse.

- 5.2.2 Rape has two main constituents: sexual intercourse by a man with a woman and the absence of consent on the part of the woman. In rape cases, therefore, consent, or rather the lack of consent, is a central feature. Indeed, in the many rape cases where the accused does not dispute the fact that sexual intercourse occurred, consent is *the* central issue. To shift the onus of proof of consent onto the accused would run counter to the principle that a person is innocent until proven guilty. Apart from the real risk of infringement of constitutional due process guarantees, such a course could give rise to grave miscarriages of justice. The possibility of miscarriages of justice as a result of a shift in the onus of proof would be particularly acute in rape cases when consent is the central issue: often in such cases it is one person's word against another's with no witnesses and little additional evidence on which to guide a jury. Where the act of sexual intercourse is not disputed, forensic evidence may be of reduced significance.

5.3 Warning About Uncorroborated Evidence

- 5.3.1 Section 7 of the 1990 Rape Act provides that, where a person is charged with an offence of a sexual nature, it is no longer a requirement that the jury be

given a warning about the danger of convicting on the uncorroborated evidence of the complainant. Now the judge decides on a case by case basis whether the jury ought to be given such a warning. That change in the law followed a recommendation by the Law Reform Commission in its 1988 Report on Rape that the warning should no longer be mandatory and that whether the warning should be given or not, and the terms in which it should be worded, should be left to the discretion of the trial judge.

- 5.3.2 In arriving at its conclusions the Law Reform Commission took the view that rape cases would arise in which the warning would be superfluous and might raise unnecessary doubts in the minds of jurors. A warning may, for instance, be unnecessary where clear evidence existed which was capable of corroborating the complainant's account. Equally, however, it is possible to envisage cases in which a warning would be appropriate — such as in cases where the parties already knew each other, the alleged offence took place in private and there was no forensic evidence supporting the charge.
- 5.3.3 The Working Party on the Legal and Judicial Process recommended that the discretionary power of the judge to issue a warning about uncorroborated evidence be abolished as unnecessary, and as seriously undermining the respect due to a complainant in cases of rape and sexual assault. The Working Party was of the view that current practice does not conform to the existing law; judges, they maintain, continue to give corroboration warnings on a routine basis.
- 5.3.4 The Task Force on Violence against Women recommended that all rules of law or practice relating to the judge's charge to the jury as to the uncorroborated evidence of complainants in all cases of sexual assault should be abolished and "the cases should be dealt with in the ordinary manner".
- 5.3.5 The question arises as to whether section 7 of the 1990 Act should be repealed, thus leaving this matter to the general law which may in fact be little different in practice to what is actually provided for in section 7. There is not, it is presumed, any suggestion that a judge be prohibited from issuing a warning where there is a lack of corroboration in any case where he or she considers it essential to avoid the possibility of an injustice.

5.4 Delayed Complaint

- 5.4.1 It is a feature of some types of sexual abuse cases that the abuse only comes to light many years after it took place. This can be a particular feature of abuse against young children, who may not fully understand the nature of what has happened or may be afraid to mention the abuse to anyone, or the mentally impaired, who may not have the verbal skills to articulate it, or those who have been placed in a position of fear by a violent or domineering abuser.
- 5.4.2 The Director of Public Prosecutions will decide, on the basis of the evidence, including the effect of a long delay on the reliability of the evidence or availability of witnesses, whether or not to prosecute any particular case. Specific statutory time limits on bringing proceedings for sexual offences are rare. Generally the courts have upheld the rights of persons to trials with expedition.

- 5.4.3 The Working Party on the Legal and Judicial Process recommended that in the case of a delayed complaint it should be compulsory for the judge to warn the jury that such delayed complaint did not imply falsehood on the part of the complainant, as there may have been good reasons why he or she did not complain immediately following the incident. The Task Force on Violence against Women adopted a somewhat different approach: it recommended that, “where [delayed complaint] is raised as an issue, it should be compulsory for the judge in appropriate cases, to warn the jury that there may be valid reasons as to why [the complainant] did not complain immediately following the incident”.
- 5.4.4 It is not clear that there is any difficulty in this regard. There have been many convictions in recent times in cases where abuse occurred many years previously. Views are invited on the need for a statutory warning of the type mentioned in *paragraph 5.4.3*.

5.5 Admissibility of Evidence of Complainant’s Past Sexual History

- 5.5.1 Under common law, evidence of the complainant’s past sexual history was considered relevant in a trial for rape. However, the law in this regard was changed in section 3 of the 1981 Rape Act, and section 13 of the 1990 Rape Act extended the section 3 provision to sexual assault offences, as defined in that Act. The law now provides that, except with the leave of the judge, no question can be asked in cross-examination and no evidence adduced about any sexual experience of a complainant with any person, other than that to which the charge relates.
- 5.5.2 The Working Party on the Legal and Judicial Process made three recommendations in relation to the issue of the complainant’s past sexual history. It recommended:
- (1) That the circumstances under which evidence is admissible in relation to the complainant’s past sexual history with other men and with the defendant should be “codified”.
 - (2) That, where the complainant’s credibility is attacked by disclosing his or her past criminal offences or previous sexual history, the defendant’s past record or sexual history should also be disclosed.
 - (3) That applications for the admissibility of the complainant’s past sexual history with the defendant should be made by the defence in writing. Where the judge allows such evidence, its relevance must be explained in writing; and the prosecution should receive reasonable notice in writing of its admissibility.
- 5.5.3 The Task Force on Violence against Women recommended that “leave to cross-examine a complainant regarding her previous sexual history should only be granted where it is proven to the court that the evidence is substantially relevant to the facts in issue, as envisaged in the 1981 Act, as amended”.
- 5.5.4 The question to be asked is does the present law strike a reasonable balance between, on the one hand, the right of the complainant not to have unnecessary intrusions into his or her private life with possible prejudice to the prosecution case and, on the other hand, the right of the defendant to a fair trial, and is there any evidence that it does not strike such a balance? The test which must

be applied by the judge in applying section 3 of the 1981 Act is very specific. It is whether the accuracy of the evidence or the effect of the cross-examination will make the difference between a finding of guilt or an acquittal. In addition the evidence must, of course, be relevant. Constitutional due process considerations almost certainly preclude the possibility of prohibiting a judge from using his or her discretion to admit evidence. Another possible way of meeting the concerns about the admission of evidence about a complainant's past sexual history following the investigation under section 3 of the 1981 Act is discussed in the next section.

5.6 Legal Representation for Complainants

5.6.1 The Working Party on the Legal and Judicial Process had, as one of its specific terms of reference, to review past recommendations that there should not be separate representation for complainants of sexual and other crimes of violence against women and children. The Working Party concluded that separate legal representation for complainants in rape and sexual assault cases would provide much-needed support for complainants, render the trial process considerably less traumatic for them, and would contribute significantly to bringing about an increase in the reporting of rape. The Working Party recommended that “mechanisms for the provision of separate legal representation, including its insertion within the legal aid system, be developed and implemented.” The basis for the recommendations is two pieces of research cited in the Working Party's report.

5.6.2 There are, however, problems with introducing such a radical change. The Law Reform Commission in its Report on Rape recommended that there should not be any provision for separate legal representation of the complainant. They questioned the constitutional propriety of such a proposal stating that—

“It might ... be constitutionally suspect, since it tilts the balance of the criminal process significantly in favour of the prosecution in a defined range of offences by permitting a dual representation hostile to the interests of the accused, thereby depriving him of one of the long standing benefits of a criminal trial conducted “in due course of law”.”.

This view is supported by the judgment of Mr Justice Flood in the case *The People v M.C.* (Central Criminal Court, 16 June 1995). In his judgment the judge considered section 5 of the Criminal Justice Act, 1993 under which an injured party has a statutory right to give evidence as to the effect of the offence on him or her when the court is determining sentence. The judge was of the opinion that section 5 does not have the effect of making the injured party an independent party in a criminal trial and “the constitutional validity of a statutory provision to that effect would be very doubtful”.

5.6.3 The Law Reform Commission were also of the view that the proposal might lead to unjustified acquittals—

“there must also be serious uncertainty as to the effect it would have on the trial of such cases. In some cases, far from assisting in the conviction of guilty rapists, it might so complicate the hearing and alienate the jury as to result in unjustified acquittals”

5.6.4 The report of the Second Commission on the Status of Women also examined this matter and decided that separate legal representation for the complainant was not feasible.

- 5.6.5 The Report of the Task Force on Violence against Women indicated that the question should be addressed in this Paper.
- 5.6.6 A number of measures have been introduced over recent years to improve the position of the complainant in the criminal trial process and to reduce the sense of alienation and helplessness that sometimes arises. For example, procedures are now in place whereby the prosecution team arrange for pre-trial consultations with complainants in cases of serious sexual assaults to familiarise them with the legal procedures and to explain the layout and procedures of the court and the type of matters which may be the subject of examination by counsel.
- 5.6.7 Another positive development was the extension of the Civil Legal Aid Scheme to allow a complainant in cases of serious sexual assaults to consult a legal aid solicitor who may accompany the complainant into court. That entitlement to legal advice has been put on a statutory basis: section 26(3) of the Civil Legal Aid Act, 1995 provides that—
- a complainant in a prosecution for the offence of rape under the common law or under section 2 of the Criminal Law (Rape) Act, 1981 or of aggravated sexual assault under section 3 or of rape under section 4 of the Criminal Law (Rape) (Amendment) Act, 1990, or of unlawful carnal knowledge under section 1 or 2 of the Criminal Law Amendment Act, 1935, or of incest under section 1 or 2 of the Punishment of Incest Act, 1908, shall qualify for legal advice free of any contribution.
- 5.6.8 Other statutory procedural improvements have been introduced. As already indicated, the 1990 Rape Act extended the restrictions on the cross-examination of the complainant on her or his past sexual history, which previously applied only to rape, to all sexual assault offences. Under the Criminal Justice Act, 1993 the court is required in determining sentence to take into account the effect of the crime on the victim and to this end can receive evidence from the victim. That Act also enables unduly lenient sentences in all indictable offences including rape and other sexual assault cases to be appealed by the prosecution.
- 5.6.9 The point to be addressed is whether any more can be done legislatively to assist complainants in rape and other serious sexual assault cases. Any proposals would have to overcome the constitutional difficulties referred to above. It is doubtful if separate legal representation could be given, if to do so would be to create an independent party, in addition to the prosecution and the accused, at the trial. One suggestion that is put forward for consideration is that separate legal representation might be allowed to the complainant in the situation where an application is made to the court in the course of the trial to adduce evidence or cross examine about the complainant's past sexual history (the so called "trial within a trial") and for the purposes of that application only. The application (under section 3 of the 1981 Act as amended) is made in the absence of the jury, consists essentially of legal argument and relates to matters of much concern and great potential trauma to the complainant. Thus, the jury could not be influenced by separate legal representation for the duration of the application. In the final analysis this is a matter requiring constitutional advice but views would be welcome.

5.7 Trial in Central Criminal Court

- 5.7.1 The Working Party on the Legal and Judicial Process recommended that in cases where the complainant in an incest case is under 21 years of age, in sexual offences cases involving girls under 15 years of age or in the case of buggery where the complainant is under 15 years of age, the trial should take place in the Central Criminal Court.
- 5.7.2 The arguments in favour of adopting such a proposal include marking the gravity of the offence, and facilitating more consistent sentencing. Since many of these cases also involve a charge of rape (which is exclusively triable in the Central Criminal Court) the number of additional Central Criminal Court cases the proposal would give rise to may be quite small.
- 5.7.3 At present only the gravest of offences, such as murder, rape, rape under section 4, aggravated sexual assault, treason and genocide are exclusively triable in the Central Criminal Court. While there may be merit in the proposal in so far as marking the gravity of the offence is concerned, as already mentioned, the charges are often accompanied by a rape or aggravated sexual assault charge (and it is likely that these will constitute the most serious of the offences in question) and they will already be triable in any event in the Central Criminal Court. The point about consistent sentencing would only be relevant if it could be shown that there is a pattern of inconsistency in the way these sentences are dealt with in the Circuit Court and at present, of course, any such inconsistency, apart from the normal variations in sentencing one would expect in cases before the courts (no two cases are the same) can be dealt with under the “unduly lenient” sentencing provision in the 1993 Criminal Justice Act.

5.8 Questions

- 5.8.1 This chapter has dealt with certain matters concerned with trial procedures in rape and other serious sexual assault cases. The main issue relates to how the trial process might be made less traumatic for the complainant in these cases.
- 5.8.2 Views are invited in particular on the following—

Is any further change in the law needed in relation to the warning about uncorroborated evidence?

Is there any need to change the law to provide for a statutory warning of the type mentioned in *paragraph 5.4.3* in relation to delayed complaints?

In the light of the problems, including constitutional concerns surrounding the matter, it may be the case that separate legal representation for complainants in sexual assault trials creates insurmountable difficulties. If it were constitutionally feasible would there be a case for having such representation for the duration of an application to adduce evidence or cross-examine a complainant about his or her past sexual experience? Are there other means of supporting complainants in the context of the trial or of making the trial process less traumatic for them?

Is there a case for other sexual offences, in addition to rape and aggravated sexual assault, being triable exclusively in the Central Criminal Court?

Chapter 6



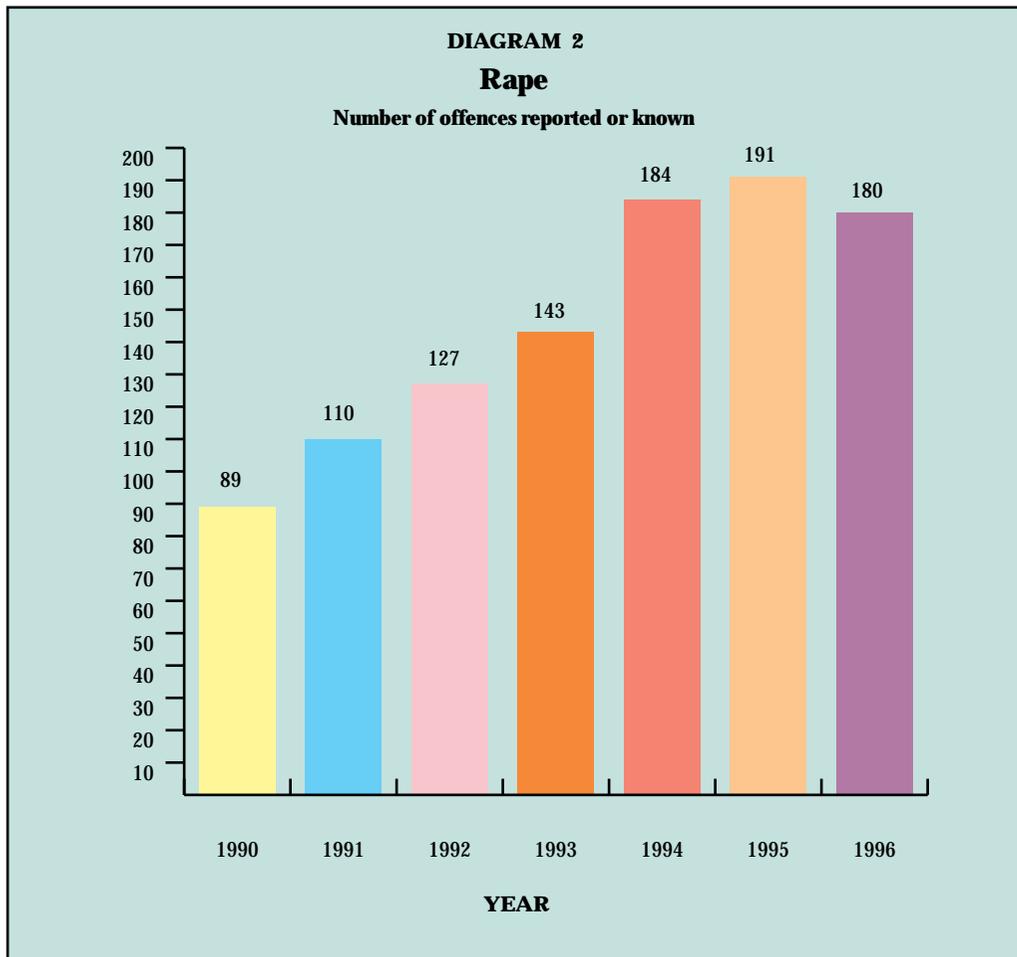
Rape and Related Offences

Chapter 6

Rape and Related Offences

6.1 Introduction

- 6.1.1 Significant changes have been made in the law on rape in the last two decades. With the Criminal Law (Rape) Act, 1981 and the Criminal Law (Rape) (Amendment) Act, 1990 in place, the focus for any discussion on the rape laws need not concentrate on reform as such, but rather on teasing out any remaining changes that may be desirable. The 1990 Act in particular is an enlightened and, in many respects, a ground breaking, piece of legislation.



6.2 “Codification”

- 6.2.1 The Working Party on the Legal and Judicial Process recommended that consideration be given to the codification (i.e., amalgamation) of rape and sexual assault offences with a view to creating an offence of ‘penetrative sex’ (rape) and ‘non-penetrative sex’ (sexual assault). These offences would have within them different categories of offence. For example, included under rape there would be the offences of incest and unlawful sexual intercourse with persons below a particular age. Sexual assault would have the same constituents as at present.

The Law on Sexual Offences

- 6.2.2 In its 1988 Report, the Law Reform Commission considered several approaches to change in this area of the law. One of the approaches considered was similar to the one recommended by the Working Party but it did not find favour with the Commission. (The Commission's recommended definition of "rape" — apart from one aspect, dealt with below, and the replacement of the offence of indecent assault with new offences of aggravated sexual assault and sexual assault, were accepted and are reflected in the 1990 Act.)
- 6.2.3 The case for amalgamating the laws relating to sexual assault offences into two offences, penetrative and non-penetrative, is that it would recognise the gravity of all penetrative offences. It would also recognise the claim of the artificiality of distinguishing penetration of any of the body orifices. The case against is that there is a substantive difference between rape and other penetrative offences in that pregnancy can result from rape. Also, rape is unique in that it is the absence of consent to intercourse that constitutes the essential ingredient of the offence. While most rape offences will also involve additional grave violence (i.e., additional to the rape itself) against the woman, the offence can also be committed where there is no such additional physical violence. Furthermore, there is no evidence that the present laws, particularly those introduced in the 1990 Act, are not working well. That Act provided for a new offence of "rape under section 4" which dealt with particularly grave sexual assaults not amounting to rape involving penetration of bodily orifices with a maximum penalty of life imprisonment. It could also be argued that the change advocated could diminish the gravity of rape as a separate offence under our laws.

6.3 Definition of "Rape under Section 4"

- 6.3.1 The Working Party on the Legal and Judicial Process recommended that section 4 of the Criminal Law (Rape) (Amendment) Act, 1990 be extended to include penetration of the anus by an object.
- 6.3.2 Section 4 of the 1990 Act provides that "rape under section 4" means a sexual assault that includes—
- (a) penetration (however slight) of the anus or mouth by the penis, or
 - (b) penetration (however slight) of the vagina by any object held or manipulated by another person.
- 6.3.3 In its 1988 Report on Rape, the Law Reform Commission recommended that the crime of rape should be defined by statute so as to include non-consensual sexual penetration of the major orifices of the body, i.e. the vagina, anus and mouth by the penis of another person or of a person's vagina *or anus* by an inanimate object held or manipulated by any other person and in this form the crime should be capable of being committed against men and women.
- 6.3.4 While the 1990 Act followed to a large extent that recommendation by the creation of an offence of "rape under section 4" it did not include in the definition of the offence penetration of the anus by an object. In favour of amending the definition of rape under section 4 is the argument that it is somewhat artificial to attempt to distinguish penetration of any of the body orifices because the attack on the dignity and bodily integrity of the victim, and his or her utter and complete humiliation, is the same in all cases of penetration. The reasons given at the time of the debates on the 1990 Act for not including the penetration of the anus by an object in the definition of the offence were—

- (1) a grave sexual assault involving penetration of the anus by an object would come within the general meaning of an aggravated sexual assault,
- (2) there are times when penetration of the anus might not amount to an aggravated sexual assault, such as horseplay between schoolboys which results in penetration of the anus by an object such as a pencil and it would be wrong to categorise such as rape.

The penalty is not an issue — penetration of the anus by an object which was an offence of aggravated sexual assault, could attract a maximum penalty of life imprisonment, the same as for rape under section 4.

6.4 Consent

6.4.1 Section 9 of the Criminal Law (Rape) (Amendment) Act, 1990 states—

“It is hereby declared that in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission by that person to offer resistance to the act does not of itself constitute consent to the act.”

This provision was based on a recommendation of the Law Reform Commission in their 1988 Report on Rape.

6.4.2 Also, in the Criminal Law (Rape) Act, 1981 section 2(2) states—

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

6.4.3 The Law Reform Commission further recommended that the word “consent” be defined on the following lines—

“ ‘Consent’ means a consent freely and voluntarily given and, without in any way affecting or limiting the meaning otherwise attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deception or fraudulent means.”

This recommendation, which was not accepted, was based on the possibility of problems arising in the future over the absence of a definition rather than any existing problems.

6.4.4 The absence of consent is the central ingredient of rape. What may pass for consent may, on closer examination, have been brought about by fear or fraud and may not have been given freely or voluntarily. The question arises as to whether the law in this respect, as built up in the courts over many years, is adequate, or whether a statutory definition could afford greater protection to women, particularly in cases where the threat is not of physical harm.

6.4.5 The many and varied circumstances in which consent can be the issue, and the relevant case law, are set out by Thomas O’Malley in his book, *Sexual Offences; Law, Policy and Punishment* (published by Round Hall Sweet & Maxwell, Dublin). For the purpose of this Paper all that it is necessary to ask is whether the present mixture of statute and case law on the issue of consent offers a better and more flexible balance than would an attempt at a more all-embracing

statutory framework? Crucial to the answer is whether any change in circumstances since 1988 have affected the assertion of the Law Reform Commission that it was not aware of any problems having arisen as a result of the “non-definition” of consent. No such change has been brought to notice but views on the issue would nevertheless be welcome.

6.5 Information and Consultation

- 6.5.1 The Law Reform Commission recommended in its Report on Rape that certain administrative changes should be made designed to alleviate the distress of the complainant in rape trials. These included the complainant being given a copy of her statement by the Gardaí as a matter of course, that the complainant be kept fully informed by the Gardaí of developments and that she be afforded access to the solicitor and counsel acting for the prosecution before the hearing of the case in court. The Working Party on the Legal and Judicial Process recommended that the Law Reform Commission’s recommendation be given the force of law.
- 6.5.2 In order that a fully informed discussion on the foregoing can take place, the following is the present administrative practice. The Director of Public Prosecutions has instructed that female complainants in sexual cases should be informed that if they wish to have a pre-trial meeting with a prosecution lawyer, it will be arranged. Ideally such meetings should take place earlier than on the morning of the start of the trial and should be attended by counsel and an appropriate member of the Gardaí. The meeting is regarded as a familiarisation process for the complainant regarding the legal procedures in which she will be involved.
- 6.5.3 A copy of a female complainant’s statement in every sexual offence case is supplied to her as soon as possible after the statement is taken. In the case of a young complainant, it is furnished, subject to the complainant’s consent, to her parent or guardian. A copy of the statement can also be supplied at the pre-trial meeting.
- 6.5.4 The training received by the Gardaí on rape and sexual assault reflects the most modern thinking and developments in this area. All student Gardaí undergo instruction on rape and sexual assault. Lectures are given by Garda College staff and the course content is continually revised and updated. External professionals also give lectures to students. Student Gardaí are also exposed to practical investigation of rape and sexual assault cases. Courses are also ongoing for members (male and female) in the operational field. These courses are continually evaluated and updated.
- 6.5.5 The argument in favour of the Working Party’s recommendation is that a statutory procedure would ensure that every rape complainant would at least be given a minimum amount of information and an adequate level of consultation. The argument against is that legislating for administrative procedures fails to cater for the type of flexibility and sensitivity necessary when dealing with victims of crime, particularly sexual crimes. The Gardaí and prosecution service might be placed in a statutory straightjacket from which they would be unable to escape when dealing with the unique circumstances of each case. There is also the point that statutory procedures might not take account of the wishes of the complainant where those wishes were at variance with the

legislation. For example, not all complainants would necessarily wish to have all of the above procedures applied to them.

6.6 Questions

6.6.1 The following are the main questions in this Chapter on which views are requested.

Would there be any benefit in creating an offence of ‘penetrative sex’ (rape) and ‘non-penetrative sex’ (sexual assault) in view of the difficulties such a change in the law would give rise to?

Should ‘rape under section 4’ be extended to include penetration of the anus by an object?

Has there been any change in circumstances since the enactment of the 1990 Criminal Law (Rape) (Amendment) Act which would warrant statutorily defining “consent”?

Chapter 7

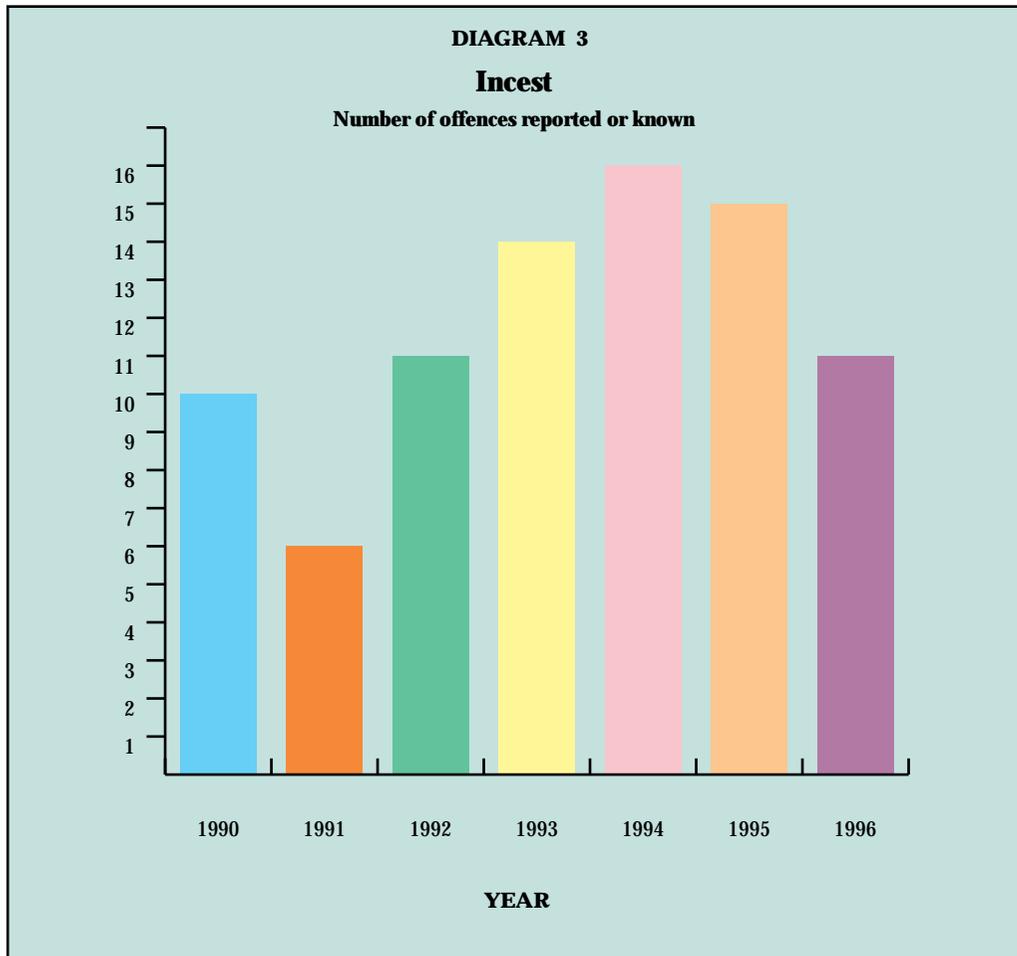


Incest

Incest

7.1 Introduction

7.1.1 The changes to the laws on incest resulting from the Criminal Law (Incest Proceedings) Act, 1995 (see *paragraphs 3.4.1* and *3.4.2*) were brought in as a matter of urgency because of judgments of the Central Criminal Court. That meant that there was not sufficient time to examine other less urgent aspects of the law on incest. Those issues are discussed in this Chapter.



7.2 Extended Incest Offence

7.2.1 During the passage through the Dáil of the Bill of the Criminal Law (Incest Proceedings) Act, 1995, an amendment was proposed which would have had the effect of extending the offence of incest to the non-blood relationships of step-parent and step-child and adoptive parent and adopted child. A recommendation along the same lines is contained in the Report of the Working Party on the Legal and Judicial Process.

7.2.2 At present it is an offence for a man to have carnal knowledge of a female person who is, to his knowledge, his grand-daughter, daughter, sister or mother (i.e. within the prohibited categories). The argument for extending the scope of the offence is that in step-parent and adoptive parent situations, the child is, for

all intents and purposes, part of a family and its relationships are no different in familial terms to those of children to their biological parents.

- 7.2.3 If the laws on incest were so extended, a question to be asked is would such a child have any more protection from the law than at present? Also, would an extension outside the historical consanguineous relationship dilute the offence to the point that the case for a separate incest offence would diminish?
- 7.2.4 If it were decided to extend the incest laws beyond the present categories based on consanguinity to second families and adoptive families, would there be any case for a further extension, for example to any family with whom a child is living permanently or on a long-term basis, e.g., foster families.

7.3 Gender Aspects and Penalties

- 7.3.1 Any male person who has carnal knowledge of a female within the prohibited categories is liable to be imprisoned for up to life (section 1 of the Punishment of Incest Act, 1908 as amended by section 5 of the Criminal Law (Incest Proceedings) Act, 1995). There is no age limit below which a male cannot be charged with incest, apart from the age of criminal responsibility, at present 7 years of age, due to be raised to 10 years by virtue of the Children Bill, 1996.
- 7.3.2 Any female person who is aged 17 years or over who consents or permits a relative from the prohibited categories to have carnal knowledge of her is liable to be imprisoned for up to 7 years (section 2 of the Punishment of Incest Act, 1908).
- 7.3.3 Four issues are raised by the way the present law is framed. First, the provision referred to in *paragraph 7.3.2* presumes that the female is never the instigator. Second, females under 17 years of age cannot be charged with incest. Third, the maximum penalty for the male (life imprisonment) is significantly higher than for the female (7 years). Fourth, there is no age, apart from the age of criminal responsibility, below which a male cannot be charged with incest. Prior to the Criminal Law (Rape) (Amendment) Act, 1990, a male under 14 years of age could not be convicted of an offence that consisted of sexual intercourse; that meant he could not be convicted of incest (or, of course, of any offence of which sexual intercourse was an ingredient). The 1990 Act abolished the rule.

Instigation of incest

- 7.3.4 The four questions raised in the previous paragraph are closely related and overlap, but will be dealt with in this section as separate topics. The provision in section 2 of the Punishment of Incest Act, 1908 would, on the face of it, appear to portray adult women in a passive manner, even when they have committed a crime. The reality may have more to do with the usage in the Act of the term “carnal knowledge” which implies an act by a male against a female. A change in the term from “carnal knowledge” to “sexual intercourse” could facilitate a rewording of section 2 of the 1908 Act so that the offence would be one of a female over 17 years of age having sexual intercourse with a relative from the prohibited categories (grandfather, father, brother or son). While any such change might result in an offence expressed in more modern terms, and would more accurately reflect the reality of some incestuous relationships, such as mother/son, it would not change the essential nature of the offence.

Liability of women

- 7.3.5 The legal provision that restricts the commission of an offence of incest to women of 17 years of age or over is related to the provision that exempts girls generally who are under 17 years of age from criminal liability when they engage in consensual sexual intercourse (see *Chapter 8.4*). In the case of incest, the arguments in favour of a change in the law that would make females under 17 years of age criminally liable (at least in certain circumstances) are that it would be equitable and recognise reality. For example, a 16 year old girl might instigate a sexual relationship with a younger brother or half-brother. In that circumstance the brother could be charged with incest while the older sister could not. As against that, making under-age girls liable for the crime of incest in any circumstances might be seen as eroding the protection given by the law at present to girls under 17 years of age. Views on this question are invited.

Penalties

- 7.3.6 The 1908 Act provided a penalty of penal servitude (which now refers to imprisonment) of not less than 3 years and not more than 7 years for incest by a male (the penalty was for up to life imprisonment where the girl was under 13 (now 15) years of age). The penalty for incest by females over 16 (later 17) years of age was also penal servitude for not less than 3 years and not more than 7 years. However, the penalty for incest by a male has been increased, first to up to 20 years imprisonment by the Criminal Justice Act, 1993 and later to up to life imprisonment by the Criminal Law (Incest Proceedings) Act, 1995. The penalty for incest by a female over 17 years of age has remained unchanged since 1908.
- 7.3.7 Is there a case for having a common penalty structure for males and females convicted of incest? If an adult brother and sister were convicted of the offence of committing consensual incest with one another, the brother would be liable to up to life imprisonment while the sister would be liable to up to 7 years imprisonment. While it could be argued that the imposition of the maximum penalties in such a case is improbable, the fact that it is possible may support an argument in favour of the penalties being brought into line. While the obvious move would be to increase the penalty for incest by females to a maximum of life imprisonment, it may be that the penalty as it applies to male incest should be reconsidered, even though it is only on the statute books since 1995. The legislature in increasing the penalty in the case of the offence committed by a male was obviously concerned about the case of domineering fathers abusing daughters who were in their later teens.
- 7.3.8 The question to be asked is whether the penalty for committing incest with a girl should be the same no matter what the age of the female. Where sexual intercourse takes place between a male and a female in a non-incest situation the maximum penalty for the male where the girl is under 15 years is life imprisonment and where the girl is over 15 years it is 5 years imprisonment for a first offence and 10 years for a second or subsequent offence. While the reasoning behind a higher penalty for incest can be understood and justified in the context of the male being in a position of authority, that may not always be the case, such as in mother/son or younger brother/older sister relationships. The question on which views are invited is whether there is a case for aligning the penalties for incest with those for unlawful carnal knowledge or whether

The Law on Sexual Offences

those for incest should be greater in order to recognise the greater pressures that can be brought to bear in an incestuous relationship. A second issue on which views are invited is whether the penalties for incest by a male and a female should be aligned leaving it to the court to decide in individual cases the severity of the sentence.

Age of male

- 7.3.9 Section 6 of the Criminal Law (Rape) (Amendment) Act, 1990 abolished the rule by virtue of which a boy under 14 years of age was treated as being physically incapable of committing an offence of a sexual nature. This means, inter alia, that a boy of any age over the age of criminal responsibility could be convicted of incest. At present that age is 7 years but the Children Bill, 1996 proposes to raise it to 10 years and there is a mechanism in the Bill to raise it at a later date to 12 years. At that time, unless there is an exempting provision, any male of 12 years of age or over will be capable of being convicted of incest.
- 7.3.10 It is possible that boys as young as 10 years of age are physically capable of committing sexual offences involving sexual intercourse. However, in the case of incest, it is more likely that young boys would be the victims rather than the instigators of the offence. Therefore, should there be an age below which a male could not be charged with incest? The argument in favour is that young boys should not be open to prosecution where abuse is instigated by, say, an older sister (who would herself be immune to prosecution if under 17 years of age). The arguments against are that any age chosen would be arbitrary and it is a matter that might be better left to prosecutorial discretion. In any case, if there is a problem with the absence of a minimum age, and there is no evidence that there is, it could resolve itself with the raising of the age of criminal responsibility. Views are invited on this point.

7.4 Adult Relationships

- 7.4.1 The standard perception of incest is of a child being sexually abused by a close relative, usually the father. However, incest is also committed where two adults within the same family engage in consensual intercourse. In such cases both the man and woman are liable to prosecution.
- 7.4.2 It has to be asked if anything is gained from criminalising sexual relations between two adult relatives such as brother and sister, where both have given valid consent to the relationship. Should such behaviour be criminal simply because it may be regarded as socially unacceptable or does it gain additional significance from the possibility of a pregnancy resulting, with implications for the health of the child because of the close family relationship between the child's parents? If it were decided to decriminalise incest for such persons should a higher age than the normal age of consent apply, say 21 or 25 years of age? One possible consequence of decriminalising sexual relations between adults within the prohibited categories is that it might lead to a perception that the State condones such relationships.

7.5 Definition of Incest

- 7.5.1 One final point on incest is the definition of what constitutes incest. At present it refers only to sexual intercourse and the narrow definition probably reflects

one of the main reasons why the offence exists, i.e. to avoid genetic defects in children. Should the definition be widened to include other sexual acts such as buggery (of both male and female) or other forms of sexual abuse such as touching.

- 7.5.2 The argument for extending the definition is that it would provide another protection for children in abusive family situations. The arguments against are that it would undermine the reason for a separate incest offence and, in any event, other laws provide adequate protection for children in such situations. Any new offences protecting children against sexual abuse (see next Chapter) would further negate the case for redefining incest.

7.6 Questions

- 7.6.1 Some of the issues raised in this Chapter are paralleled in other Chapters, particularly *Chapter 8*. However, we are concerned specifically with the offence of incest in this Chapter. One of the issues raised relates to the question of gender equality in incest cases. In other words, should men and women who commit incest be treated equally under the law or is incest a special case? There may also be a more fundamental question: in the light of the extensive range of offences and severe penalties in those areas of the law dealing with sexual matters, is a separate offence of incest still necessary?

- 7.6.2 Views are particularly invited in relation to the following issues—

Should the offence of incest be extended to incorporate step-parents and adoptive parents?

Should females be dealt with similarly to males in incest cases?

Should consensual sexual relationships between adult relatives within the prohibited degrees continue to constitute a criminal offence?

Should incest be redefined to include other forms of sexual abuse?

Chapter 8



Sexual Abuse of Children

Chapter 8

Sexual Abuse of Children

8.1 Introduction

- 8.1.1 Internationally the sexual exploitation and abuse of children have become matters of great concern. The horrific child abuse perpetrated by the paedophile ring in Belgium has added impetus to the search for a response at a national level and for genuine international cooperation.
- 8.1.2 At an international level the most important development in this area was the adoption of the United Nations Convention on the Rights of the Child. The most relevant Convention article to our discussion is article 34 which provides that:
- States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
 - (b) The exploitative use of children in prostitution or other unlawful sexual practices;
 - (c) The exploitative use of children in pornographic performances and materials.
- 8.1.3 The 1996 Stockholm World Congress on the Commercial Sexual Exploitation of Children not only further emphasised the need to implement measures to protect children from sexual exploitation but agreed an agenda for action in this area.
- 8.1.4 The Europol Act, 1997 enabled Ireland to ratify the 1995 Europol Convention and related Protocol. The Convention provides a framework for law enforcement co-operation in the field of international organised crime — where there are indications that an organised criminal structure is involved. The expression “international organised crime” includes “trafficking in human beings”, which means—
- Subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children.
- 8.1.5 During the last Irish Presidency of the E.U., the Joint Action on Trafficking in Human Beings and the Sexual Exploitation of Children was negotiated and has since been adopted. The Child Trafficking and Pornography Bill, 1997 will give legislative effect to those parts of the Joint Action dealing with trafficking in children for the purpose of their sexual exploitation and child pornography. The Children Bill, 1996 has provisions protecting children against sexual abuse by persons in whose custody, charge or care they are. The Sexual Offences (Jurisdiction) Act, 1996 gives protection to children outside the State against abuse by persons ordinarily resident in this country.

The Law on Sexual Offences

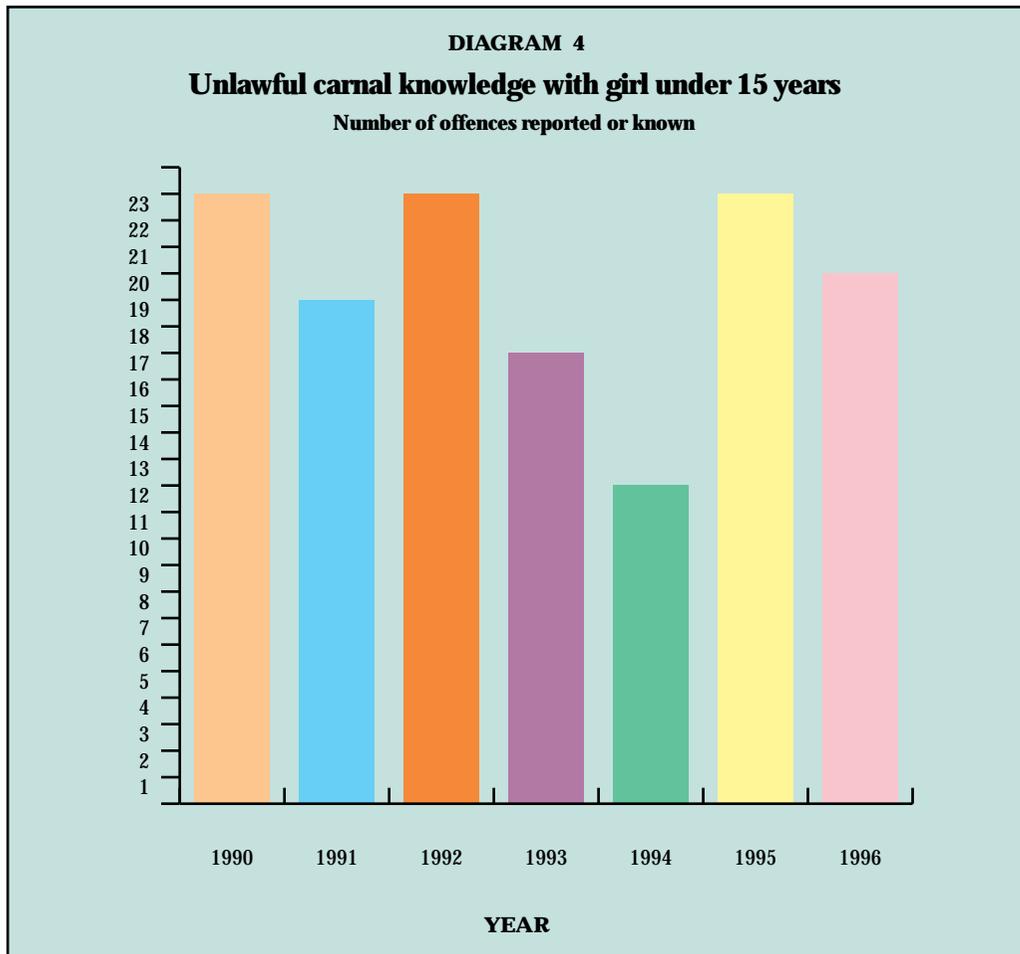
- 8.1.6 Of relevance also is the Report of the Law Reform Commission on Child Sexual Abuse which was published in 1990.

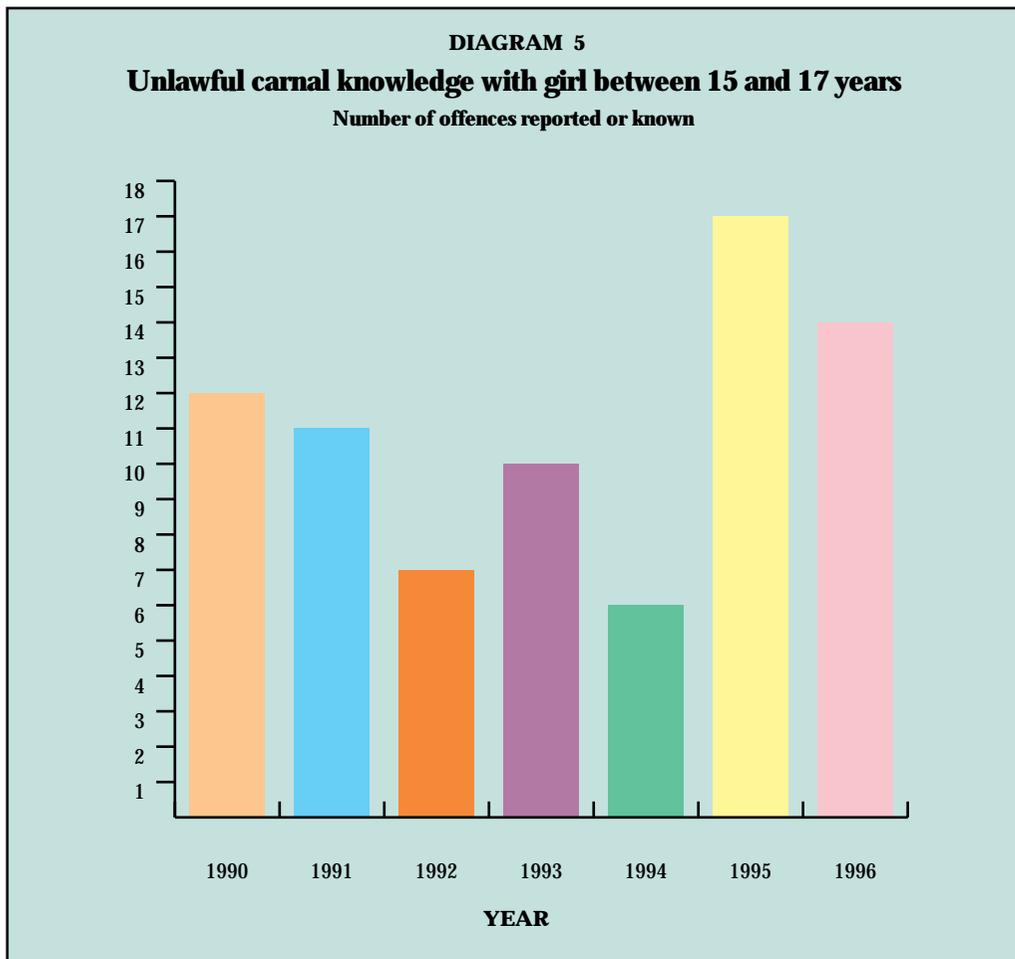
The role of legislation in governing human behaviour

- 8.1.7 One of the functions of legislation is to seek to set out in a statutory framework what is and what is not acceptable behaviour in society. This is probably more true of sexual behaviour, particularly “consensual sexual relations” than of other forms of behaviour. This is because what comes to be regarded as normal and acceptable, or at least tolerable, is governed by the general moral and social climate, or what that climate is perceived to be, rather than threats, real or otherwise, of criminal action. One of the areas explored in this Chapter is how the law should deal with sexual relations amongst post-pubertal teenagers, who are below the age of consent.

8.2 Unlawful Carnal Knowledge

- 8.2.1 It is an offence for any person to have unlawful carnal knowledge of (i.e. to have sexual intercourse outside of marriage with) a girl under 17 years of age. The penalties range from a maximum of life imprisonment where the girl is under 15 years of age to a maximum of 10 years imprisonment, for a second or subsequent offence, where the girl is under 17 years of age.





8.2.2 The age for consent to sexual relations in Ireland is fairly high by international standards. In England the age is 16 and, indeed, prior to 1935 that was the age in Ireland. In some other countries the age is lower still, 14 years of age would be by no means untypical. However, it is difficult to compare the age of consent as between various countries because of complexities in the law in this area. It exemplifies the point that what constitutes a criminal offence in the area of consensual sexual relations in any country will relate to the mores, beliefs, attitudes and values of its population at any particular time. The law has an additional societal function in this area, as in the case of incest. In the case of consensual sexual relations the law can be used to support society by being seen not to condone certain behaviour, particularly where it operates to protect members of society who by reason of their age or particular vulnerability require such protection. It is in that context that any discussion on the issue of the age of consent to sexual relations must be approached.

8.2.3 This matter was considered by the Law Reform Commission in its 1990 Report on Child Sexual Abuse. The Report followed the publication in 1989 of the Commission's Consultation Paper on Child Sexual Abuse in which views were invited from the public. The Commission in its Report recommended the retention of 17 (with exceptions) as the age for consent. However, where the girl was between 15 and 17 years of age, an offence would only be committed where the male participant was a person in authority or at least 5 years older than the girl. The case for the change recommended by the Law Reform

Commission was that above a certain age the criminal law should not intrude on sexual relations between persons of the same age but girls between 15 and 17 years of age would continue to have the protection of the law against persons in authority and more experienced older males. The case against such a change is that it would be perceived as giving out “wrong signals” and, at a time of increased awareness of sexual abuse, and the danger of sexually transmitted diseases, the perception might be that girls were receiving lesser protection from the law than heretofore. It is also the case that if the male participant is older than the female but not by the 5 years as suggested, girls in their mid-teens could be subjected to undue pressure from more experienced older boys.

- 8.2.4 An allied question to the age for consent concerns penalties on conviction. The Law Reform Commission recommended that life imprisonment should only apply where the girl is under 13 years of age (15 years at present). The Commission also recommended that the maximum penalty for unlawful carnal knowledge of a girl between 13 and 17 years of age, under their proposal mentioned in the previous paragraph, be 7 years (at present 5 years for a first offence and 10 years for any subsequent offence where the girl is under 17 years of age and life imprisonment where the girl is under 15 years of age).
- 8.2.5 The present penalties are without doubt severe and reflect the protection and support the law has traditionally given to under-age girls from sexual exploitation. Even though they are maximum penalties it could be argued that they are non-discriminatory in so far as, for example, a 15 year old boy could face a maximum sentence of life imprisonment for having sexual intercourse with his 14 year old girlfriend — the same penalty to which, say, a 30 year old man would be liable for having sexual intercourse with a girl under 13 years, where paedophilia may be involved. On the other hand the exercise of judicial discretion enables the court to hand down severe penalties in the worst cases and to take account of circumstances, like those just referred to, where society should not require or expect a substantial penalty to be handed down.

8.3 Reasonable Mistake

- 8.3.1 A man who is charged with having unlawful carnal knowledge of an underage girl does not have any defences available to him. It is an offence of strict liability. The Law Reform Commission examined this question and concluded that Irish law in this area was unduly harsh and out of step with the law in other jurisdictions. The Commission recommended that there should be a defence available to an accused that he genuinely believed at the time of the act that the girl had attained the age of consent or an age attracting a less severe penalty, as the case may be, and that he had reasonable grounds for such a belief. The court would be able to take into account whether in fact there were reasonable grounds on which he could have held such belief.
- 8.3.2 Should such a defence be introduced? A defence of reasonable belief existed in this country until 1935. The advantage in maintaining the present position is that it affords protection to girls whose physical maturity has outstripped their emotional maturity. It also discourages reckless behaviour by men who, if there were such a defence available, might take a chance as to the age of the girl in the hope of putting forward a defence of reasonable belief later. The Law Reform

Commission also made the point that in court the girl's appearance would become relevant, so that she would be an exhibit as well as a witness.

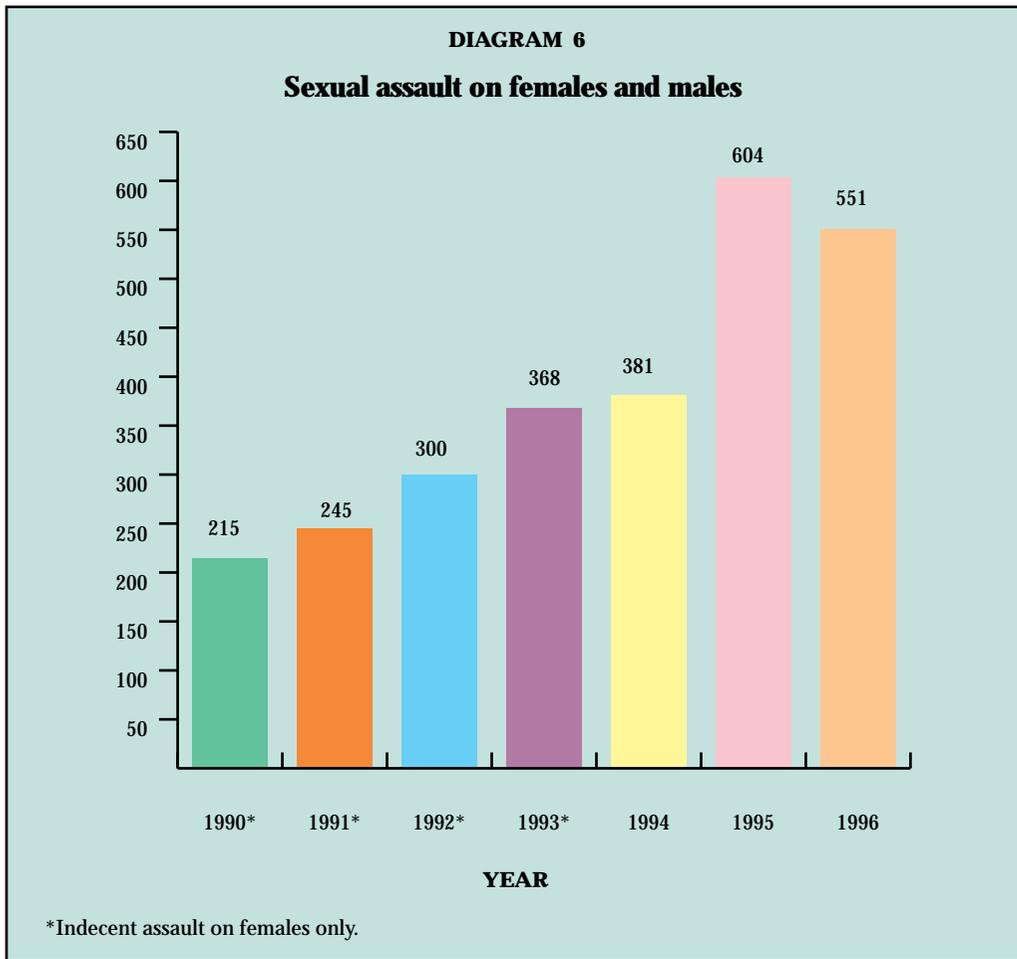
- 8.3.3 It can be argued that the present law denying a defence to the accused is unfair. It is also at variance with what should be the normal legal requirement for a criminal offence, i.e. guilty knowledge. With teenagers maturing earlier, genuine mistakes as to age can be made. An analogous example, but obviously not one of equal seriousness, is the case where a licensee who is charged with selling alcohol to a person under 18 years of age can claim as a defence that he or she had reasonable grounds for believing that such person was over 18 years of age. Views are invited on the introduction of a defence as recommended by the Law Reform Commission.

8.4 Criminal Liability of Under-Age Girls and Boys

- 8.4.1 Where a person is charged with having carnal knowledge of (or another sexual offence with) a girl under 17 years of age, the girl is not subject to any criminal liability. On the face of it, this seems to portray males as always being the instigators of sexual activity and girls as passive participants. The reality is that girls can be the instigators or — a more likely scenario — two young persons simply consent to have sexual intercourse with one another.
- 8.4.2 The Law Reform Commission examined this issue of criminal liability and put forward a compelling argument for retaining the present law. A person charged with rape can, on acquittal of that charge, be found guilty of having carnal knowledge of a girl (where she is under the age of consent), even though such a finding would not imply consent by the girl. If the law was altered to provide for criminal liability for underage girls, the girl could be regarded as being guilty of the same offence. This could have undesirable consequences. It could, for example, discourage rape victims from reporting the rape to the Gardaí. The underlying argument, however, would seem to be that the purpose of the law is to protect young girls even if that means, on occasion, protecting them from themselves.
- 8.4.3 The arguments for a change in the law are, as already mentioned, that the girl may be the instigator and it could be argued that the law is discriminatory in its different treatment of both boys and girls of the same age. The Law Reform Commission recognised the potential anomalies in the present position but considered that these could be coped with by the use of prosecutorial discretion. Views on this issue are invited.

8.5 An Offence of Child Sexual Abuse

- 8.5.1 Section 14 of the Criminal Law Amendment Act, 1935 provides that consent is not a defence to a charge of indecent (now sexual) assault upon a person under 15 years of age. This provision raises two important issues. First, it provides a concept of “indecent assault with consent”, something that has been described as the “fiction of assault”. Second, and of more practical significance, the offence does not cover the situation that arises where an adult, without force or threats or touching with his or her own hands, induces a child to undress before that adult or to touch him or her indecently.



8.5.2 The Law Reform Commission in its Report on Child Sexual Abuse recommended a new definition of child sexual abuse or sexual exploitation (to include sexual intercourse and anal penile penetration of a child) to replace the offence of “indecent assault with consent” based on a definition used in Western Australia which is as follows—

- “(i) intentional touching of the body of a child for the purpose of the sexual arousal or sexual gratification of the child or the person;
- (ii) intentional masturbation in the presence of the child;
- (iii) intentional exposure of the sexual organs of a person or any other sexual act intentionally performed in the presence of the child for the purpose of sexual arousal or gratification of the older person or as an expression of aggression, threat or intimidation towards the child; and
- (iv) sexual exploitation, which includes permitting, encouraging or requiring a child to solicit for or to engage in prostitution or other sexual act as referred to above with the accused or any other person, persons, animal or thing or engaging in the recording (on video-tape, film, audio tape, or other temporary or permanent material), posing, modelling or performing of any act involving the exhibition of a child’s body for the purpose of the sexual gratification of an audience or for the purpose of any other sexual act (referred to in sub-paragraphs (i) and (iii) above).

8.5.3 The need for legislation to deal with the second issue referred to in *paragraph 8.5.1* would seem to be incontrovertible. This could be done, as in England, by

making a sexual assault with children an offence when committed “with or towards a child”. Inciting or permitting a child to engage in such activity with oneself or another would also be an offence. The case for and against otherwise retaining the present law on indecent (sexual) assault is not so clear-cut and this was recognised by the Commission. The arguments for such retention were set out succinctly by the Commission. They are—

- (a) that there are no practical difficulties in prosecuting under the present law,
- (b) that the existing law is comprehensive, and
- (c) that the offence of indecent (sexual) assault is well established.

The arguments for a new approach to the issue (as given by the Commission) are that the acts covered by the present law are not assaults and that there may be cases which cannot be prosecuted because of inadequacies in the present law, but should be open to prosecution.

8.5.4 The question of whether or not a new offence of “child sexual abuse” or “sexual exploitation” is introduced is essentially a law reform issue. Any definition would have to be carefully scrutinised to ensure that certain activities were not overlooked. On the other hand, there would be a danger of overlap with other provisions. For example, the meaning of “sexual exploitation” in the definition put forward overlaps with new offences being created in the child pornography legislation already referred to.

8.5.5 Whether or not it is decided to introduce a new offence of “child sexual abuse” or “sexual exploitation”, the question remains as to what should be the maximum age of the child against whom the offence could be committed. The Law Reform Commission recommendation is based on its recommendation concerning persons in authority (see *paragraph 8.2.3*). This would mean that their proposed new offence could generally be committed against children under 15 years of age and also by persons in authority or older persons against 15 and 16 year old children. While that recommendation could be sustained if the present offence were retained, it would require careful consideration before applying it to a new offence. It could be argued that the elements that make up the offence proposed by the Commission are so varied that different age limits should apply to different parts. For example, the meaning of sexual exploitation in the definition might be better applied to persons under 17 years of age.

8.6 Time Limit

8.6.1 An offence under section 2 of the Criminal Law Amendment Act, 1935, i.e. unlawfully and carnally knowing a girl under 17 years of age, or attempting same, must be prosecuted within 12 months of when the offence was alleged to have been committed.

8.6.2 The argument for retention of the time limit is that complaints could be made for malicious or vengeful reasons years after a relationship had broken down. Against that it is the practice that, in general, time limits do not apply to the prosecution of indictable offences. An analogous provision at section 4(2) of the 1935 Act, which provided for a 12 months time limit in relation to prosecutions for sexual offences against mentally impaired persons, was repealed by the

Criminal Law (Sexual Offences) Act, 1993, although it must be pointed out that the offences in question gave rise to different issues.

8.7 Questions

8.7.1 For convenience and brevity, the many important issues raised in this Chapter are dealt with as separate items. However, they are not mutually exclusive and any proposal to change one particular law could have knock-on effects elsewhere. For example, a decision to reduce the age of consent from 17 to 15 years, except where the male is a person in authority or some specified years older than the female, would diminish the argument for introducing a defence of reasonable mistake.

8.7.2 Views are particularly invited on the following issues—

Should the age of consent to sexual relations be changed?

Alternatively, should the age of consent be lowered except where the male is some years older than the female or is a person in authority?

Should the penalties for unlawful carnal knowledge be amended?

In the case of a consensual sexual offence, should there be a defence that the accused genuinely believed that the girl had attained the age of consent or an age attracting a less serious penalty and, in arriving at a conclusion as to whether the accused did so believe, should the court be entitled to take into account whether there were reasonable grounds on which the accused could hold such a belief?

Should underage girls ever be criminally liable, even where they may be the instigators of the sexual activity in question?

Should the offence of sexual (indecent) assault be replaced by an offence of “child sexual abuse” or “sexual exploitation” or would it be sufficient to amend the law to provide that certain activities which would not appear to be covered by the present law, viz, inviting or permitting a child to commit an indecent act or committing such an act in the presence of a child, would be an offence?

Should the offence of sexual assault with consent be extended to cover girls in the 15-17 year age group where the sexual abuse is by “a person in authority”?

Should the time limit of 12 months for prosecuting offences under section 2 of the Criminal Law Amendment Act, 1935 be abolished?

Chapter 9



Sexual Abuse of the Mentally Impaired

Sexual Abuse of the Mentally Impaired

9.1 Introduction

- 9.1.1 One of the major reasons why the criminal law intervenes in sexual issues is to protect vulnerable people. Thus, the law protects young persons because of their age and lack of maturity. Similarly, it protects the mentally impaired because of their vulnerability to sexual abuse. (The expression “mentally impaired” is used in this Chapter for consistency with the Criminal Law (Sexual Offences) Act, 1993). In the case of young persons, when deciding on who needs the protection of the criminal law, the objective yardstick of age exists and it becomes a question of determining the ages at which various types of sexual activity would constitute abuse. Such a yardstick does not exist in the case of sexual activity involving mentally impaired persons. The objective here is to achieve a satisfactory balance between protecting mentally impaired persons from sexual abuse and ensuring their right to engage in loving, including sexual, relationships where circumstances allow. It is doubtful if the criminal law can be expressed with the type of sensitivity that would achieve that balance. The Criminal Law (Sexual Offences) Act, 1993 seeks to provide for the protection of mentally impaired persons, who are defined as people—

“suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such a nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation.”

9.2 Law Reform Commission Report

- 9.2.1 The changes to the law contained in the Criminal Law (Sexual Offences) Act, 1993 were based on recommendations contained in the Law Reform Commission Report on Sexual Offences against the Mentally Handicapped. Most of the Commission’s recommendations were implemented by that Act (others were dealt with in the Criminal Evidence Act, 1992) but there are a few issues that were not dealt with and these are discussed below.

9.3 Protection of the Mentally Impaired

- 9.3.1 Section 5 of the 1993 Act criminalises sexual intercourse, attempted sexual intercourse, buggery and attempted buggery with a mentally impaired person, as defined in that section. It also makes it an offence for a male to commit or to attempt to commit, an act of gross indecency with another male person who is mentally impaired. Section 6 of the Act makes it an offence to solicit or importune for the purpose of the commission of an act which would constitute an offence under section 5.
- 9.3.2 The definition of mental impairment includes persons who are suffering from a permanent mental disorder and those who are suffering disorder of the mind due to a mental illness, which may be temporary. The test contained in the definition is disjunctive i.e., incapable of living an independent life *or* incapable of guarding against serious exploitation. The first test has a significant degree of objectivity but the second is more subjective and illustrates the point that the criminal law is of necessity a less than perfect way of protecting the mentally impaired against sexual exploitation.

- 9.3.3 The issue that arises and on which views are invited is whether the protection at present afforded the mentally impaired is sufficient. There is no evidence that the present laws do not provide adequate protection. On the other hand, the question might be asked whether there is any reason why the mentally impaired should not also be protected by the criminal law against other forms of sexual abuse falling short of sexual intercourse or buggery? The Law Reform Commission recommended that it should be an offence to engage in other exploitative sexual activity with persons suffering from mental handicap or mental illness. Prior to 1993 the only protection afforded to the mentally impaired was to females who were “idiots, imbeciles or feeble-minded” and the protection then was only against being carnally known. This would seem to suggest that the only rationale for any protection for mentally impaired persons was to prevent mentally impaired women from becoming pregnant and had nothing to do with preserving their dignity or protecting them from abuse. While the offences have since been extended as indicated above, the question now is what, if any, further protection is required?

9.4 Liability of Mentally Impaired Persons

- 9.4.1 Another recommendation of the Law Reform Commission which was not implemented was one that would have prevented a mentally impaired person from being charged with any of the prescribed offences against another mentally impaired person, unless the act in question constituted a criminal offence by virtue of some other provision of the law.
- 9.4.2 The argument in favour of adopting the recommendation of the Law Reform Commission is that it would avoid inappropriate prosecutions. The argument against is that a matter of such sensitivity should be left to the discretion of the Director of Public Prosecutions. Also, in dealing with a category of persons who are comprehended by a definition which is, of necessity, partially subjective in nature, an appropriate provision would be no guarantee against an inappropriate prosecution — or even an inappropriate decision not to prosecute.

9.5 Higher Penalties where Victims are Institutionalised

- 9.5.1 Under the Criminal Law Amendment Act, 1935 the maximum penalty for “defilement of idiots, imbeciles and feeble-minded females” was 2 years imprisonment. Where the accused was a carer of the victim in a mental institution the penalty was a maximum of 5 years imprisonment (section 4 of the Mental Treatment Act, 1945). The Criminal Law (Sexual Offences) Act, 1993 introduced a maximum penalty of 10 years imprisonment for having sexual intercourse or committing buggery with a mentally impaired person. That provision incorporates all persons found guilty of the offence, whether or not they are carers.
- 9.5.2 The Law Reform Commission recommended a penalty of up to 7 years imprisonment for a person convicted of sexual offences against the mentally impaired and 10 years where the accused was a carer. As mentioned in the previous paragraph, the 1993 Act stipulated 10 years in all cases. The issue on which views are invited is should the penalty be still higher where the perpetrator has had the care of the victim in a mental or other institution? The case for that course is that a carer is in a position of trust and power who has

taken advantage of his or her position and, thus, deserves to be dealt with more harshly by the law than a person in the community, who may possibly have formed a relationship with the victim. The case against is that the 10 years maximum term of imprisonment provided in the 1993 Act is long enough to cater for the worst cases, including crimes by carers.

9.6 Questions

9.6.1 At the outset of this Chapter reference was made to the sensitivities required in dealing with sexual matters in the case of mentally impaired persons. The aspect with which this Paper is solely concerned is how the criminal law protects the mentally impaired from sexual abuse. The social aspects of dealing with mentally impaired persons, such as their care and treatment, both within the community and in institutions, and considerations of how best they can lead positive lives with fulfilling relationships, are outside the scope of this Paper. So far as the criminal law is relevant, prosecutorial discretion is of the utmost importance in this area.

9.6.2 The following are the main questions raised in this Chapter.

Should the protection of mentally impaired persons be extended to cover other offences not at present covered?

Should mentally impaired persons be liable in any circumstances for abusing other mentally impaired persons?

Should the penalties be higher where the perpetrator of a sexual offence against a mentally impaired person is a carer in an institution caring for or treating mentally impaired persons?

Chapter 10



Sex Offenders Register and Post-Release Supervision

Chapter 10

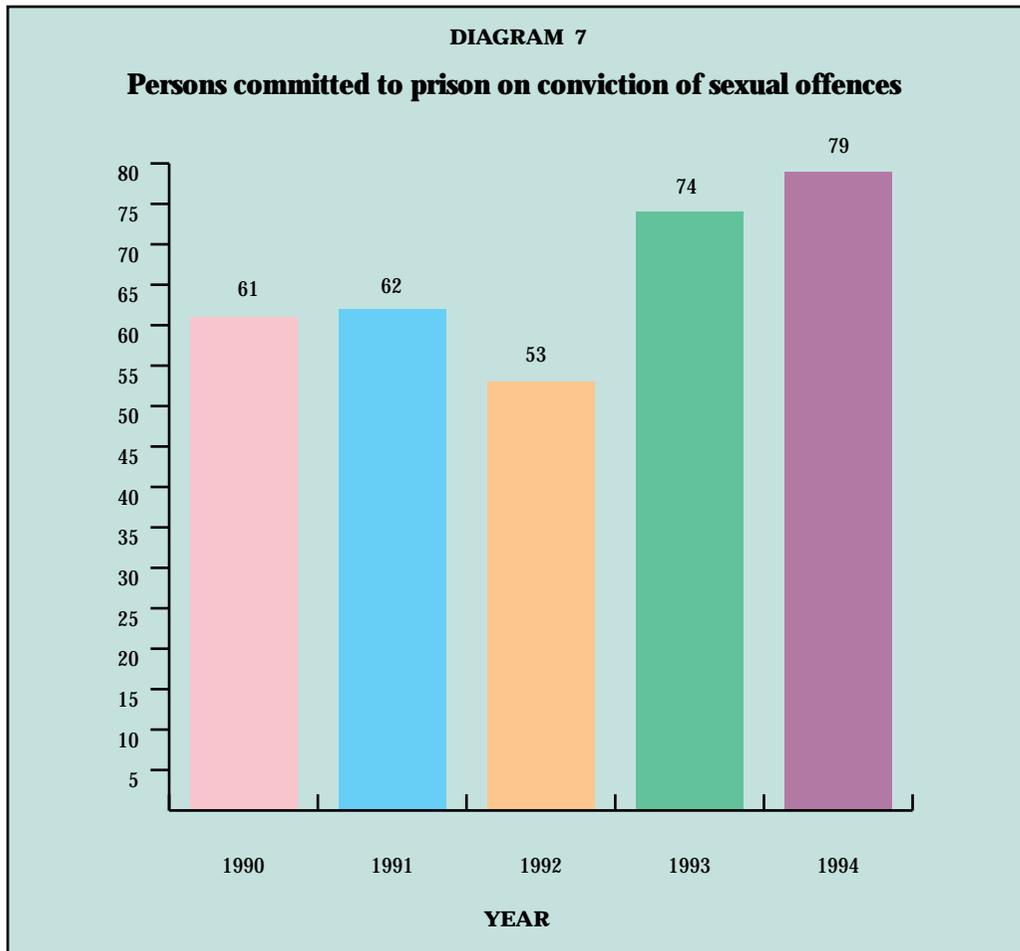
Sex Offenders Register and Post-Release Supervision

10.1 Introduction

- 10.1.1 For convenience, the expression “sex offenders register” is used in the title of this Chapter, even though it largely concentrates on the protection of children. Underpinning any discussion on the need for a sex offenders register or, alternatively, a paedophile register is, of course, the primary objective to protect persons from attack by convicted sex offenders. In particular, a paedophile register would have the objective of protecting children from abuse or attack by convicted child sex abusers. Since most paedophiles are males, in this Chapter the masculine gender will be used in relation to them.
- 10.1.2 The conviction of a person for any criminal offence is a matter of public record, decisions being announced by judges in open court. For crime prevention and crime investigation purposes, such records are of special interest to the Garda Síochána. As a consequence, the Gardaí maintain an up-to-date computerised record of all criminal convictions (indictable) with appropriate details. The record includes, of course, information on sexual offences. In effect, therefore, the Gardaí already maintain a “Register” in the sense that they have on computer recorded information about persons who have been convicted of sexual offences.
- 10.1.3 As the focus of this Chapter is primarily the steps that would need to be taken to provide the optimum protection for children from abuse or attack by convicted paedophiles, it is necessary to set out what is meant by “paedophilia” and the potential problem posed by convicted sex offenders on release at the completion of their prison sentences. In broad terms “paedophilia” involves a compulsive sexual preference on the part of postpubertal males or females for prepubertal or peripubertal children. There are various ways that paedophiles can be grouped or categorised. Under one particular grouping there is, first, the extroverted paedophile who, by force of personality, can gain the trust of children and sometimes their parents. These paedophiles are generally plausible and manipulative seducers of children. Second, is the introverted paedophile who does not have the seductive manner of the extrovert and thus may be forced to use a more direct approach to children or make contacts through so called paedophile rings. The third and fortunately rarest group is the sadistic paedophile who is not only prepared to inflict torture on his victim, but also to murder the child. A different, more psychologically based approach to classifying paedophiles subdivides them into two categories: fixated and regressed. Fixated paedophiles are primarily or exclusively attracted to significantly younger persons whereas regressed paedophiles do not have a predominant sexual attraction to such younger persons. Peer age or adult persons are the primary focus of the sexual interests of regressed paedophiles.

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- 10.1.4 There is a public perception that the recidivism rate among sex offenders, in particular paedophiles, is very high. Recidivism rates of over 90% have been mentioned in relation to paedophiles, but there is no empirical evidence to support such a perception. Because of the subject matter of this Paper, and in particular of this Chapter, there is a danger that a public belief of almost certain re-offending by sex offenders could be re-inforced. That is not the intention, and in order to place the remainder of this Chapter in its proper context, the outcome of some relevant research is outlined in the next paragraph.
- 10.1.5 Research done abroad shows that, if anything, sexual offenders are less recidivistic than non-sexual offenders. A 1996 Report (*Hanson & Bussiere*) on a meta-analysis of 61 studies that included 29,000 sex offenders who were followed-up for an average of 4 to 5 years found that the recidivism rate for sexual offences was 13.4% and for non-sexual violence was 12.2%. The rate for other offences was 36.3%. There were differences in the recidivism rates for different types of sexual offenders. Rapists were slightly more likely to re-offend (19%) than were child molesters (13%). Among child molesters, the rate of sexual offence recidivism was much lower for incest offenders (4%) than for boy-victim paedophiles (21%). However, further research shows that the risk of re-offending remains a problem in the long term and, of course, sex offenders, in particular paedophiles, who do re-offend can have very many victims.



- 10.1.6 There are at present about 280 persons in custody for sex offences. Of these, approximately half were convicted of sex offences against children. Two forms of therapy are available to those offenders within the prison system. The first is individual counselling from the Clinical Psychological Service or the Probation and Welfare Service of the Department of Justice, Equality and Law Reform. It is normally available in all prisons. The second is an intensive offence-focused group work programme available only in Arbour Hill Prison. Both forms of treatment are voluntary; offenders are encouraged to avail of them but are not compelled to attend. Compelling offenders to attend could be counter-productive in that failure to apply for a place would indicate a lack of desire for treatment. No extra concessions are given for attendance.
- 10.1.7 Somewhere in the region of only 15% to 20% of sex offenders in prison are sufficiently motivated to apply for a place on the group programme. Of those who have been recruited to the programme to date, 58% had been convicted of offences against women and 42% had been convicted of offences against children.
- 10.1.8 The number of sex offenders in Irish prisons is rising and new and different programmes for sex offenders are planned. It is also proposed to undertake a comprehensive research project to fully evaluate the present Arbour Hill Prison programme. However, the fact is that up to 60 sex offenders are released every year on completion of their sentences and most of those would not have availed of the group programme at Arbour Hill.
- 10.1.9 Six issues relating to child sex abusers are discussed in the following sections. First, to what extent should the present system of recording maintained by the Gardaí be categorised to allow for the development of a separate, more focused, register? Second, to what extent should convicted paedophiles be obliged to keep the Gardaí aware of their location following their release from prison? Third, should the Gardaí (or some other Body) be obliged to inform local communities, or selected persons in a community, on request or otherwise, and under what criteria, of the presence of a paedophile in their midst? Also discussed is the issue of post-release supervision, the question of penalising paedophiles who apply for or accept work which would give them access to children and whether there is a role for electronic monitoring.

10.2 The Register

- 10.2.1 There are two possible forms the register could take; it could be a sex offenders register or it could be a paedophile register. For the purpose of this Paper, a “sex offenders register” would contain the names of persons convicted of specified sexual offences against persons, whether adults or children, while the meaning given to a “paedophile register” is of a register consisting specifically of the names of persons convicted of sexual offences against children. A fundamental question concerns responsibility for keeping the register. Should it be compiled and maintained by the Garda Síochána, the Health Boards, some other Body or should a specialised National Authority be established for that purpose? Views are sought on this question but for the purpose of the discussion following it will be assumed that the register would be compiled and maintained by the Gardaí. It would seem to be beyond argument that only the names of

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convicted sex offenders generally or paedophiles should be included on the register, regardless of whether or not they received a custodial sentence. The existing practice is outlined at *paragraph 10.1.2*.

- 10.2.2 The primary purpose of a register is to increase public safety through more effectively managing the risk posed by persons convicted of sex offences. The aim is to reduce the likelihood of their re-offending. However, managing the risk posed by convicted sex offenders is a complex business. It involves two main components — increasing personal control (through appropriate treatment and maintenance programmes) and increasing external control (surveillance, supervision, conditional release). A register is just one component of such external monitoring of convicted sex offenders.
- 10.2.3 One of the principal arguments underpinning the introduction of a register in other countries is that it provides a single centralised record of convicted sex offenders (or child sex offenders). That argument would not apply in this country as, with just one police force, the Garda Síochána, centralised records already exist. The only issue, therefore, (apart from which Body would keep the register), is to what extent the register should be kept separate from the other records. Therefore, the arguments for and against a register will be based more on the detail of what would be included in it, to what use would it be put, who would have access to it, etc. These issues are discussed in the following sections.

10.3 Names on Register

- 10.3.1 There are four separate issues relevant to the question of whose names should be placed on the register. These are: the type of register (sex offenders or paedophile); the category of offender (all or selected offenders convicted of the same type of offence); the risk of re-offending and children who are sex offenders.

Type of register

- 10.3.2 There would be no basis for including any names on a register other than those of convicted sex offenders. The question that arises is should the register consist solely of 'paedophile offences' or should all sex offenders be included? While a paedophile register would offer protection specifically to children, there is evidence that once a pattern of sex offending is established, the risk of re-offending remains for many years. That argument could also of course be applied to persons involved in other types of crime or anti-social behaviour, such as burglary or drunkenness leading to violent activity. Would the solution be to confine the register to child sex offenders and to look to other measures, such as, for example, post-release supervision, aimed at sex offenders generally? Supervision following release from prison is discussed later in this Chapter.

Category of offender

- 10.3.3 The second relevant point concerns the category of child sex offender whose name would be held on the register. For example, in the case of a paedophile register, an adult or older teenager may be convicted of having sexual intercourse with a 15 year old girl. That conviction may not signify paedophilic

tendencies and in the latter example almost certainly would not. Would the perpetrator be a continuing threat to adolescent or younger children? It could represent merely opportunistic behaviour but not paedophilia. It also raises the question, in the case of a paedophile register, as to whether there should be an upper age limit for the child against whom the offence has been committed before the name of the convicted person would be placed on the register? It has been suggested that 13 years should be the cut off age, i.e. around the age of puberty, the age below which children are potentially more liable to be victims of sexual abuse by paedophiles. Without special provision as to age, any sexual offence committed against a child under 17 years of age, whether consensual or not, would result in a new name being placed on the register. A lack of some such special provision would seem to broaden the scope of the register beyond what would normally be understood to be a paedophile register or even a sex offenders register.

Risk of re-offending

- 10.3.4 A further point concerns placing the names of persons on the register who may not be considered at high risk of re-offending. A person may conscientiously undergo treatment in prison and agree to continue with some form of therapy or treatment following release. Automatically placing the name of that person on a register might be unfair in that he may not pose a significant further threat and it might act as a discouragement to his agreeing to or seeking treatment. On the other hand, could one ever be really sure that the person will not again re-offend, in particular the person who has abused children? The case for excluding names in certain clearly understood and defined circumstances from a sex offenders register rather than from a paedophile register would seem to be more clear cut.

Child sex offenders

- 10.3.5 A related question, but of sufficient importance to be dealt with separately, is whether children, i.e., persons under 18 years of age, who commit sexual offences against other children, should be included in the register. As already indicated in the preceding paragraph, there would seem to be no reasonable case for including a teenager who is convicted of having sexual intercourse, especially within a relationship, with his girl friend of the same age, in the event of his being prosecuted and convicted. However, sexual abuse of a young child by a teenager raises different issues. The sexual behaviour might arise from horseplay, curiosity or be a manifestation of some deeper psychological problem. It might be an early indication of behaviour that, particularly if undetected and untreated, could continue into adult life. Including their names on a register would stigmatise them for many years, maybe for life, possibly unfairly in an indeterminate number of cases. Instead of protecting some children, other child victims could be created. On the other hand, a small number of young sex offenders may be highly dangerous. This is a complex area where much clinical research remains to be done. Subject to the views of experts dealing with child abusers, the answer may be to target resources towards the treatment of the children in question.

10.4 Decision to Place Names on Register

- 10.4.1 Who, or what Agency, should make the decision to place the name on the register? The Gardaí will continue to keep records of convictions. These may,

depending on decisions taken in the light of the response to this Paper, be separate from a dedicated sex offenders or paedophile register. The type of register that emerges and the uses to which it will be put will be among the factors relevant to the decision. Some degree of risk assessment of re-offending will almost certainly be involved; this implies that if the decision is to be made administratively, there will, at the very least, be an important role for experts, such as the probation and welfare service and the psychological services. Alternatively, would it be a function more appropriately given to the courts? For example, at the time of sentencing the judge could order the offender to be brought before the court shortly before he is due for release (where a custodial sentence has been imposed) where a decision could be made by the court, on the basis of risk assessment reports, whether to place the person's name on the register. Where a non-custodial sentence is imposed, the decision could be made at the time of sentence.

10.5 Length of Time on Register

- 10.5.1 For how long should any particular name remain on the register? (Since the Gardaí will continue to maintain records of conviction in any event, this issue also relates more to the type of register that will emerge and the use to which it will be put rather than the maintenance of the register as such.) Many paedophiles are essentially untreatable in that they are liable to remain a threat for life. The logical answer would seem to be that once a person, in particular a paedophile, is on the register, only death should cause his name to be removed from it. The case against a lifelong inclusion in a register is that it does not take account of individual or changing circumstances. A person may become harmless through age or infirmity or may no longer be considered a risk to others. (This may become obvious over time although the existence of the register and the use to which it is put may have an influence on future behaviour).
- 10.5.2 If a name is placed on the register through administrative action, should it be for life or for a specified period, such as for 5 or 10 years? If for a specified period, should it be subject to review at the end of that period? Following the review, the name could be either removed from the register or left on it for a further specified period. In such a case would there be a role for the courts? For instance, applications could be made to a court by persons whose names have been placed administratively on the register to have their names removed. If the decision to place a name on the register was made judicially then the court would also decide for how long the name would remain on the register (within any statutory limits). It would also be a function of the court to review any such decision, whether of its own motion or on application to it, while the decision is still in force. Similarly, at the end of the time specified in a court order for the inclusion of a name in the register, it would be for the court to decide, on the basis of information at its disposal, whether or not to extend the period that the person's name should remain on the register. Relevant to any decision is section 2(1)(c)(iv) of the Data Protection Act, 1988 which requires that data be retained no longer than necessary for the specified purpose. Views are sought on the length of time a name should remain on the register, who should decide to place a name on the register and who should decide if and when and in what circumstances to remove it.

- 10.5.3 When a name is placed on the register, should consideration be given to a risk assessment accompanying such placement. Risk assessment takes place in some American States. It consists of grading sex offenders as low, medium or high risk. The assessments are made by specialists and the register is overseen by a team of specialists. The conditions attached to registration vary depending on the level of risk. There is a logic to risk assessment in that it would target those offenders who pose the greatest risk to the public. It is possible that low risk offenders could be kept on a register for shorter periods. Views are sought on the desirability of introducing a policy of risk assessment.

10.6 Access to Register and Informing the Community

- 10.6.1 Criminal records maintained by the Gardaí are confidential and they are only disclosed to third parties with the consent of the individual concerned. For instance, since 1994 an arrangement has been in place whereby the Gardaí provide prospective employers, who have obtained the relevant consents from candidates, with particulars of criminal convictions, if any, recorded against the candidates where employment in children's residential centres and other posts in the health service, which involve substantial access to children and vulnerable persons, are involved. Disclosing names to third parties without the applicant's consent would have implications for privacy and data protection.
- 10.6.2 Access to a register could be widened to include all persons considering employing persons in positions where there would be access to children. Persons applying to do voluntary work with children could be similarly checked. It might be administratively neater if prospective employers could ask applicants for work with, or who would have access to, children to obtain from the Gardaí a certificate certifying that their names are not on a register rather than leaving it to the employers to do so. Where employment is involved, a "need to know" can be demonstrated. The question is, should access to a register of this nature be still wider?
- 10.6.3 The implications of public or widespread access to the register give rise to very serious issues of policy because of the potential for harm and victimisation. At its most extreme, should a person be in a position to check out a new neighbour? If it transpires that the neighbour is on the register, what can a person do with that information? On a personal level parents can effectively "lock up" their children, if very young, or keep them under constant observation, or move home. In practical terms these would not be realistic options in most cases, so that persons would have access to information in respect of which they would unlikely be in a position to react lawfully. Alternatively, the new neighbour could be "exposed" leading to isolation, discrimination or violence in circumstances where, perhaps, there may not be any real threat.
- 10.6.4 A lesser form of access might be to allow persons such as teachers or other identifiable categories of persons involved with children generally, to check out people seen acting suspiciously in the region of a school or any other place where young children congregate or play. Would this put such persons in an invidious position, or place an unfair burden on their shoulders?

- 10.6.5 Who should have access to a register is a difficult and sensitive issue. So also is the question of who should be informed of the presence of a known paedophile or other sex offender in their area. The means of finding out may be different but the end result is the same — information in the hands of persons who may not know what should be done with it or may not have the means of acting on it within the law.
- 10.6.6 The question to be asked concerns the circumstances, if any, under which persons should be informed of the presence of a sex offender in their area. Could a distinction be drawn between the situation where a sex offender living in or frequenting a particular area is not deemed by the Gardaí (or some other Agency?) to be a threat and the case where such a threat is deemed to exist, possibly as a matter of imminence. In the former case the sex offender may have received or may be receiving treatment, is under supervision or has chosen a place to live which, if a paedophile, gives him no apparent access to children. What would happen in the case where the paedophile is living in an area where he has obvious access to children? Should the decision in this latter case as to who should be informed, and how, be a function of the courts, left to the Gardaí alone (having had their views informed by the appropriate specialists) or should any decision be taken jointly by the Gardaí and those specialists? Would it be possible to draw up clear guidelines to assist them in this task given the myriad of circumstances that may arise and what would be the consequences of such information being given, e.g., as respects the physical safety of the paedophile or sex offender. If people were told in a general way to be vigilant as a paedophile was in their area, with no name mentioned, innocent persons might be mistakenly attacked or run out of the area. Another solution may be that where the Gardaí are aware that a paedophile poses a real and specific threat to a community, he would be informed by the Gardaí that certain people (such as the school principal, etc.) will be informed of his presence. The result of that course of action would possibly be that the paedophile would leave the area voluntarily. While solving the problem in one area a new problem would be created elsewhere or he would go to ground.
- 10.6.7 The issues raised in the preceding paragraphs point to some of the dangers and difficulties associated with general access to the register and of informing a community of the presence of a paedophile in their midst. The risks attached to imparting such information are very real. However, they have to be balanced against the primary objective, protecting children against paedophiles. The balance that is sought is that of the protection of children, as against the civil rights of individuals who have previously offended and have paid their dues to society.
- 10.6.8 Are there other ways of protecting children against abuse by paedophiles? Could the courts, when sentencing, place a residential restriction on paedophiles at the time of their release or place them under supervision (of the probation and welfare service) until such time as they no longer represent a danger to society, or make an order preventing their working in sports or other organisations which would bring them into contact with children? A further alternative might be to allow the Gardaí apply to a court at any time for a residential restriction or work prevention order where the original court declined to make such an order at the time of sentence. The general question of post-release supervision is discussed in detail in *section 10.8*.

10.6.9 The issues discussed in this Chapter are of only marginal relevance as respects offering protection to children from unconvicted paedophiles and frequently, of course, the greatest danger to children from sexual abuse occurs in the home. In these cases one is dependant to a large extent on the existing criminal law and police investigative, including intelligence, work and the vigilance of the child care services.

10.7 Tracking Convicted Paedophiles

10.7.1 A register as discussed above would (assuming that access to it would be limited to those who could demonstrate a need to know) provide protection primarily for children in or in the vicinity of, schools, child care institutions, crèches, etc. as well as children who are members of sporting or other organisations. It would not directly provide protection for children who may, for example, be approached on the street or in an unsupervised playground by a paedophile. Is there anything that can reasonably be done to reduce the chances of children being approached in those circumstances?

10.7.2 In England, Wales and Northern Ireland that problem is being dealt with by placing a statutory obligation on convicted or cautioned sex offenders to inform the police where they live and when they move home. A wide range of sexual offences is covered by the legislation, including rape, sexual intercourse with a girl under 13 years of age, buggery, indecent assault on a boy or girl and indecent conduct towards a young child. Failure to comply with the requirements of the legislation is a criminal offence.

10.7.3 What would be the advantages of such a provision in this country? Its main advantage is that it would allow the Gardaí to track the movements of convicted sex offenders following their release from prison. It could assist the Gardaí in “keeping an eye” on persons as part of their normal policing role and, in addition, if an offence is committed, it could narrow the field of suspects. One of the advantages of such a register of addresses in England and Wales is that it enables information to be shared by a large number of different police forces. The same need does not arise in this country.

10.7.4 The success of an address register on the lines described would depend on convicted sex offenders informing the Gardaí of their whereabouts. Some sex offenders, in particular paedophiles, can be manipulative and devious and, rather than have their movements constantly tracked, may disappear underground where they could be of even greater danger. It could be argued that a system whereby the Gardaí informally kept known sex offenders in their areas under observation might be more effective. On the other hand, the existence of such a register in the United Kingdom with the obligation to inform the police of any change of address gives rise to an obvious difficulty for this jurisdiction in that, in the absence of similar legislative provision here, convicted paedophiles may consider — rightly or wrongly — that they would be subject to less scrutiny if they moved to this jurisdiction. A further question for us in this jurisdiction is whether we should confine such a provision to paedophiles or extend it as has been done in the UK.

10.8 Post-Release Supervision

10.8.1 The supervision of sex offenders in the community has two targets — to help the offender maintain internal control over his offending behaviour and to provide

external monitoring of his behaviour and activities. The strategy of supervision required to achieve these targets is a combination of at least three techniques: on-going treatment/relapse prevention, specialised conditions of probation tailored to the offender's risk areas and, as far as possible, use of an informed support network within the community.

- 10.8.2 Sex offenders need to attend specialised therapeutic programmes in order to effect change in their abusive behaviour. Such programmes can operate within institutions or within the community. However, it is critical that the therapeutic gains made in an intensive treatment programme are maintained in the long-term, hence the need for on-going relapse prevention work. Relapse prevention is a self-management programme designed to teach offenders who want to change their behaviour to identify problems early on and to develop strategies to avoid or cope more effectively with those problems in order to avoid re-offending. This model was initially developed as a treatment tool with addictive behaviours such as substance abuse, but in the early 1980's was adapted for the treatment of sex offenders.
- 10.8.3 At present, sex offenders cannot be mandatorily supervised after their final release from prison unless the original sentence was one of life imprisonment. Agencies of the criminal justice system have no influence over where an offender lives or what he does, nor can they oversee the implementation of the relapse prevention plan drawn up with the offender while he is receiving treatment in prison. Many sex offenders serve long sentences and adjusting to societal change, in addition to implementing a relapse prevention plan, is difficult.
- 10.8.4 In the absence of post-release mandatory support and supervision, much of what has been learnt in therapy in prison may simply not be put into practice. Thus the risk of re-offending may not be reduced. It is also the case that mandatory post-release supervision could be important in supporting and observing those offenders who did not receive treatment in prison. The subject of mandatory post-release supervision is an issue in its own right but is included in this Chapter because a decision to provide for same could influence the response to other issues raised in the Chapter.
- 10.8.5 Post-release supervision would involve a court, at the time of sentence, in providing for mandatory supervision of the defendant in the community after the sentence has been served. Alternatively, a specified final part of the actual sentence could be served in the community under supervision. Numerous questions arise, not least of which is which agency would be responsible for the supervision? The most obvious answer is the Probation and Welfare Service who already have built up extensive experience in the area of supervision. If the supervision was to mean anything its parameters would have to be carefully defined. It would have to consist of more than checking on a person's whereabouts once in a while if it was to have any positive effect. This would have obvious resource implications. The question that arises, therefore, is, if legislation is introduced providing for post-release supervision, of what should the supervision consist and what would be the resource implications?
- 10.8.6 It could be argued that the time scale for post-release supervision should be finite. However, there may also be an argument for life-long supervision in certain cases. If it is the case that many paedophiles, in particular, remain a threat in the long-term, this would seem to dictate in their cases that there

should be no cut off point. A possible approach would be to provide for supervision for a certain period, say 5 years, and at the end of that the supervising probation and welfare officer could apply to the court for an extension, if he or she considered the offender still a threat. Further extensions could be applied for if and when necessary. An alternate approach discussed in the next paragraph would be to leave it to the court to decide the initial period of supervision post release.

- 10.8.7 A further question is to what offences should post-release supervision apply? Should it be confined to child sex abuse offences or should it apply to a whole range of sexual offences (the same question that is raised in *paragraph 10.3.2* in relation to a register and in *paragraph 10.7.4* in relation to tracking the whereabouts of convicted sex offenders). Apart from the obvious resource implications of a widescale application, there are presumably many cases where the offence may have been a “one-off” or at least not a manifestation of compulsive behaviour, as in the case of many paedophile offences. It may be that the better approach would be to commence with paedophile offenders with provision to extend to other sexual offenders as experience grows and resources become available. A supplementary question is whether different periods of supervision should apply to different offences. The case against attempting such a classification of offences is that it concentrates on the offence rather than the offender: the risk of re-offending can be very different for offenders who have committed similar offences. As against that it may be that in some cases the perpetrators of certain offences are more likely to re-offend than the perpetrators of others. A possible solution would be to leave it to the courts to decide in each case. The decision would be based on the likelihood of re-offending in a particular case.
- 10.8.8 One final point on post-release supervision already referred to is its potential cost. There is no doubt that a large scale programme of meaningful post-release supervision and an ongoing regime of risk assessment would be costly. Would this be the most cost effective way of securing protection for children and others from recidivist sex offenders? Also, would post-release supervision replace the need for or be in addition to the register or registers discussed above?

10.9 Electronic Monitoring

- 10.9.1 One possible form of control of convicted sex offenders is electronic tagging. This concept has not always been successful as a method of supervision but in recent times some European countries have begun using more modern and refined equipment. The results of research done abroad on electronic tagging should soon become available and, assuming any technical difficulties can be overcome, electronic monitoring may represent another means of supervising sex offenders.

10.10 Penalties

- 10.10.1 As already stated throughout this Chapter, sex offenders, particularly paedophiles, can be devious and manipulative and have a propensity towards re-offending. They may go to extraordinary lengths to gain access to children, and to access positions of power and trust with regard to children.
- 10.10.2 One suggestion put forward for discussion in the area of penalties is the creation of an offence where convicted paedophiles obtain or apply for work with

children, whether or not they succeed with their applications, i.e., an offence of seeking or accepting work or a voluntary position which involved contact with children or offering services which would bring the person into contact with children.

- 10.10.3 The creation of such an offence would have to be carefully considered as it raises constitutional issues on a number of fronts. In addition, it is open to question whether paedophiles would be dissuaded by the possibility of conviction for such an offence.
- 10.10.4 Other proposals considered in this Chapter, such as the tracking system and post-release supervision, would also involve the creation of offences for non-compliance or they would be ineffective. What should be the level of those penalties? Would the creation of summary offences suffice? For example, would failure to inform the Gardaí of a change of name or address under a tracking provision be sufficiently serious to attract trial on indictment with severe penalties for failure to so inform. In England, the offence of non-compliance carries a maximum prison sentence on summary conviction of 6 months.

10.11 Questions

- 10.11.1 Many questions have been raised in this Chapter, not only on the establishment of, and the potential effectiveness of a dedicated sex offenders or paedophile register, but on the many issues arising from the existence of such a register. Some of these issues raise very difficult questions but ultimately, the State's response to the serious problem of sex offending must be workable, legally and constitutionally sustainable while at the same time offering the best possible protection to children. Regard must also be had to the resource implications of the suggested solutions, particularly in the case of post-release supervision.
- 10.11.2 The following are the questions on which views are invited:

Is the present arrangement whereby certain potential employers can obtain relevant information on job applicants a sufficient response to the problem of paedophiles working with children?

If not, should a dedicated register of sex offenders be maintained and, if so, who should maintain it? Should it be confined to paedophile offenders? Who should be included in it? Who should decide on the inclusion of particular individuals? Who should have access to it and how should that access be organised? How long should names remain on it?

Should there be a system whereby sex offenders must inform the Gardaí of any change in address, as in the U.K.? Should it be confined to paedophile offenders?

Should the Gardaí inform the community, or selected persons in the community, when a paedophile (or sex offender) comes to live or work in that community and, if so, how should they undertake that task?

Should there be post-release supervision of paedophiles or sex offenders?

Should it be an offence for a convicted paedophile to apply for or to accept employment that would bring him into contact with children?

Chapter 11



Prostitution

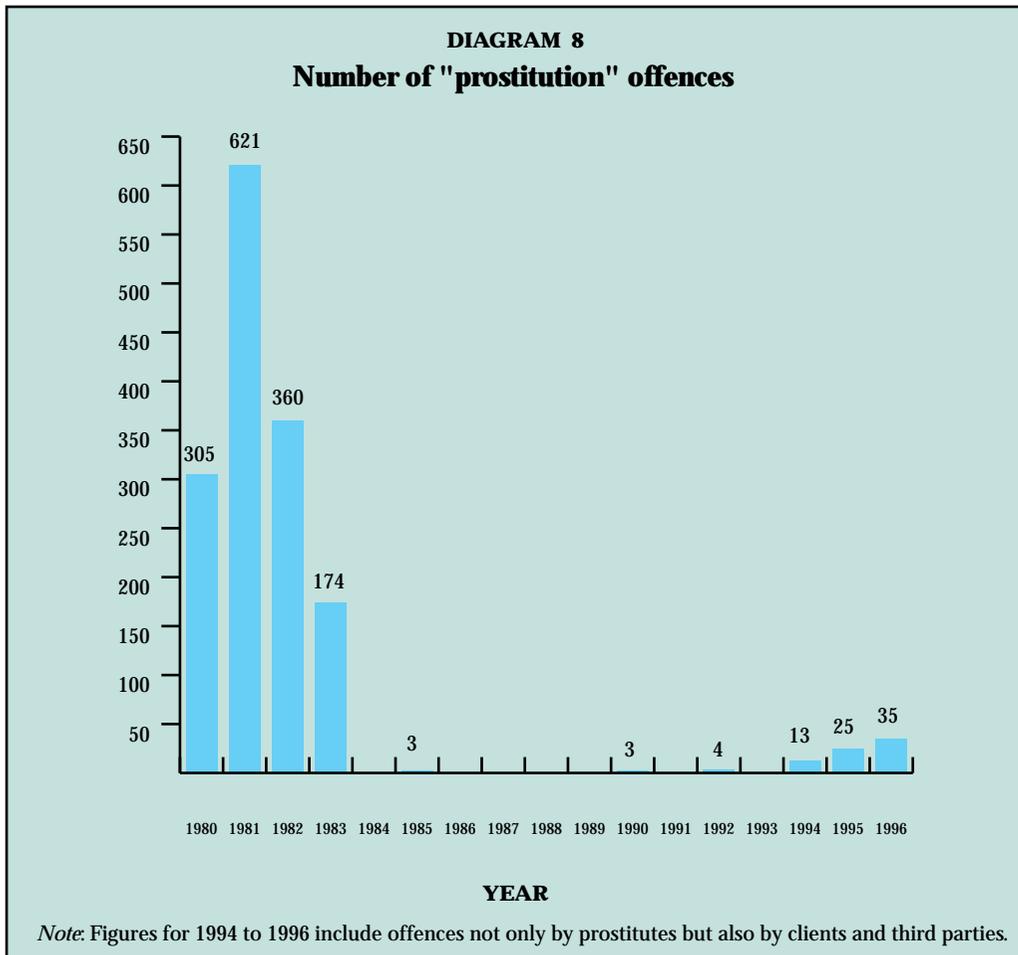
Chapter 11

Prostitution

11.1 Introduction

11.1.1 The law on prostitution was updated relatively recently in the Criminal Law (Sexual Offences) Act, 1993.

11.1.2 Prostitution itself is not an offence. What the law seeks to do is to protect society from the more intrusive aspects of prostitution, such as soliciting in the streets, and to protect prostitutes from exploitation by persons such as pimps living on the earnings of prostitutes. The laws governing prostitution are, therefore, primarily public order offences and are not designed to prevent sexual contact. A wide range of offences are involved of which the following are the more important.



11.1.3 Under section 7 of the Criminal Law (Sexual Offences) Act, 1993, it is an offence to solicit or importune another person in a street or public place for the purposes of prostitution. That offence applies to everyone, whether male or female, prostitute or client, or a third party such as a pimp. Under section 8 of the 1993 Act, a member of the Garda Síochána may direct a person in a street or public place to leave the vicinity if he or she has reasonable cause to suspect

The Law on Sexual Offences

that the person is loitering in order to solicit or importune another person for the purposes of prostitution. It is an offence for a person without reasonable cause to fail to comply with such a direction.

- 11.1.4 Any person involved in the organisation of prostitution is liable to be penalised under a number of offence headings: for example, organising prostitution or coercing or compelling a person to be a prostitute (section 9 of the 1993 Act), knowingly living in whole or in part on the earnings of a prostitute (section 10), or keeping or managing a brothel (section 11). The penalty on being found guilty on indictment for organising prostitution or for coercing or compelling a person to be a prostitute can be as high as a fine of £10,000 and/or a prison sentence of 5 years.
- 11.1.5 In addition, section 23 of the Criminal Justice (Public Order) Act, 1994 makes it an offence to publish or distribute an advertisement which advertises a brothel or the services of a prostitute.

11.2 International Dimension to Prostitution

- 11.2.1 The greater ease and lower cost of long distance travel means there is an increasing international dimension to prostitution, a dimension which could well have implications for the law on prostitution. For instance, prostitutes travel to Ireland from other countries, often to coincide with major events. Therefore, it would not necessarily be an answer to say that better housing, social services and education will remove the problem. All these are desirable and maybe would help some persons to abandon prostitution but, as long as the demand exists, others, including foreign prostitutes, would take their place.

Joint Action on trafficking in persons

- 11.2.2 Another aspect of the international dimension to prostitution is the related problem of trafficking in persons for the purpose of prostitution. That problem is recognised in the EU Joint Action on Trafficking in Human Beings and the Sexual Exploitation of Children. The Joint Action calls on EU Member States to review their laws on trafficking. “Trafficking” is defined in the Joint Action as any behaviour which facilitates the entry into, transit through, residence in or exit from the territories of a Member State, in the case of persons other than children, for gainful purposes with a view to their sexual exploitation or abuse. As already mentioned in this Paper, a new offence of trafficking in children is included in the Child Trafficking and Pornography Bill and a similar provision relating to trafficking in adults will be introduced in due course in order to give effect to the Joint Action in Ireland.

11.3 Decriminalising Public Soliciting

- 11.3.1 The 1993 Act made effective the laws on public soliciting that had become inoperative due to the Supreme Court decision in the case of *King v. Attorney General [1981] IR 233*. Diagram 8 shows graphically the effect on prostitution convictions of that decision. For several years prior to the 1993 legislation the Gardaí had to rely on such unsuitable provisions as breach of the peace to deal with the public manifestations of soliciting for the purpose of prostitution. Realistically, in 1993, the Oireachtas had a choice; to either make the law on soliciting workable or to decriminalise public soliciting — it was not a

sustainable option to continue with the then existing unsatisfactory situation. It chose the former. It is only since the enactment of the 1993 legislation that the number of convictions for prostitution offences began to increase.

- 11.3.2 This Paper provides another opportunity to discuss what should be the attitude of the criminal law to prostitution. While it is difficult to broach the subject of the legislation without also raising questions of morality, health and treatment, as well as the causes of prostitution, this Paper is of necessity restricted to the legal issues. As a starting point, there are four parties to be considered in any discussion on prostitution; the prostitutes, their clients, the people living in the areas in which the prostitutes solicit and society generally.
- 11.3.3 Prostitutes and others have claimed that the 1993 Act left them open to a greater likelihood of assault (they thought that if they reported the assaults they would be charged with soliciting) and manipulation by pimps. It is difficult to understand how an increased likelihood of assault could be the case; it may be a perception rather than a reality, but it is true that an undesirable element will always attach itself to prostitutes and prostitution, making it a potentially violent milieu in which prostitutes live and work. There is no evidence, however, to support their fear of prosecution when reporting assaults. The fact is prostitutes are treated by the Gardaí in the same way as any other person reporting an assault. It has also not been possible to find any evidence of an increased risk of assaults on prostitutes due to the provisions of the 1993 Act. The question of control by pimps is difficult to gauge but, as outlined in *paragraph 11.1.4* above, the law offers strong protection to prostitutes against exploitation. What is true is that the Oireachtas has given the Gardaí adequate powers to deal with public soliciting, and that would not be popular among those engaged in public soliciting for the purpose of prostitution.
- 11.3.4 The 1993 Act for the first time extended the meaning of the terms “soliciting or importuning” to soliciting or importuning by clients for the purpose of prostitution. The soliciting may or may not be in or from a car (kerb crawling). Thus, since 1993, the clients of prostitutes run the risk of prosecution and, on conviction, they are subject to the same penalties as prostitutes who are convicted of soliciting or importuning. Third parties to any transaction with a prostitute, such as a pimp or any other person acting for either the prostitute or the client, could also be charged with soliciting or importuning for the purpose of prostitution.
- 11.3.5 The present law is framed so as to protect the public against the unacceptable nuisance caused by soliciting. It is a feature of prostitution that prostitutes tend to congregate in specific areas. This offers a level of protection to them and it also means that their clients know where they can be found. However, areas (particularly residential areas) unfortunate enough to be used by the prostitutes and their clients suffer the unpleasant consequences. Littering (e.g. condoms on door-steps) is an additional problem. It can also be unpleasant for women who live in the area, or who are visiting or simply passing through, to be accosted by men on foot or in cars. It is also an unsatisfactory atmosphere in which to try to bring up children.
- 11.3.6 The fourth party referred to is society generally and the question to be asked is would the general public be prepared to accept the abolition of the offence of

public soliciting. Reaction to this Paper may give some indication of the answer to that question.

- 11.3.7 What would be the effects of decriminalisation? It is difficult to answer but some of the more tangible scenarios could include an increase in the number of young men and women becoming prostitutes, an increase in the problems referred to above in residential areas and an influx of prostitutes from abroad. There could also be a less tangible but perceptible erosion of public confidence in what would be regarded as a right to enjoy a certain ambience and level of standards in places, such as the streets of our cities, frequented by the public. On the other hand, prostitutes might develop a better relationship with the Gardaí and be more likely to report assaults; the power of pimps might be reduced and prostitutes might be more willing to have regular health checks.
- 11.3.8 Would it be practicable to retain public soliciting as an offence, but only for soliciting in residential areas? Alternatively, should there be an onus on the Gardaí to prove in court that the soliciting did cause a nuisance? One problem with the latter suggestion is that the Gardaí would have to find a person prepared to testify in court that the soliciting did cause a nuisance. For various reasons, that would not be easy. Both suggestions could overcome the problem of soliciting in residential areas but could cause problems elsewhere, such as in public parks. The former suggestion could also leave prostitutes very vulnerable if they had to work in relatively isolated places.

Penalties

- 11.3.9 One aspect of the present law that caused some comment during the debates on the Bill of the 1993 Act was the level of fines for soliciting for the purposes of prostitution. The fine on a first conviction is a maximum of £250; it is £500 on a second conviction and £500 and/or a term of imprisonment not exceeding 4 weeks in the case of a third or subsequent conviction. As already mentioned, clients and third parties are subject to the same scale of penalties.
- 11.3.10 The arguments against the above level of fines (which are comparatively low in the context of fines for offences generally) are that there is no victim, in the usual meaning of the term, and that the only way prostitutes could afford to pay that level of fine would be to go “back on the street”. The arguments in favour are that a criminal offence is pointless if the penalty on conviction does not provide some form of deterrence and significant fines could discourage persons going into or continuing a life in prostitution.

11.4 Brothels

- 11.4.1 Any decisions on soliciting in public would have repercussions for the law governing the operation of brothels. However, it is in its own right a subject that can be dealt with independently of public soliciting.
- 11.4.2 Under the law on brothel keeping, as updated in 1993, it is an offence to keep or manage a brothel. Prosecution can be either summarily or on indictment; in the latter case the maximum penalty is a fine of £10,000 and/or 5 years imprisonment. The term “brothel” is not defined but it has been described in court decisions as “a place resorted to by both sexes for the purposes of prostitution” (*Singleton v. Ellison [1895] 1 QB 607*) and a place “used by more

than one person for the purpose of sexual lewdness with more than one man (*Abbott v. Smith [1965] 2QB 662*). The 1993 Act makes it clear that a reference in any enactment to “a prostitute” includes reference to a male person who is a prostitute.

- 11.4.3 Should brothels be legalised? The arguments for such a course are varied and of greater or lesser impact but the main ones are that: it would be facing reality (i.e. at present brothels operate but under other guises such as massage parlours, etc.); it would allow prostitutes to work indoors in comparative safety; it would allow for proper control (fire safety, planning, working conditions, etc.); it would allow for regular health checks and would remove the business from a marginal existence where crime, drugs, etc. are a feature.
- 11.4.4 The arguments against legalisation of brothels include: it would not meet with public acceptance; reservations about the State becoming involved at every level in the control of brothels, such as operating a licensing system — a business which many persons would find unacceptable — and the fact that, almost certainly, many prostitutes would, for their own reasons, continue to work outside the officially sanctioned system, either on the streets, in illegal brothels or as “high class” call girls.

11.5 Children in Prostitution

Introduction

- 11.5.1 It is the unfortunate reality that children, through force of circumstances, engage in prostitution and it behoves the State to make every effort to eliminate this appalling form of sexual exploitation. Given the secret nature of child prostitution it is extremely difficult to obtain accurate information on its extent. The recent Report of the Eastern Health Board’s Working Party on Children in Prostitution, however, does attempt to quantify the extent of the problem in Dublin. The report found that 47 under 18s were involved in prostitution at some stage and the age breakdown was as follows: 1 aged 13 years, 8 aged 14 years, 9 aged 15 years, 10 aged 16 years and 19 aged 17 years.
- 11.5.2 The child prostitution problem needs to be tackled on a number of fronts: the Eastern Health Board’s report for instance found that the majority of the children involved in prostitution had been or were homeless. Measures to tackle homelessness could, therefore, make significant inroads into the problem. The focus of this Paper is, however, the criminal law and that is what is addressed in the following paragraphs.

Penalty for soliciting a child

- 11.5.3 The laws governing public soliciting are the same for all prostitutes (or their clients) regardless of age. To take the example of a man convicted of soliciting a 14 year old girl, he is liable to the same scale of penalties as a man convicted of soliciting an adult woman. However, should the man who solicits the adult then have consensual sexual intercourse with her, no other offence is committed, unless it takes place in circumstances of public indecency. The man having sexual intercourse with the 14 year old whom he solicited could be charged under section 1 of the Criminal Law Amendment Act, 1935, where the maximum penalty on conviction is life imprisonment. It could also be argued

that soliciting a young girl is no different from attempting to have carnal knowledge of her which would also leave a person open to prosecution under sections 1(2) or 2(2) of the 1935 Act.

- 11.5.4 The question arises as to whether the penalty for soliciting an under-age person should be higher than where the prostitute is an adult. It could be argued that the additional penalties for having sexual intercourse with a minor are a sufficient deterrent. On the other hand, where sexual intercourse with an under-age prostitute has taken place it would be unlikely that there would be any complaint to the Gardaí and, therefore, evidence would be difficult to obtain. The Criminal Law (Sexual Offences) Act, 1993 (section 6) makes it an offence to solicit or importune another person for the purposes of the commission of an act which would, *inter alia*, constitute an offence under section 1 or 2 of the 1935 Act. The penalty on conviction is a maximum fine of £1,000 and/or 12 months imprisonment. An amendment to section 6 of the 1993 Act was proposed for inclusion in the Children Bill, 1996 which would have extended the offence to include soliciting or importuning for the purpose of prostitution (i.e. not confining it just to unlawful sexual intercourse with a girl under 15 or 17, as the case may be) and would have increased the maximum fine to £1,500.
- 11.5.5 Perhaps, on reflection, and because paedophilia may be involved, there is a case for creating a totally new offence of soliciting a child for the purposes of prostitution with a maximum penalty on indictment of, say, 5 years, making it an arrestable offence. This would be in addition to the existing offence under section 6 of the 1993 Act.

Decriminalisation of under-age prostitution

- 11.5.6 Central to any discussion on prostitution is whether the child engaged in “child prostitution” should be subject to the criminal law. This is a separate issue to the question of decriminalising public soliciting generally or legalising brothels. A 14 year old girl or boy who publicly solicits for the purposes of prostitution commits the same offence as an adult who similarly solicits. Apart from the social aspects of criminalising child prostitutes, it might be argued that there is a certain ambiguity, if not illogicality, in laws that criminalise a child who so solicits while, on the other hand, protect a girl under 17 years of age from criminal liability where another person is charged with having carnal knowledge of her, regardless of the circumstances. There is a difference, of course, in that in the former case it is the act of public soliciting that is being penalised.
- 11.5.7 The advantage of decriminalising public soliciting for persons under 17 years of age would be a recognition of such prostitution for what it is, a social problem where the young person is the real victim. As against that, more young persons might become involved in prostitution, and solicit more openly and boldly. Under-age persons might come under pressure from pimps to become involved in prostitution in the knowledge that those under-aged persons could not be prosecuted. Ironically, the very fact that a child comes to the notice of the Gardaí for soliciting may be the first indication that the child has become involved in prostitution, thus enabling help to be provided.

11.6 Questions

11.6.1 Unlike issues raised in most other chapters, this Chapter is not generally about reform as such. It raises one or two major questions for discussion which are as much about the way we visualise society generally as about the particular issues raised. Admittedly, it is a difficult subject to discuss in a narrow criminal justice context, as prostitution raises essentially social matters such as its causes, the education and health of prostitutes, the assistance that can be given to prostitutes trying to give up the life or attempting to escape the clutches of pimps or others who may be influencing them to continue as prostitutes. However, it is also clear that some persons become prostitutes voluntarily and willingly, especially at the so called top end of the market, and have no wish to cease their activities. Therefore, controlling prostitution from a social point of view is more complex than helping homeless boys or girls, persons with a drug problem or women trying to support a family, to get out of prostitution.

11.6.2 The questions raised in this Chapter include—

The criminalisation of public soliciting for the purposes of prostitution and of brothel-keeping

The present level of penalties for public soliciting

Should there be a more severe penalty for soliciting a person under 17 years of age for the purpose of prostitution and should there be separate provision for the offence?

Should a child engaged in prostitution be subject to the criminal law?

Chapter 12



Other Issues

Chapter 12

Other Issues

12.1 Introduction

- 12.1.1 A wide range of issues relevant to the legislation governing sexual offences has been discussed in the previous Chapters. The purpose of this Chapter is to discuss briefly some topics of singular relevance to the problems associated with sexual offences but which are otherwise unconnected to one another. Those topics are: aspects of pornography, sentencing and forensic evidence.

12.2 Pornography

General

- 12.2.1 It is not the intention to discuss the censorship laws as such in this Paper. However, the apparent increasing availability of pornography has recently become a cause of concern. Concerns about child pornography are being addressed as a separate matter in the Child Trafficking and Pornography Bill, 1997; the other current concerns are raised here. These relate to the absence of a penal deterrent to the importation of pornography; the lack of an effective prohibition, apart from the censorship laws, on the possession of pornography for the purpose of its distribution or sale and the open display of pornography.

Legislative background

- 12.2.2 The laws dealing with obscene or indecent materials can be broadly divided under two headings, those concerned with censorship and those that have created specific criminal offences for the distribution, display etc., of obscene or indecent articles. The censorship laws emanate from this century, some being of recent origin, and deal with the censorship of films, publications and videos. Those laws that created criminal offences are of much older origin, going back in some cases to the middle of the last century and beyond. It is with these latter laws that this section of the Paper is primarily concerned.
- 12.2.3 There is no statutory definition of pornography. The expressions “obscene” and “indecent” are the tests for censorship and are also the expressions used in the criminal law. It is not the intention to explore the meanings of “obscene” and “indecent” — they extend into areas beyond the contemplation of this section which is concerned with the efficacy of the legislation under which the Gardaí and the customs authorities attempt to control the importation and availability of obscene or indecent materials, such as books, pictures, magazines, etc.

Importation

- 12.2.4 Section 42 of the Customs Consolidation Act, 1876 gives the customs authorities power to seize any obscene or indecent articles etc., being imported or brought into the State. While the effect of the exercise of this power can be to remove the obscene articles etc. from circulation, criminal charges cannot be laid against the would be importer. Therefore apart from the possible confiscation of goods at the point of entry or later — less likely now in the era of free movement of goods — there is very little disincentive to the importation of pornography. An

immediate question arises, therefore, as to whether a criminal offence should be created, with appropriate penalties, of importing pornography. The arguments for and against reflect two very different views on how we should organise society. On the one hand there are those who would argue that the State should have no role in deciding what material could be brought into the country — that the decision to purchase such material should be left to the individual. The opposite view is that the State has a duty to exclude pornographic material because of its corrosive moral effect and possible contribution towards a rise in sexual violence against women and children.

Distribution or sale of pornography

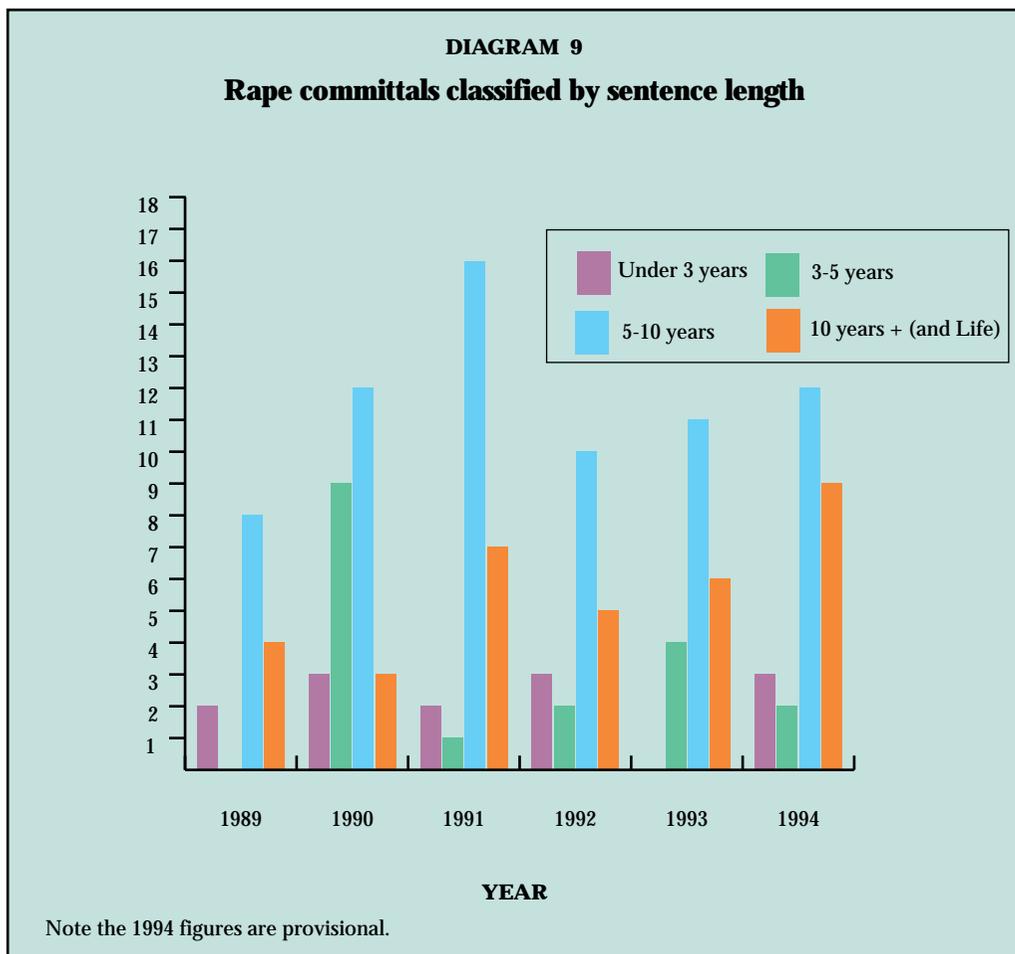
- 12.2.5 There are various pieces of legislation that deal with the distribution or sale of obscene or indecent materials. For example, section 72 of the Towns Improvement Ireland Act, 1854 provides that every person who in any street in a town where the Act applies, to the annoyance of the residents publicly offers for sale or distribution, or exhibits to public view, any profane, indecent or obscene book, paper, print or drawing is guilty of an offence which carries a penalty of £2. Section 18 of the Censorship of Publications Act, 1929 prohibits the sale or the keeping for sale of indecent pictures. The penalty on conviction for a first offence under this section is a maximum fine of £50 and for a second offence £100, or 6 months imprisonment.
- 12.2.6 The above offences are archaic and, apart from the low penalties, are clearly inadequate to deal with the sale or distribution of pornography in modern conditions. It would appear that in most circumstances it is not an offence to be in possession of or to offer for sale or otherwise distribute pornographic materials where the material has not already been the subject of certification or been banned by the censor. Pornographic publications cannot be examined by the censor until brought to his or her notice by a member of the public. By the time a particular publication may be banned, an identical or similar publication with a different name may be on sale. Modern printing and publication technology makes that inevitable. This means that there is little control over the sale or distribution of pornography. Should the Gardaí be given the power to prosecute persons found to be in possession of pornography for the purpose of its sale or distribution? The arguments for and against are essentially the same as those relating to the importation of pornography. Simple possession of pornographic material raises more difficult issues. It is proposed to make it an offence to possess child pornography in the Child Trafficking and Pornography Bill, 1997. However, the consideration there is the protection of children who are used for the creation of such materials and also the link between the possession of child pornography and paedophile rings. Similar considerations would not appear to arise to the same extent as respects the possession of pornography which does not constitute child pornography.
- 12.2.7 Any discussion on attempting to control the influx of pornography into this country has to take place against the background of the reality of the transmission of pornography by means of modern technology. The abuse of technology may well make any attempts to restrict pornography redundant. As it is, the Internet is used to transmit pornography as are so-called adult satellite television channels.

Display of pornography

- 12.2.8 At present, under section 3 of the Indecent Advertisements Act, 1889 it is an offence to exhibit indecent or obscene pictures or printed materials in a shop window or to affix indecent material in any place where it is visible to the public. The maximum penalty is a £10 fine. An even older provision, section 4 of the Vagrancy Act, 1824 provides that every person who wilfully exposes to view in any public place, any obscene print, picture or other indecent exhibition will be guilty of an offence which carries a penalty of 3 months imprisonment on conviction. While these laws could in any case benefit from an examination (e.g. should they be strengthened to include all advertising and displaying of pornography?), a review of them would acquire some urgency if the laws governing the importation and the distribution and sale of pornography were not strengthened.

12.3 Sentencing for Sexual Offences

- 12.3.1 It is difficult to discuss sentencing policy for sexual offences in isolation from other offences. For example, questions relating to the purpose of sentencing, the toughness or otherwise of sentences, comparisons with other countries, consistency in sentencing and mandatory sentences, are common to most crimes. Nonetheless, for the purpose of this Paper, the discussion is confined to sentencing in the context of sexual offences and, in particular, uniformity in sentencing and mandatory sentences.



The Law on Sexual Offences

- 12.3.2 Under our legal system, the law provides generally for maximum penalties for criminal offences. The law enables Judges to exercise their discretion within the maximum penalty by reference to the conclusions they have reached after trying the case, hearing the evidence, assessing the culpability and the circumstances of the accused, etc.
- 12.3.3 Public disquiet may occasionally arise in relation to what are perceived to be unaccounted for variations in the sentences handed down by the courts in the case of apparently similar crimes. However, in considering any such disquiet it must be borne in mind not only that no two cases (no matter how apparently similar) will be the same but also that literally thousands of decisions made in the courts every year go uncriticised because there is no basis for criticism.
- 12.3.4 Any discussion on sentencing should take place in the context of the right, in certain circumstances, of the accused to appeal against the sentence. The Court of Criminal Appeal has the power to remit, reduce, increase or otherwise vary the sentence. In addition, where it appears that an unduly lenient sentence has been imposed, there is provision under section 2 of the Criminal Justice Act, 1993 for the Director of Public Prosecutions to make an application to the Court of Criminal Appeal for a review of the sentence. Also the Courts (Supplemental Provisions) Act, 1961 makes provision for meetings of District Court Judges to discuss, *inter alia*, the avoidance of undue divergence in the exercise of their jurisdiction. There is no similar provision in the case of the other courts but there is no barrier to their having similar meetings and it is understood that such meetings do take place.
- 12.3.5 A uniformity of approach to sentencing can be developed within the judiciary through the education and on-going training of members of the judiciary. Because of the constitutional independence of the judiciary, the Executive is precluded from intervening in the exercise of judicial functions including imposing a training or briefing programme for them. Our system of recruitment of the judiciary is based on the appointment of highly qualified and experienced legal practitioners. The law enables the Minister for Justice, Equality and Law Reform to provide funds for training courses arranged by the judiciary and also provides that persons wishing to be considered for judicial appointment must agree to undertake courses following their appointment. Furthermore, the Chief Justice established the Judicial Studies Institute in 1996 to oversee judicial training and to ensure that the funds which are made available for training are used effectively.
- 12.3.6 The maximum penalties for most sexual offences are already very severe. Eight such offences attract up to life imprisonment. Where the question of adjusting the penalties for particular sexual offences arises, it is dealt with in the appropriate Chapter of this Paper.
- 12.3.7 The occurrence of a few perceived inadequate sentences for sexual offences would not form an appropriate basis for the introduction of mandatory minimum sentences. Mandatory sentences could only be justified if a particular length of sentence could be identified above which, on conviction for even the most minor manifestation of an offence, that sentence at the very least should be imposed. The argument advanced in favour of introducing mandatory sentences, especially for rape and aggravated sexual assault, are that such a threshold does exist.

12.3.8 There is no evidence that this country is out of line with other jurisdictions with regard to rape sentences. Indeed the evidence is that very substantial penalties are imposed on conviction for rape. The Chief Justice in the case of the *People - v- Tiernan [1988] IR 250* stated that—

“it is not easy to imagine the circumstances which would justify departure from a substantial immediate custodial sentence for rape and I can only express the view that they would probably be wholly exceptional.”

While that statement does say that a substantial custodial sentence is appropriate on conviction for rape, it also implies that there may be exceptional cases which could not be catered for in a regime of mandatory sentencing.

12.3.9 There are a number of other arguments against mandatory minimum sentences in sexual offence cases. One such argument is that they would not work (evidence from America suggests that they have no significant effects on rates of serious sexual crime). The experience in America suggests that mandatory sentences might make it more difficult to obtain convictions, or the jury might find the accused guilty of a lesser offence; defendants may be less likely to plead guilty. Another consideration is that in the case of offences where the circumstances of the offence could vary widely, mandatory sentences could fall foul of the constitutional requirement of proportionality. A matter that has given rise to concern and confusion, particularly in the case of sentences for rape, are recent High Court judgments to the effect that where an accused pleads guilty, even in a particularly horrific case, the judge is precluded from imposing the maximum sentence, i.e., life imprisonment even if he or she felt it appropriate to do so. This matter is being clarified in the Criminal Justice Bill, 1997 where it is made clear that even where there is a guilty plea a court is not precluded from imposing the maximum sentence where it is satisfied that the circumstances of the offence warrant the maximum sentence.

12.4 Forensic Evidence (Body Samples)

12.4.1 Section 2 of the Criminal Justice (Forensic Evidence) Act, 1990 gave the Gardaí power to take body samples from persons who are being held in custody under section 30 of the Offences against the State Act, 1939 or under section 4 of the Criminal Justice Act, 1984. In the case of intimate samples, the consent of the person from whom the sample is to be taken has to be given in writing. Samples, and records of those samples, must be destroyed within 6 months where proceedings have not been taken against the persons from whom they were taken. Where proceedings have been instituted and a person has been acquitted, the sample and record must be destroyed within 21 days. An application to a court can be made by the Director of Public Prosecutions to retain a sample and record for such period as the court may direct. Records of samples of convicted persons need not be destroyed.

12.4.2 Two questions arise from the foregoing. First, should samples generally (and, more importantly, records of them) be kept as a matter of routine for longer than 6 months? A period of, say, 12 months, it could be argued, would be more realistic in an era where criminal investigations of sophisticated crimes can be lengthy and complex. On the other hand, it could be said that, whatever the time limit, it would be somewhat arbitrary and cases might arise where even 12 months might not suffice. In any case, the “safety net” of applications to the

court by the D.P.P. can be resorted to where necessary and that provision would still be necessary no matter what the time limit.

- 12.4.3 The second and more important question is whether samples should be taken from all persons convicted of certain offences; for the purpose of this Paper the scope of the question will be confined to sexual offences. This would, in effect, allow for a DNA data base of convicted sex offenders to be built up by the Gardaí, particularly if the giving of such samples was compulsory. The compilation of such a data base could be justified in the context of sex offenders, where there is a tendency towards re-offending and where forensic evidence can be important. As against that it would have civil liberties implications, particularly if made compulsory. It might also be in breach of the constitutional right to bodily integrity and Article 3 of the European Convention on Human Rights (*'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'*). The method of taking samples, and from which part of the body they are taken, could be important considerations in arriving at any decision. As technology advances, it may be possible to take DNA samples in a more non-invasive manner.

12.5 Questions

- 12.5.1 The questions raised in this Chapter include—

Should the laws be strengthened to deal with the importation of pornography?

Should the distribution or sale of pornography be made an offence?

Are the laws concerning the display of pornography sufficient?

Are the present sentencing arrangements for rape and other sexual offences sufficient?

Is 6 months a sufficient time to retain body samples and records as a matter of routine?

How could one achieve a permanent DNA data base of convicted sex offenders while at the same time respecting constitutional and human rights?

Appendix 1



Terms of Reference of Working Group to Review the Child Abuse Guidelines

Appendix 1

Terms of Reference of Working Group to Review the Child Abuse Guidelines

The Terms of Reference are as follows:

“In view of the implementation of the Child Care Act, 1991, changes in the management of health boards and the commitment of the Government to introduce mandatory reporting of child abuse to review

- (i) the Guidelines on Procedures for the identification, investigation and management of child abuse and
- (ii) the Notification of Suspected Cases of Child Abuse between Health Boards and Gardaí

and to prepare revised guidelines aimed at improving the identification, investigation and management of child abuse.”

Appendix 2



Joint Action on Trafficking in Human Beings and Sexual Exploitation of Children

Joint Action on Trafficking in Human Beings and Sexual Exploitation of Children

JOINT ACTION
of 24 February 1997

adopted by the Council on the basis of Article K.3
of the Treaty on European Union
concerning action to combat
trafficking in human beings and sexual exploitation of children (97/154/JHA)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3(2)(b) thereof,

Having regard to the initiative of the Kingdom of Belgium,

Whereas the establishment of common rules for action to combat trafficking in human beings and sexual exploitation of children is likely to contribute to the fight against certain unauthorised immigration and to improve judicial cooperation in criminal matters, which are of common interest to the Member States within the meaning of Article K.1(3) and (7) of the Treaty;

Having regard to the Resolution on trafficking in human beings adopted by the European Parliament on 18 January 1996⁽¹⁾ and the Resolution on victims of violence who are minors, adopted on 19 September 1996⁽²⁾;

Bearing in mind the Recommendations of combating trafficking in human beings adopted by the Council on 29 and 30 November 1993;

Bearing in mind the conclusions of the European Conference on trafficking in women, held in Vienna on 10 and 11 June 1996;

Bearing in mind the conclusions of the World Congress against commercial sexual exploitation of children, held in Stockholm from 27 to 31 August 1996;

Recalling Article 34 of the Convention on the Rights of the Child of 20 November 1989;

Whereas trafficking in human beings and sexual exploitation of children constitute serious infringements of fundamental human rights, in particular human dignity;

Aware of the need to take account of the particularly vulnerable position of the victims of this type of crime, in particular the vulnerability of children;

Whereas trafficking in human beings and sexual exploitation of children may constitute an important form of international organized crime, the extent of which within the European Union is becoming increasingly worrying;

Anxious to implement the necessary measures to put a stop to trafficking in human beings and the sexual exploitation of children;

⁽¹⁾ OJ No. C32, 5.2.1996, p. 88.

⁽²⁾ OJ No. C320, 28.10.1996.

Taking into account the fact that the Council already has decided to take effective measures against the trafficking in human beings by the adoption of a Joint Action to set up a Directory of Centres of excellence⁽³⁾ and by establishing an Exchange Programme for training of persons competent in this matter⁽⁴⁾;

Considering that the Member States of the European Union concerning certain types of trafficking in human beings and sexual exploitation of children should take concerted action to counter obstacles, where they exist, to effective judicial cooperation on the subject, in accordance with the multi-annual programme on cooperation in justice and Home Affairs, adopted by the Council on 14 October 1996;

Aware of the need for a multi-disciplinary approach to the question of trafficking in human beings and sexual exploitation of children;

Noting that the terms used in this Joint Action do not refer to any specific legal system or national law but rather should be interpreted in the light of the legal systems of Member States;

Noting that the provisions of this Joint Action are without prejudice to obligations of Member States under conventions to which they are bound, such as the 1950 UN Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others, or to the right of Member States to take measures which further enhance the protection of children or combat trafficking in human beings,

HAS ADOPTED THIS JOINT ACTION:

Title I

Aims

- A. For the guidance of Member States in applying this Joint Action, and without prejudice to more specific definitions in the Member States' legislation, the following concepts are understood, in the context of this Joint Action:
- (i) 'trafficking', as any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of a Member State, for the purposes set out in point B(b) and (d);
 - (ii) 'sexual exploitation' in relation to a child, as the following behaviour:
 - (a) the inducement or coercion of a child to engage in any unlawful sexual activity;
 - (b) the exploitative use of a child in prostitution or other unlawful sexual practices;
 - (c) the exploitative use of children in pornographic performances and materials, including the production, sale and distribution or other forms of trafficking in such materials, and the possession of such materials;
 - (iii) 'sexual exploitation' in relation to an adult, as at least the exploitative use of the adult in prostitution.
- B. In order to improve judicial cooperation in the context of combating trafficking in human beings and sexual exploitation of children, each Member State undertakes, while respecting the constitutional rules and legal traditions of each Member State, to review their relevant national laws concerning the measures set out in Titles II and III relating to the following intentional types of behaviour, in accordance with the procedure set out in Title IV;

⁽³⁾ OJ No. L342, 31.12.1996, p. 2.

⁽⁴⁾ OJ No. L322, 12.12.1996, p. 7.

- (a) Sexually exploiting a person other than a child for gainful purposes, where
 - use is made of coercion, in particular violence or threats, or
 - deceit is used, or
 - there is abuse of authority or other pressure, which is such that the person has no real and acceptable choice but to submit to the pressure or abuse involved;
- (b) trafficking in persons other than children for gainful purposes with a view to their sexual exploitation under the conditions set out in paragraph (a);
- (c) sexually exploiting or sexually abusing children;
- (d) trafficking in children with a view to their sexual exploitation or abuse.

Title II

Measures to be taken at national level

- A. Each Member State shall review existing law and practice with a view to providing that:
 - (a) the types of behaviour set out in Title I B are classified as criminal offences;
 - (b) these offences, and, with the exception of the possession referred to in Title I A (ii) (c), participation in or attempt to commit them, are punishable by effective, proportionate and dissuasive criminal penalties;
 - (c) legal persons may, where appropriate, be held administratively liable in connection with the offences listed in Title I B or criminally responsible for such offences, committed on behalf of the legal person in accordance with modalities to be defined in the national law of the Member State. That liability of the legal person is without prejudice to the criminal responsibility of the physical persons who have been accomplices in or instigators of those offences;
 - (d) the penalties and, where appropriate, the administrative measures referred to in paragraphs (b) and (c) of this Title include:
 - insofar as natural persons are concerned, in serious cases at least, custodial penalties which may involve extradition;
 - confiscation, where appropriate, of the instruments and proceeds of those offences;
 - where appropriate and as provided by the administrative or criminal law of the Member State, the temporary or permanent closure of establishments which have been used or intended for committing such offences;
 - (e) the offences covered by this Joint Action will, where appropriate, fall within the scope of application of the Council of Europe 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;
 - (f) its authorities are competent regarding the offences set out in Title I B (c) and (d), at least in cases where:
 - (i) the offence is committed, wholly or partly, on its territory;
 - (ii) with the exception of the offence of possession of pornographic material referred to in Title I A (ii) (c), the person committing the offence is a national or a habitual resident of that Member State.
- B. Where it would be otherwise contrary to the established principles of its criminal law relating to jurisdiction, a Member State may in either adopting or exercising

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the competence referred to in point A (f) (ii), provide that the offence must also be punishable under the law of the State where it was committed.

- C. Where a Member State maintains the requirement of double criminality provided for in point B, it shall keep its law under review, with a view to ensuring that this requirement is not an obstacle to effective measures against its nationals or habitual residents who are suspected of engaging in such offences in jurisdictions which may not have taken adequate measures as referred to in Article 34 of the Convention on the Rights of the Child of 20 November 1989.
- D. Member States may provide that they will only exercise the jurisdiction provided for in point A (f) (ii) if certain procedural conditions are fulfilled, or where the alleged offender cannot be extradited because of:
- a refusal by the Member State concerned to comply with a request for extradition made by the State where the offence was committed, or
 - a confirmation by that latter State that it does not intend to request the extradition of the alleged offender, or
 - failure by that State to request the extradition of the alleged offender within a reasonable time.
- E. Each Member State shall take the measures necessary to ensure that in addition to ordinary constraining measures such as search and seizure, adequate investigation powers and techniques are available to enable the offences listed in point A (a), (b) and (e) to be investigated and prosecuted effectively, in compliance with the rights of defence and privacy of the persons subject to those measures.
- F. Each Member State shall take the measures necessary to ensure:
- (a) appropriate protection for witnesses who provide information concerning the offences referred to in point A (a), (b) and (e), in accordance with, in particular, the Resolution of the Council of the European Union of 23 November 1995 on the protection of witnesses in the fight against organized crime⁽⁵⁾;
 - (b) appropriate assistance for victims and their families.

For this purpose, each Member shall ensure that:

- (i) victims are available where required by the Member State's criminal justice system to give evidence in any criminal action, which may entail provisional residence status in appropriate cases; and
- (ii) victims are enabled to return to their country of origin, or another country which is prepared to accept them, with the full rights and protections accorded by the national law of the Member States.

In addition, each Member State shall ensure that victims of the offences referred to in Title I B are given appropriate assistance to enable them to defend their interests before the Courts.

Each Member State shall examine how to keep families of children who are victims of offences covered by this Joint Action informed of the progress of the enquiry.

- G. Each Member State shall take the necessary measures to ensure that the services which are likely to have relevant experience in the context of the fight against trafficking in human beings and sexual exploitation of children, in particular the immigration, social security and tax authorities, give special attention to the problems connected with trafficking in human beings and sexual exploitation of

⁽⁵⁾ OJ No. C327, 7.12.1995, p. 5.

children and, while respecting the internal law of the Member State, cooperate with the authorities responsible for investigation and punishment of the offences referred to in point A (a), (b) and (e). In cases which merit special attention, these services should in particular:

- advise those authorities on their own initiative, where there are reasonable grounds for considering that one of these offences has been committed;
 - provide those authorities with all useful information, either on request or on their own initiative;
 - if appropriate, take part in the procedures as experts.
- H. For the purposes of ensuring that the fight against trafficking in human beings and sexual exploitation of children is fully effective, each Member State shall ensure that the activities of the authorities responsible for this fight are properly coordinated, allowing for the possibility of a multi-disciplinary approach. Such coordination could, for instance, involve at national or regional level, depending on the administrative structure and legal system of the Member State concerned, ministerial departments, the police services, the judicial authorities which specialize in the matter, as well as public bodies which have been given special responsibilities in this area.
- I. The authorities of each Member State shall take due account of the contribution to the fight against trafficking in human beings and sexual exploitation of children of any group, foundation or association which, by virtue of its Statute, has the aim of combating such offences.

Title III

Cooperation between Member States

- A. Member States shall grant each other the widest possible judicial cooperation in the investigations and judicial processes relating to the offences referred to in Title II, point A (a), (b) and (e).
- B. Each Member State which has made a reservation or declaration with respect to Article 5 of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, shall review it in order to verify whether it might pose an obstacle to an effective cooperation with other Member States in relation to offences covered by this Joint Action.
- C. Member States shall, in accordance with the applicable arrangements and conventions in force, ensure that letters rogatory are dealt with as quickly as possible and shall keep the requesting State fully informed of the progress of the procedure.
- D. Member States shall, where appropriate, take the necessary measures, to allow the direct transmission of requests for assistance between locally competent authorities.
- E. Each Member State shall, where such appointments do not already exist, appoint one or several contact authorities which may be contacted in the event of difficulty in complying with urgent letters rogatory.
- F. Member States shall also, in conformity with the respective legal traditions of each Member State and applicable conventions and arrangements, grant each other assistance in the exchange of information which in one of the Member States is administrative in nature or falls under the competence of administrative authorities.

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- G. Each Member State shall ensure that information concerning missing minors and persons convicted of offences set out in this Joint Action as well as information which could be useful for investigations and prosecutions of such offences is organized in such a way that it is readily accessible and can be effectively used and exchanged with other Member States.
- H. Without prejudice to its own investigations and procedures, each Member State may, without receiving a prior request, communicate to another Member State any factual information where it considers that disclosure of the said information is likely to help the recipient State to begin to carry out investigations or procedures to prevent or punish the offences referred to in Title II, point A (a), (b) and (e) or is likely to involve a request for judicial cooperation from that Member State.
- I. The exchange and communication of information referred to in paragraphs F, G and H shall be carried out in compliance with the right to privacy and applicable instruments and national law relating to the computerised processing of personal information.
- J. Member States shall inform and alert their diplomatic and consular posts, where applicable, in third countries and make the best use of the possibilities offered by them, in the context of international co-operation against trafficking in human beings and sexual exploitation of children.

Title IV

Commitment and follow-up

- A. Each Member State shall bring forward appropriate proposals to implement this Joint Action for consideration by the competent authorities with a view to their adoption.
- B. The Council will assess, on the basis of appropriate information, the fulfilment by Member States of their obligations under this Joint Action, by the end of 1999.
- C. This Joint Action shall be published in the Official Journal.
- D. It shall enter into force on the date of its publication.

Done at Brussels, 24 February 1997.

For the Council

The President

H. VAN MIERLO

Appendix 3



Table of Sexual Offences

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Offence	Statute	Penalty Maximum
Rape	Offences against the Person Act, 1861 (section 48) Criminal Law (Rape) Act, 1981 (section 2)	Life imprisonment
Rape under section 4	Criminal Law (Rape) (Amendment) Act, 1990 (section 4)	Life imprisonment
Aggravated sexual assault	Criminal Law (Rape) (Amendment) Act, 1990 (section 3)	Life imprisonment
Incest by males	Punishment of Incest Act, 1908 (section 1), as amended by the Criminal Law Amendment Act 1935 (section 12), the Criminal Justice Act, 1993 (section 12) and the Criminal Law (Incest Proceedings) Act, 1995 (section 5)	Life imprisonment
Incest by females of or over 17 years	Punishment of Incest Act, 1908 (section 2), as amended by the Criminal Law Amendment Act, 1935 (section 12)	7 years imprisonment
Unlawful carnal knowledge of girls under 15 years	Criminal Law Amendment Act, 1935 (section 1)	Life imprisonment
Unlawful carnal knowledge of girls under 17 years	Criminal Law Amendment Act, 1935 (section 2) as amended by Criminal Law Act, 1997 (section 13)	5 years imprisonment (1st conviction); 10 years for any subsequent conviction
Buggery with person under 15 years	Criminal Law (Sexual Offences) Act, 1993 (section 3)	Life imprisonment
Buggery with person of or over 15 years and under 17 years	Criminal Law (Sexual Offences) Act, 1993 (section 3)	5 years imprisonment (1st conviction); 10 years for any subsequent conviction
Bestiality	Offences against the Person Act, 1861 (section 61)	Life imprisonment
Sexual assault	Criminal Law (Rape) (Amendment) Act, 1990 (section 2)	5 years imprisonment
Gross indecency with male under 17 years	Criminal Law (Sexual Offences) Act, 1993 (section 4)	2 years imprisonment
Public indecency	Criminal Law Amendment Act, 1935, (section 18) as amended by the Criminal Law (Rape) (Amendment) Act, 1990 (section 18)	£500 fine or 6 months imprisonment or both
Sexual intercourse or buggery with mentally impaired person	Criminal Law (Sexual Offences) Act, 1993 (section 5)	10 years imprisonment
Gross indecency with mentally impaired male	Criminal Law (Sexual Offences) Act, 1993 (section 5)	2 years imprisonment
Soliciting or importuning for purpose of committing offence under section 3, 4 or 5 of 1993 Act	Criminal Law (Sexual Offences) Act, 1993 (section 6)	£1,000 fine or 12 months imprisonment or both
Soliciting or importuning for purposes of prostitution	Criminal Law (Sexual Offences) Act, 1993 (section 7)	£250 fine (first offence) £500 fine (second offence) £500 fine or 4 weeks imprisonment or both (third or subsequent offence)

The Law on Sexual Offences

Offence	Statute	Penalty Maximum
Failing to comply with direction of Garda where loitering for purposes of prostitution	Criminal Law (Sexual Offences) Act, 1993 (section 8)	£250 fine (first offence) £500 fine (second offence) £500 fine or 4 weeks imprisonment or both (third or subsequent offence)
For gain, controlling or directing activities of a prostitute, organising prostitution, compelling or coercing a person to be a prostitute	Criminal Law (Sexual Offences) Act, 1993 (section 9)	£10,000 fine or 5 years imprisonment or both
Living on earnings of prostitution	Criminal Law (Sexual Offences) Act, 1993 (section 10)	£1,000 fine or 6 months imprisonment or both
Keeping or managing a brothel	Criminal Law (Sexual Offences) Act, 1993 (section 11)	£10,000 fine or 5 years imprisonment or both
Prohibition of advertising of brothels or prostitution	Criminal Justice (Public Order) Act, 1994 (section 23)	£10,000 fine
Procuring any girl or woman to: have unlawful carnal connection; to become a prostitute; to leave this country to become a prostitute; to leave her usual place of abode to become a prostitute in a brothel within or without the country	Criminal Law Amendment Act, 1885 (section 2)	2 years imprisonment
Procuring defilement of woman or girl by threat or intimidation or by false pretences or false representation	Criminal Law Amendment Act, 1885 (section 3), as amended by the Non-Fatal Offences against the Person Act, 1997 (section 31)	2 years imprisonment
Licensee permitting licensed premises to be used as brothel	Licensing Act, 1872 (section 15)	£40 fine (and forfeiture of licence and disqualification for ever from holding a licence for the sale of liquor)
Owner or occupier of premises who induces or suffers a girl under 15 years to be on such premises for the purpose of being unlawfully and carnally known by a man	Criminal Law Amendment Act, 1885 (section 6) as amended by Criminal Law Amendment Act, 1935 (section 9)	Life imprisonment
Owner or occupier of premises who induces or suffers a girl under 17 years to be on such premises for the purpose of being unlawfully and carnally known by a man	Criminal Law Amendment Act, 1885 (section 6), as amended by the Criminal Law Amendment Act, 1935 (section 9) and Criminal Law Act, 1997 (section 13)	2 years imprisonment

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