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**An Bille um an Dlí Coiriúil (Cionta Gnéasacha), 2015**  
**Criminal Law (Sexual Offences) Bill 2015**

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*Meabhrán Mínitheach agus Airgeadais*  
*Explanatory and Financial Memorandum*

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CRIMINAL LAW (SEXUAL OFFENCES) BILL 2015**

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**MEABHRÁN MÍNITHEACH AGUS AIRGEADAIS  
EXPLANATORY AND FINANCIAL MEMORANDUM**

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The main purposes of the Bill are:

- (1) To give effect to recommendations made by two Oireachtas committees – the Joint Committee on Child Protection and the Joint Committee on the Constitutional Amendment on Children;
- (2) To implement the criminal law provisions of (a) Directive 2011/93/EU of the European Parliament and of the Council on combating the sexual abuse and sexual exploitation of children and child pornography (“Directive 2011/93/EU”), (b) the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and (c) the Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;
- (3) To criminalise the purchase of sexual services;
- (4) To reform the law on incest including addressing a gender anomaly in penalties;
- (5) To make a number of amendments to the Criminal Evidence Act 1992 including regulating the disclosure of the content of third party counselling or therapy records in sexual offence trials;
- (6) To replace the public indecency provisions in section 18 of the Criminal Law Amendment Act 1935;
- (7) To provide for harassment orders prohibiting a convicted sex offender from contacting his or her victim; and
- (8) To provide for related matters.

*Provisions of the Bill*

***Part 1***

***Preliminary and General***

**Section 1: Short title and commencement**

*Section 1* provides for the short title and commencement of the Act.

**Section 2: Interpretation**

*Section 2* is a standard interpretation provision. Among the definitions are the terms “sexual activity” and “sexual exploitation”. The definition of ‘sexual exploitation’ includes the production of child pornography, prostitution of a child or the commission of a sexual offence against a child.

## ***Part 2***

### ***Sexual Exploitation of Children***

This Part contains provisions to enhance the protection of children from sexual exploitation, including exploitation through child prostitution and child pornography. Provisions are also included to target acts of child sexual grooming.

#### **Section 3: Obtaining, providing etc. a child for purpose of sexual exploitation**

*Section 3* provides for an offence of paying, giving or offering payment to a child for the purpose of sexual exploitation. A person offering a child to another person or obtaining a child for himself or herself or for another person for the purpose of sexually exploiting that child will also be guilty of an offence.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 10 years imprisonment.

The term “sexual exploitation” is defined under section 2.

#### **Section 4: Invitation etc. to sexual touching**

*Section 4* provides for an offence where a person who, for sexual purposes, invites, induces, counsels or incites a child to touch any person.

As this offence is effectively a passive form of sexual assault, to which a child under the age of 15 years cannot consent, a child is defined for the purposes of this section as being under 15 years of age.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 14 years imprisonment.

#### **Section 5: Sexual activity in presence of child**

*Section 5* provides for an offence where a person (on their own or with another person) engages in sexual activity either in the presence or view of a child under the age of consent, for the purpose of obtaining sexual gratification or for the purpose of corrupting or depraving the child. This offence is a requirement under Directive 2011/93/EU.

For the purposes of this section, a child is any person under the age of 17 years.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 10 years imprisonment.

#### **Section 6: Causing child to watch sexual activity**

*Section 6* provides for an offence of causing a child under the age of consent to watch sexual activity.

The offence is committed where a person intentionally causes a child to watch another person engaging in sexual activity, or to look at an image of the first person or another person engaging in any sexual activity. This offence is a requirement of Directive 2011/93/EU.

For the purposes of this section, a child is any person under the age of 17 years.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 10 years imprisonment.

#### **Section 7: Meeting child for purpose of sexual exploitation**

*Section 7* contains an offence targeting a form of “grooming” of children for the purpose of sexual exploitation.

Under this section it is an offence where a person meets, or travels with the intention of meeting, a child having communicated with the child on at least one occasion and does so for the purpose of doing anything that would constitute sexual exploitation of the child. This section is in addition to the existing offence under section 3(2A) of the Child Trafficking and Pornography Act 1998 where an offender must have communicated with the child on two or more previous occasions.

In addition, the new offence will address the making of arrangements to meet with a child or have the child travel.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 14 years imprisonment.

Jurisdiction for an offence committed outside the State will be established by way of amendment to the Sexual Offences (Jurisdiction) Act 1996 to be brought forward under section 35 of this Bill.

### **Section 8: Use of information and communication technology to facilitate sexual exploitation of child**

*Section 8* also addresses the “grooming” of children for the purpose of sexual exploitation and provides for two related, but distinct, offences.

Subsection (1) provides for an offence where a person communicates with another person (including a child), via information and communication technology, for the purpose of facilitating the sexual exploitation of a child by that person or any other person. A person found guilty of an offence under this subsection shall be liable on conviction on indictment to up to 14 years imprisonment.

Subsection (2) provides for an offence where a person sends sexually explicit material, via information and communication technology, to a child. A person found guilty of an offence under this subsection shall be liable on conviction on indictment to up to 5 years imprisonment.

Subsection (3) provides that no prosecution shall be taken for an offence against a child under the age of 17 years, under this section, except with the consent of the Office of the Director of Public Prosecutions. For the purposes of this section ‘sexually explicit material’ shall mean any indecent or obscene images or words and a child is defined as any person under the age of 17.

### **Section 9: Amendment of section 2 of Act of 1998**

*Section 9* amends and updates the definition of child pornography in section 2 of the Child Trafficking and Pornography Act 1998, to include in the definition showing or depicting a child engaged in simulated sexually explicit activity.

With regard to child pornography, a child will now be defined as any person under the age of 18 years. Previously, under the 1998 Act, it was defined as a person under the age of 17.

### **Section 10: Amendment of section 3 of Act of 1998**

This is a minor amendment to the definition of sexual exploitation in section 3 of the Child Trafficking and Pornography Act 1998 and brings it into line with the definition of sexual exploitation in section 2 of this Bill. The amendment is contained in paragraph (e) of the definition which clarifies that an invitation to engage in a sexual act is an offence where, if the act were done, that act would be an offence.

### **Section 11: Organising etc. child prostitution or production of child pornography**

*Section 11* strengthens existing provisions concerning child prostitution and child pornography. It inserts a new section (4A) into the Act of 1998 and provides for an offence where a person controls or directs the activities of a child for the purposes of the prostitution of the child or the use of the child for the production of child pornography.

Other elements of the offence include where a person:

- organises the prostitution of children or the production of child pornography by controlling or directing the activities of more than one child for those purposes;
- compels, coerces or recruits a child to engage or participate in child prostitution or the production of child pornography;
- knowingly gains from the prostitution of a child or the production of child pornography; or
- incites or causes a child to become involved in child prostitution or production of child pornography.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 14 years imprisonment.

### **Section 12: Producing, distributing, etc. child pornography**

*Section 12* replaces the existing section 5 of the Child Trafficking and Pornography Act 1998 and provides for an updated offence concerning the production and distribution of child pornography.

Any person who:

- knowingly produces any child pornography;
- knowingly distributes, transmits, disseminates, prints or publishes any child pornography;
- knowingly imports, exports, sells or shows any child pornography;
- knowingly supplies or makes available any child pornography to another person;
- publishes, distributes, transmits or disseminates any advertisement likely to be understood as conveying that the advertiser or any other person produces, distributes, transmits, disseminates, prints, publishes, imports, exports, sells, shows, supplies or makes available any child pornography;
- encourages, causes or facilitates any activity mentioned above; or
- knowingly possesses any child pornography for the purpose of distributing, transmitting, disseminating, publishing, exporting, selling or showing it;

shall be guilty of an offence.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 14 years imprisonment and / or a fine.

This section also increases the maximum monetary penalty for offences tried summarily from a class C fine (a fine not exceeding €2,500) to a class A fine (a fine not exceeding €5,000).

### **Section 13: Participation of child in pornographic performance**

*Section 13* provides for a new offence where a person:

- coerces, causes, recruits, induces or invites a child to participate in a pornographic performance;
- gains from such participation; or
- knowingly attends a pornographic performance in which a child participates.

A pornographic performance is not limited to real sexual activity and also includes simulated sexual activity.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 10 years imprisonment and / or a fine.

#### **Section 14: Possession of child pornography**

This section updates the existing offence concerning the possession of child pornography under section 6 of the 1998 Act.

An offence of acquiring child pornography has been added to the existing offence of possessing child pornography. The section also updates the primary offence to provide for a scenario where a person knowingly obtains access to child pornography by means of information and communication technology.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 5 years imprisonment and / or a fine.

This section is in line with the requirements of Directive 2011/93/EU and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

#### **Section 15: Amendment of section 1 of Act of 2006**

This section substitutes the current definition of “person in authority” in the Criminal Law (Sexual Offences) Act 2006. Under that Act, persons in a position of authority over a child who engage in a sexual act with that child are subject to more severe penalties.

The Joint Oireachtas Committee on the Constitutional Amendment on Children (Second Interim Report, May 2009) recommended that the definition be amended to include persons responsible for training a victim and persons who, while not acting in a position of authority over the victim at the time of the offence, would have become acquainted with the victim from having occupied such a position.

This section provides for such a definition and lists persons who, through their day to day contact with children, would be regarded as persons in authority over them. The definition includes persons in authority both within and outside the household.

#### **Section 16: Sexual act with child under 15 years of age**

This section amends section 2 of the Criminal Law (Sexual Offences) Act 2006 which is the offence of engaging in a sexual act with a child under the age of 15 years.

Subsection (3) replaces the defence of honest belief in the 2006 Act with a more objective test of reasonable mistake as to the child’s age. Under subsection (4), the court will consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the age of 15 years. Subsection (5) provides that the standard of proof required of an accused will be that applicable to civil proceedings.

The penalty for engaging in a sexual act with a child under the age of 15 years remains one of up to life imprisonment.

Sexual act is defined under the 2006 Act as sexual intercourse, an act of buggery, an act of rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990 or aggravated sexual assault.

**Section 17: Sexual act with child under 17 years of age**

This section amends section 3 of the Criminal Law (Sexual Offences) Act 2006 which is the offence of engaging in a sexual act (as defined under the 2006 Act) with a child under the age of 17 years. In addition to amending the defence of mistake as to age along the lines set out in relation to section 16 of this Bill, the penalty for an offence under this section is increased.

Subsection (1) increases the penalty of an offence from up to 5 years imprisonment to up to 7 years imprisonment or if the accused is a person in authority, to up to 15 years imprisonment (previously 10 years).

Subsection (3) replaces the defence of honest belief in the 2006 Act with a more objective test of reasonable mistake as to the child's age. Under subsection (4), the court will consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the age of 17 years. Subsection (5) provides that the standard of proof required of an accused will be that applicable to civil proceedings.

Subsection (7) provides for the prosecutorial discretion of the Office of the Director of Public Prosecutions for an offence under this section.

Under subsection (8), where a person is charged with an offence against a child (between the ages of 15 and 17), it shall be a defence that the child consented to the activity and: (i) the accused is younger than or less than 2 years older than the child; (ii) the accused is not considered to be a person in authority; and (iii) there is no exploitative element to the relationship.

**Section 18: Offence by person in authority**

*Section 18* inserts a new section 3A into the Criminal Law (Sexual Offences) Act 2006 to provide for an offence whereby a person in authority engages in a sexual act with a child between 17 and 18 years of age. Currently, such an offence only arises in relation to children up to the age of 17 years.

Subsection (1) provides that any person (being a person in authority as defined under the Bill) who engages in a sexual act with a child between the ages of 17 and 18 years shall be guilty of an offence. Any person found guilty of an offence under this section shall be liable on conviction on indictment to up to 10 years imprisonment (subsection (8)).

In addition, this section provides for a number of defences available to an accused. It shall be a defence for the accused to prove that they were reasonably mistaken at the time of the alleged offence that the child had attained the age of 18 years (subsection (3)) and the court will consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained this age (subsection (4)).

It shall also be a defence for the accused to prove that he or she had reasonable grounds for believing that they were not a person in authority in relation to the child for the purpose of the Bill (subsection (6)).

Subsection (7) provides that it shall not be a defence for the accused to prove that the child consented to the sexual act.

This offence is a requirement of Directive 2011/93/EU.



### **Section 19: Amendment of section 8 of Act of 1990**

Section 8 of the Criminal Law (Rape) (Amendment) Act 1990 provides that where a person is charged with an offence of rape or a sexual act with a child under the age of 15 years but the evidence for the offence does not warrant such a conviction, then the accused may be found guilty of an offence of (i) rape under section 4 of the Act of 1990, (ii) aggravated sexual assault or (iii) sexual assault where appropriate (i.e., alternative verdicts).

This section amends section 8 to include the offence created under section 18 of this Bill in the list of possible alternative verdicts.

### ***Part 3***

#### ***Purchase of Sexual Services***

This Part contains provisions relating to the purchase of sexual services. The provisions address recommendations of the Joint Committee on Justice, Defence and Equality in its Report on the Review of Legislation on Prostitution (June 2013).

### **Section 20: Payment etc. for sexual activity with prostitute**

*Section 20* provides for a new offence which criminalises paying for sexual activity with a prostitute. Under this section it shall be an offence where, in the context of prostitution, a person pays for a sexual act / activity with another person. It will also be an offence to promise payment for sexual activity with a prostitute. The person offering sexual acts does not commit any offence under this section.

A person guilty of an offence under this section shall be liable on summary conviction to:

- a class E fine (a fine not exceeding €500), in the case of a first conviction (or where they attempt to commit an offence under this section); or
- a class D fine (a fine not exceeding €1000), in the case of a second or subsequent conviction.

### **Section 21: Amendment of section 5 of Act of 2008**

*Section 21* amends section 5 of the Criminal Law (Human Trafficking) Act 2008 by providing for an offence of payment for sexual activity with a person, for the purpose of prostitution, where it is known that person was trafficked.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to 5 years imprisonment and / or a fine.

### ***Part 4***

#### ***Amendment of Punishment of Incest Act 1908***

The main purpose of this Part is to address a gender imbalance in the penalty structure for incest. The law on incest is governed primarily by the Punishment of Incest Act 1908. Amendments since then have twice increased the penalty for incest by males. The Criminal Justice Act 1993 and the Criminal Law (Incest Proceedings) Act 1995 increased that penalty to 20 years and life imprisonment, respectively. The maximum penalty of 7 years imprisonment for incest by a female has remained unchanged since 1908 and this gender inequality is now addressed.

## **Section 22: Incest by males**

*Section 22* substitutes, in its entirety, the existing section 1 of the Punishment of Incest Act 1908 which provides for incest by males. The new provision does not depart significantly from the provisions contained in the 1908 Act other than to bring them up to date and reflect general changes in the law.

Subsection (1) maintains a maximum penalty of life imprisonment for incest by a male, whilst subsection (2) provides that consent on the part of the female shall not be a defence.

## **Section 23: Incest by females of or over seventeen**

The purpose of this section is to bring the penalty for the offence of incest by a female of or over 17 years into line with the penalty for males. At present a female convicted of an incest offence is liable to up to 7 years imprisonment as opposed to up to life imprisonment for a male offender.

*Section 23* of the Bill increases the penalty for female offenders to up to life imprisonment, which is equivalent to the penalty for male offenders.

## **Section 24: Exclusion of public from hearings of proceedings under Act of 1908**

*Section 24* incorporates the provisions of section 2 of the Criminal Law (Incest Proceedings) Act 1995 into the present Bill. The 1995 Act is to be repealed by section 27 of this Bill and this is one of the provisions to be retained via this Bill.

The purpose of this provision is to ensure that although the public generally are excluded from the court during incest trials, the verdict and sentence, if any, must be announced to the public. The fact of the trial and its outcome is a matter of public record. It also ensures that persons with a legitimate interest in the outcome of a particular case will be able to establish whether or not the accused has been convicted and sentenced.

## **Section 25: Anonymity of person charged with offence under Act of 1908 and person to whom offence relates**

This section repeats, with some updating, section 3 of the Criminal Law (Incest Proceedings) Act 1995. It provides for the anonymity of a person charged with an offence under this part and the person against whom the offence is alleged to have been committed.

Currently, there is no provision permitting the lifting of anonymity. Even where a charge of incest did not proceed or the accused was convicted of another offence, the anonymity of both parties appears to be totally protected by the wording of section 3 of the 1995 Act. Subsection (4) relaxes this anonymity in certain circumstances. The purpose of this provision is to extend the anonymity provisions which currently apply in respect of a sexual assault offence to cases where a defendant is charged with both an incest offence and a sexual assault offence but the incest offence either is not proceeded with or the defendant is found not guilty of that offence. A "sexual assault offence" is defined at section 1 of the Criminal Law (Rape) Act 1981 as a rape offence, aggravated sexual assault or sexual assault, including attempt, aiding and abetting, etc.

## **Section 26: Provisions in relation to offences under section 25**

This section repeats section 4 of the Criminal Law (Incest Proceedings) Act 1995. It specifies the penalties for an offence under section 25. The monetary penalties for summary conviction and conviction on indictment have been updated.

**Section 27: Repeal**

This section repeals the Criminal Law (Incest Proceedings) Act 1995 as the provisions of that Act have been updated and included in this Part.

**Part 5*****Criminal Evidence***

This Part amends the Criminal Evidence Act 1992 to give effect to a number of recommendations in the Reports of the Joint Committee on the Constitutional Amendment on Children (May 2009) and the Joint Committee on Child Protection (November 2006). These are aimed at rendering the justice system less formal and more sensitive for child victims of sexual abuse.

**Section 28: Amendment of section 2 of Act of 1992**

This section updates the definition of “sexual offence” in section 2 of the Criminal Evidence Act 1992 (“the 1992 Act”) to include the new offences created by this Bill including organising child prostitution or the production of child pornography (section 11), meeting a child for the purpose of sexual exploitation (section 7), sexual activity in the presence of a child (section 5) and causing a child to watch sexual activity (section 6). As the definition of “sexual offence” has been amended a number of times since 1992, it is proposed to restate it in a consolidated format.

**Section 29: Amendment of section 13 of Act of 1992**

Section 13 of the Criminal Evidence Act 1992 provides that where evidence is being given by a child through video link, neither the judge, nor the barrister or solicitor involved in the examination of the witness shall wear a wig or gown.

This is being repealed as section 30 of this Bill introduces a similar provision which will be extended to the giving of evidence, in all circumstances, by children under the age of 18 years. The requirement not to wear a wig or gown will no longer be limited to those instances where a child gives evidence by video link.

**Section 30: Amendment of Act of 1992**

This section introduces three new provisions into the 1992 Act in the form of new sections 14A, 14B and 14C.

Section 14A provides for the giving of evidence from behind a screen or other similar device. Under this section, a judge may direct the giving of evidence by a child from behind a screen (or other appropriate device) in the courtroom. The facility of a screen will protect a child from any potential intimidation, or feeling of intimidation, by the sight of the accused while giving evidence in court. In such circumstances, it may be more appropriate for the child to give evidence through a live television link but, for various reasons, the child might wish to be heard in person before the judge, and jury when present, and this section ensures such provision is available.

A direction by the judge for a child to give evidence from behind a screen would be given in the interests of justice, such as ensuring that a child can give a full account of the acts complained of without feeling intimidated. However, the interests of justice also demand that the accused be able to see and hear the witness giving evidence. For practical and other reasons, the judge, jury (if a jury trial), legal representatives and court appointed persons, such as an intermediary, will need to be able to see and hear the witness giving evidence and be seen and heard by the witness. Subsection (2) makes the necessary provision.

It is possible that not every courtroom could accommodate the type of screen envisaged in this section. Accordingly, it is proposed to amend section 17 of the 1992 Act via section 32 of this Bill to facilitate the transfer of proceedings where the court is satisfied that it is desirable that evidence be given in the proceedings from behind a screen.

A provision along these lines was recommended in the Report of the Joint Committee on Child Protection.

Section 14B addresses the issues of wigs and gowns which was referred to in relation to section 29 above. This section will ensure that the judge, barrister or solicitor involved in the questioning of a child witness will not wear a wig or gown.

Section 14C is an entirely new provision concerning the protection of certain persons from cross-examination by the accused. The Oireachtas Joint Committees on Child Protection and on the Constitutional Amendment on Children both recommended that in the trials of sexual offences, personal cross-examination of a child complainant or a child witness by the accused be prohibited.

Subsections (1) and (2) prohibit personal cross-examination of a child witness by the accused where he or she is charged with an offence to which Part III of the Criminal Evidence Act 1992 applies. Part III of the 1992 Act applies to (a) sexual offences, (b) offences involving violence or the threat of violence to a person, (c) child trafficking and pornography offences, (d) offences under the Criminal Law (Human Trafficking) Act 2008 and (e) offences consisting of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of an offence mentioned in (a) to (d). Where the child is under the age of 14 years, the court must prohibit personal cross-examination by the accused (unless the interests of justice require otherwise) and where the child is under 18 years of age the court may prohibit such cross-examination.

Subsections (3), (4) and (5) provide for alternative cross-examination where an accused person is prohibited from personally cross-examining a child witness. The court must invite the accused to make arrangements for legal representation to act for him or her for the purpose of cross-examination of the witness. However, where it becomes clear that the accused has made no such arrangements, it is open to the court to appoint a qualified legal representative to act in the interests of the accused.

Subsection (6) seeks to ensure that the interests of an accused are not prejudiced by the fact that he or she is prevented from engaging in personal cross-examination. The judge must inform the jury that no inferences may be drawn from the fact that the accused has not been permitted to personally cross-examine the witness or that the cross-examination was conducted by a court appointed legal representative as opposed to a person acting as the accused's own legal representative.

### **Section 31: Amendment of section 16 of Act of 1992**

The purpose of this section is to extend, for sexual offences, existing rules which make it easier for children to give evidence in criminal prosecutions.

This section effects two changes to section 16(1)(b) of the Criminal Evidence Act 1992 in respect of sexual offences. Firstly, it increases from 14 to 18 years the upper age threshold for out-of-court video recording of a complainant's evidence. Secondly, the amendment also applies to a child witness, other than the accused, who is under the age of 18 years.

The existing safeguards to protect the rights of accused persons will continue to apply. The application of section 16 of the 1992 Act is, at all

times, subject to the control of the court. Video recorded evidence (or a part of such evidence) must be excluded if the court is of the opinion that, in the interests of justice, it should not be admitted.

### **Section 32: Amendment of section 17 of Act of 1992**

This section amends section 17 of the Criminal Evidence Act 1992.

Under section 17 where it is appropriate that evidence is given by video link, and such facilities are not available in the court room at which the trial is scheduled, then the proceedings can be transferred to a court room where such facilities are available. This section extends the power to transfer a case to another court room where evidence is to be given behind a screen or other similar device but such cannot be facilitated in the current court room.

### **Section 33: Disclosure of third party records in certain trials**

*Section 33* regulates disclosure of the content of third party counselling or therapy records in sexual offence trials. The disclosure of counselling or therapy records in the context of criminal proceedings, especially in relation to sexual violence, touches on a number of sensitive issues and balancing of rights. The right to a fair trial for an accused has to be acknowledged. However, so too does the right of the victim not to feel further violated in the criminal justice process. This section establishes a process for the disclosure of such records, where appropriate.

A decision to disclose this type of record to the defence side will be the subject of a separate pre-trial hearing and the records will be disclosed only to the extent where the court considers that it contains information relevant to the issues at trial.

These proposals were developed on foot of recommendations in the fourth report of the Special Rapporteur on Child Protection but will apply to all victims of sexual offences.

Subsection (1) defines terms used in the section. Key definitions include “competent person”, “counselling”, and “relevant record”.

Subsection (2) provides that while the prosecutor must disclose the fact of the existence of a “relevant record”, i.e., a counselling or therapy record, to the defence, he or she cannot disclose its content without the leave of a judge of the court concerned.

Subsection (3) requires the accused to make a written application to the court if they wish to seek disclosure of the content of a counselling or therapy record. The “disclosure application” must specify the grounds relied on to establish that the record is likely to be relevant to the trial or to the competence of the complainant or a witness to testify.

Subsection (4) contains a list of factors, none of which, on its own, is sufficient to establish relevance in the context of a disclosure application. It includes assertions that the record may relate to the credibility of the complainant, or may disclose a prior inconsistent statement of the complainant.

Subsection (5) requires the accused to put the parties concerned, i.e. the complainant, the person who has control or possession of the record and any other person to whom the accused believes the relevant record relates, on notice that a disclosure application is being made.

Subsection (6) provides that the judge can, at any time, order that a disclosure application be notified to any person to whom he or she believes the relevant record may relate.

Subsection (7) requires the judge to hold a hearing for the purpose of determining whether the content of the counselling or therapy record should be disclosed to the accused.

Subsection (8) provides that the owner of the record, the complainant and any other person to whom the record relates shall be entitled to appear and be heard at such a hearing.

Subsection (9) provides a non-exhaustive list of factors which the judge shall take into account in making a determination regarding disclosure such as the probative value of the record, the extent to which the record is necessary for the accused to defend the charges and the public interest in encouraging the reporting of complaints.

Subsection (10) provides that the judge can order disclosure of the content of the relevant record to the accused following a hearing under subsection (7). The judge has to be satisfied that the disclosure application was correctly made and that disclosure is necessary to safeguard the rights of the accused.

Subsection (11) provides for the attachment of conditions to an order made under subsection (10), such as that a part of the content of the relevant record is to be redacted, or that the relevant record is not to be copied.

Subsection (12) provides that where such an order is made, the relevant record cannot be used in any other proceedings.

Subsection (13) requires the judge to provide reasons for ordering, or refusing to order, disclosure of the content of a relevant record to the accused. This will ensure clarity for the parties and facilitate effective consideration of an appeal.

The purpose of subsection (14) is to provide that, in normal circumstances, a disclosure application should be made before the commencement of the accused's trial. This is directed at avoiding delays in criminal trials for sexual offences and thereby adding to the trauma of complainants. However, there may be circumstances, in the interests of justice, where a late application would be justified and the judge is permitted to direct that the accused may make a disclosure application after the commencement of the trial. This is intended to be the exception and not the rule. The judge must be satisfied that there are exceptional circumstances which warrant this course of action.

Subsection (15) provides for exclusion of the public from a hearing under subsection (7).

Subsection (16) makes provision for legal representation for the complainant or witness (e.g., the parent of an alleged child victim who participated in the child's counselling) for the purposes of consideration of a disclosure application. This type of application would be akin to an application by an accused to hear evidence of a complainant's previous sexual history and, for that reason, it is considered that the same arrangements with regard to legal representation should be applied.

Subsection (17) disapplies this section where a complainant or witness has expressly waived his or her right to have a request for disclosure of the content of a relevant record determined by a judge.

#### **Section 34: Amendment of section 28 of Civil Legal Aid Act 1995**

*Section 34* inserts two new subsections (5B) and (5C) into section 28 of the Civil Legal Aid Act 1995.

The new subsection (5B) provides for legal aid in respect of representation for an accused who is prohibited from conducting a cross-examination in proceedings related to a sexual offence.

Subsection (5C) further amends the 1995 Act to provide for legal aid in respect of representation for a victim or witness in proceedings concerning a sexual offence.

## ***Part 6***

### ***Jurisdiction***

This Part extends jurisdiction over offences involving sexual acts with children done outside the State, by citizens of the State or by persons ordinarily resident in Ireland. The provisions of the Sexual Offences (Jurisdiction) Act 1996 are amended to include the offences updated and created by this Bill.

In addition, the extra-territorial jurisdiction requirements of Directive 2011/93/EU and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse are provided for in this Part.

#### **Section 35: Amendment of the Sexual Offences (Jurisdiction) Act 1996**

The Sexual Offences (Jurisdiction) Act 1996 (“1996 Act”) extends the criminal law of this jurisdiction to sexual acts involving children done outside the State by citizens of the State or by persons ordinarily resident in Ireland.

*Section 35* provides for the increase from 17 years to 18 years of the upper age threshold for the purposes of the 1996 Act. This section will provide that Irish legislation conforms to the general international norm of protecting persons under the age of 18 years against non-consensual or exploitative sexual acts.

In addition to the existing offences included in the 1996 Act, it shall now be an offence for any citizen of the State, or person ordinarily resident in the State, to do an act, in a place other than the State, against or involving a child which would constitute an offence under the law of that place, and if done within the State, would constitute an offence under, or referred to in, an enactment specified in the Schedule to the 1996 Act.

The new offences to be included in the Schedule to the 1996 Act are:

- Section 5 of the Child Trafficking and Pornography Act 1998: Producing, distributing etc. child pornography;
- Section 5A(4) of the Child Trafficking and Pornography Act 1998: Knowingly attending a pornographic performance (involving a child);
- Section 6 of the Child Trafficking and Pornography Act 1998: Possession of child pornography;
- Section 5 of the Criminal Law (Sexual Offences) Act 2015: Sexual activity in presence of child;
- Section 6 of the Criminal Law (Sexual Offences) Act 2015: Causing child to watch sexual activity;
- Section 7 of the Criminal Law (Sexual Offences) Act 2015: Meeting child for purpose of sexual exploitation; and
- Section 8 of the Criminal Law (Sexual Offences) Act 2015: Use of information and communication technology to facilitate sexual exploitation of child.

### **Section 36: Jurisdiction**

*Section 36* is necessary to ensure the State is in line with the extra-territorial jurisdiction provisions in Directive 2011/93/EU and the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

Under this section certain child sexual offences including rape, sexual assault, engaging in sexual activity with a child and child prostitution offences committed outside the State can be prosecuted within the State if done by a person who is an Irish citizen or ordinarily resident in Ireland. The act does not need to be an offence in the State in which it takes place, i.e., the requirement of dual criminality does not apply.

In general terms, the applicable age of the complainant will be that as provided for under Irish law and not that which applies in the place where the offence is committed.

### **Section 37: Proceedings relating to offences committed outside State**

*Section 37* is a standard provision providing for jurisdiction in the State for proceedings relating to an offence committed outside the State.

### **Section 38: Double Jeopardy**

*Section 38* provides that the common law rule against double jeopardy will apply to offences under the Bill. This is consistent with the principle that no person shall be punished twice for the same offence or be re-tried having been acquitted.

## ***Part 7***

### ***Miscellaneous***

### **Section 39: Exposure, offensive conduct of a sexual nature**

Following a number of judgments of the High Court which struck out offences relating to public indecency and exposure, this section replaces section 18 of the Criminal Law Amendment Act 1935 and provides for new offences to address certain behaviour. There are essentially two types of behaviour to be addressed. The first is exposure of genitalia and the second is inappropriate sexual behaviour which may not involve actual exposure.

Subsection (1) provides for an offence of “exposure” where a person exposes his or her genitals and intends to cause fear, distress or alarm to another person.

Subsection (2) addresses inappropriate sexual behaviour which does not have to involve exposure. This section provides for an offence of engaging in (i) sexual intercourse, (ii) an act of buggery, or (iii) an act of masturbation in a public place.

Subsection (3) provides for an offence of engaging in offensive conduct of a sexual nature which gives rise to distress or alarm and which does not fall within either subsection (1) or (2).

For the purposes of this section, “offensive conduct of a sexual nature” is defined as any behaviour of a sexual nature which, having regard to all the circumstances, is likely to cause fear, distress or alarm to any person, who is, or might reasonably be expected to be, aware of any such behaviour.

A person found guilty of an offence under this section shall be liable on conviction on indictment to up to two years imprisonment and / or a class C fine (a fine not exceeding €2,500).



**Section 40: Harassment order**

*Section 40* provides for a harassment order whereby a court can impose an order prohibiting a convicted sex offender from contacting or approaching his or her victim for a specified period of time. The order can be imposed at the time of the offender's sentence, where the sentence includes a term of imprisonment, or at any time before the offender's release from prison. Provision is also made for the court to discharge or vary a harassment order. Breach of a harassment order will be an offence punishable by a fine and / or imprisonment for up to 5 years.

**Section 41: Effect of appeal from order**

*Section 41* makes provision for the effect of an appeal from a harassment order.

**Section 42: Amendment of section 249 of Children Act 2001**

*Section 42* amends section 249 of the Children Act 2001 so that a child will now be defined for the purpose of that section as being under 18 years of age. Previously a child was defined as a person under the age of 17 years.

Section 249 of the Children Act 2001 makes it an offence for a person who has the custody, charge or care of a child to cause or encourage unlawful sexual intercourse or buggery with the child or to cause or encourage the seduction or prostitution of, or sexual assault on the child. A person found guilty of this offence is liable to imprisonment for up to 10 years and / or a fine.

**Section 43: Amendment of Bail Act 1997**

*Section 43* amends the Schedule to the Bail Act 1997 in order to include the offences created in this Bill in the Schedule to that Act.

Under the Bail Act 1997, bail may be refused to a person charged with a serious offence where it is considered necessary to prevent the commission of a serious offence, i.e., an offence carrying a maximum prison sentence of at least 5 years. Serious offences for bail purposes are specified in the Schedule to the 1997 Act. The offences to be included in the Schedule, by way of this section, shall be regarded as serious offences for bail purposes.

**Section 44: Amendment of Act of 2001**

*Section 44* amends the Schedule to the Sex Offender Act 2001 to include the offences created in this Bill in the Schedule to that Act. Persons found guilty of an offence included in the Schedule to the Sex Offenders Act, with limited exceptions, shall be subject to the notification requirements under the 2001 Act.

**Section 45: Offences by bodies corporate**

*Section 45* provides for the criminal liability of legal persons for an offence under this Bill as required by various international instruments.

**Financial implications**

These proposals are not expected to give rise to any significant additional costs to the Exchequer. There may be some such costs arising from the proposals relating to child evidence and legal representation for complainants in connection with applications for disclosure of third party counselling/therapy records in sexual offence trials.

*An Roinn Dlí agus Cirt agus Comhionannais  
Meán Fómhair, 2015.*