

RCNI Presentation to the Joint Committee 2008



**RAPE CRISIS NETWORK IRELAND (RCNI)  
ORAL PRESENTATION  
TO THE  
JOINT COMMITTEE ON THE CONSTITUTIONAL  
AMENDMENT ON CHILDREN**

**1ST OCTOBER 2008**

The **Rape Crisis Network Ireland (RCNI)** is the national representative body of the rape crisis sector in Ireland. We are pleased to be here today to speak to you and thank you for the opportunity. I am Fiona Neary, Executive Director of the RCNI and my colleague Clíona Saidléar, Policy and Communications Director will also be speaking today.

The rape crisis sector tends to be visible in our society in relation to what we do in meeting the needs of and advocating for victims of sexual violence. However, the aim of the rape crisis sector has always been and continues to be the prevention of sexual violence. To that end we analyse the causes of sexual violence in the aspects of our society that support and facilitate such high levels to persist. Our task is to name unhealthy norms and assumptions in our culture and society and to advocate solutions and positive alternatives where sexual violence can no longer hide and thrive.

We propose to use this time to speak to only one aspect of your remit that of the question of Absolute and Strict Liability in statutory rape. We welcome the Joint Committee's interim report on Vetting and Soft Information and hope that legislation can be advanced speedily. The Rights aspects of a Referendum we continue to support but we propose not dealing with those today. We will address Absolute Liability as defined in the 2007 Bill first.

### **Absolute Liability in Statutory Rape Cases**

The RCNI became engaged in this debate in May 2006. We have been advocates for the reinstatement of absolute liability in statutory rape legislation from the outset. We have engaged in this debate over the past 2 years and 5 months and we have taken each challenge and question seriously. We have answered all of those questions to our satisfaction. Therefore, our position, which is widely known and detailed in our January submission, remains the same. We advocate the reintroduction of Absolute Liability in Statutory Rape cases as vital and as a matter of urgency.

#### **The Primary Functions of Absolute Liability (AL) are:**

1. to protect children from adults who would sexually exploit them,
2. to send a clear message to adults regarding consequences for those who choose to take the risk of having sex with someone young enough to be a child,
3. to enable prosecutions for statutory rape in Ireland by protecting children from the potential trauma of being cross examined as to their behaviour,
4. to clearly spell out in our society what is unacceptable behaviour.

#### **1. Child Protection**

We understand Absolute Liability legislation as primarily a child protection measure. It is designed to address the particular vulnerability of children to sexual exploitation and sexual manipulation by adults. The RCNI believes the legislation should only apply when the complainant is under 15. It is a tool to allow for the

prosecution of those who abuse this particularly vulnerable group of children and it is to protect children as far as possible from secondary trauma within the justice system. It is proactive and preventative as well as reactive and names childhood as worthy of protection.

**2. A message to perpetrators and would be perpetrators on their responsibilities and the consequences if they ignore them.**

Absolute Liability in statutory rape is needed to discourage the targeting of children by those who would abuse them, to send them a message of serious consequences. It focuses our attention on the behaviour and choices of the perpetrator. We assign responsibility squarely on the adult, not the child. **In this law we signal that we will not tolerate a climate of victim blaming for the purposes of an irresponsible adult eluding responsibility for their actions**, and that they may well face consequences for breaking the law by choosing to have sex with someone who is young enough to be only 14.

In rape cases involving adults, the case often comes to rely on the resilience of the witness on the stand under cross examination. This is often further traumatising and experienced as victim blaming by the complainant. Absolute Liability in statutory rape cases, allows us to treat children differently; we refuse to ask them to be held to account for an assailant's choices, in this same manner;

The question then may be, **but what of the defendant?** To treat the child complainant differently to adult complainants are we undermining the rights of an innocent person? Our answer is No. There are two reasons for this.

**Firstly**, it is just to hold **adults accountable** for their choices, behaviour and actions. Absolute Liability very firmly puts the responsibility with the adult for the choices that they make in relation to their own sexual conduct and risk taking. The onus, morally and legally, lies with the adult. Absolute Liability ensures that a child's vulnerability cannot be used as a defence by those who have wronged them. The adult has chosen to take a known risk. It is reasonable for society to hold them to account for the consequences.

**Secondly**, it is the duty of **the DPP to serve the public interest** on behalf of the State. The public interest is not served when legislation intended for adults is used to prosecute non-exploitative teenage sexual experimentation. Neither would it serve the public interest or maintain the good reputation of the law for morally blameless people to be criminalised and sentenced. While it is true that, by having consensual underage sex some break our statutory rape laws, the function of this law is to protect children from sexual exploitation from adults.

**3. To enable prosecutions for statutory rape in Ireland by protecting children from the potential trauma of being cross examined as to their behaviour**

It is clear from the office of the DPP's recent description of his use of the statutory

laws available to him that the prosecution of the exploitation of children is his primary intention.

The DPP has described <sup>(i)</sup> how the law with Absolute Liability was used in two ways:

- to prosecute situations where the child felt they were consenting to what was evidently an exploitative sexual relationship or
- to expedite sexual offences which could have been prosecuted as rape or other such offences but were prosecuted as Statutory Rape to shield the child from secondary trauma.

The DPP has described his statutory rape case load in 2007 as having the following properties:

- The smallest age gap between victim and perpetrator was 5 years,
- the average age of the complainant was 14 and
- the average age of the perpetrator was 27.

The DPP, Mr James Hamilton, concluded that 'it is misguided to suggest that the legislation is being used to criminalise the sexual experimentation of teenage peers. This is simply not the case.'

We must bear in mind the **impact of public interest on the DPP's decision making in this area in the absence of Absolute Liability**. It is not in the public interest to inflict trauma on an already victimised child in order to attempt to hold to account the person who has committed a criminal act against them. The result is that the prosecution of statutory rape becomes undesirable. The impact can be clearly seen in the stark figures released by the DPP. The average number of cases prosecuted under the old legislation was approximately 100 per annum. In 2007 under the new 2006 Act the number was 13. We have no reason to believe that actual incidents of abuse have decreased to mirror this drop in cases prosecuted.

Absolute Liability is not used to criminalise young people inappropriately; it is used to protect children and to equip the State with a tool which makes it possible to prosecute where it would otherwise be extraordinarily difficult due to the vulnerability of the witness/victim.

4. **For the RCNI**, there is a much broader function of this law than the prosecution of individual cases. **The law is also required to send a message to adults and society about our responsibilities.**

The fact that it is currently felt reasonable to put forward an argument that adults should *not* be held accountable for their risky and potentially harmful behaviour, should in itself alert us to the urgent need for leadership. Instead, when adults offend against children we find ourselves equivocating about holding them to account.

We are in need of a message about what is and is not acceptable and what will and

will not be tolerated in our society when it comes to the protection of children from sexual exploitation.

An explicit Child Protection public position is necessary to counterbalance cultural messages and pressure which serve to make children vulnerable.

The impact of an increasingly sexualised culture is that young people's choice to say no, to be disinterested in sex, to have value through personal attributes other than the sexual, is ever diminished and increasingly given negative connotations. The pressure to appear and be sexually available leads to norms where, choice, consent, the nurturing of holistic relationships, negotiation, and self and mutual respect, are at risk. These conditions lead to everyone's increasing vulnerability to sexual violation.

This climate often results in the minimisation of sexual violence. Minimisation means that **firstly the perpetrator** is not confronted in any way with their wrongdoing and so can confirm their belief that they did nothing wrong; that their behaviour is normal and ok. For evidence you may have seen yesterday's poll of attitudes in colleges in Northern Ireland as reported in the Irish Times, where for example, 30% felt women were totally or partially responsible if attacked while wearing "sexy of revealing clothes".<sup>(ii)</sup>

**Secondly the self-blaming victim** may minimise the rape and therefore is disempowered in terms of their capacity to recognise and resist future unacceptable behaviour. As a result they remain particularly vulnerable to re-victimisation.

The price of not sending out a public signal about acceptable standards of sexual behaviour is borne by child victims and all of society. 10% of RCC clients in 2007 were victimised in both child and adulthood, <sup>(iii)</sup> the SAVI Report (2002) <sup>(iv)</sup> found that people raped in childhood were 17 times more likely than the non-abused population to be raped again in adulthood. Research has found that when a young person labels their experience as rape, although this has traumatic immediate consequences, they are much less likely to be raped again. <sup>(v)</sup> Clearly societal messages which correctly label rape, and appropriate public reactions including political leadership and the law, are key in supporting a child rape victim to not self-blame and instead to acknowledge, disclose and recover.

Ultimately minimisation has a significant negative impact on reporting rates which means the State and Criminal Justice System never has the opportunity to intervene. A signal from society is vital in countering this rape facilitative culture.

We would now like to briefly turn to the issue of Strict Liability.

### **Strict liability in Statutory Rape Cases**

The RCNI advocates that Strict Liability, meaning that a defence must be objectively reasonable and not merely subjectively honest, be applied to Statutory

Rape cases.

The RCNI understands this law to be formed with clarity regarding its role in endorsing or challenging social norms. The practice of the law, tests for those ideals as set out by the legislature on behalf of the people. We are here for the purpose of child protection and making good legislation.

Sexual Offences clearly intend to name society's intolerance of such violations. However, the RCNI believe the instruments and practice of the law currently fall far short of testing adherence to prescribed standards of behaviour in relation to sexual crimes.

In the absence of a definition of consent, guidelines in assessing consent for juries, and crucially a standard of reasonableness applying to a defence argument and absolute liability in statutory rape cases, our court rooms are reduced to a reliance on the rationale of the defendant. Under our law the burden of proof lies with the State *but* it is the perpetrator's construction of consent that counts, not the victim's. The only aspects our courts judge are a defendant's adherence to their own standards, whatever they may be. The threshold of criminality is the defendant's own belief that they had consent. Therefore, the defendant is setting the standard for behaviour, not society. This is unacceptable.

It is the RCNI's analysis that Sexual Offences, without empowering the jury to adjudicate if the defence is reasonable, is uncomfortably facilitative and supportive of a defendant's attitudes which may in fact be objectionable and in a common sense understanding, criminal.

No one doubts that the majority of society and the legislature seek the prevention and reduction in prevalence of sexual violence. However, in the current instruments of the law, we mismatch the law to this intent. Strict Liability in Statutory Rape addresses this deficit/ perversion.

This is why the RCNI advocate the introduction of Strict Liability.

### **Special measures**

In this debate at various times we have heard commentators suggest that other legislation, which does not require Constitutional change, may be sufficient. We understand this to mean so called 'special measures'. That is, the statutory rights of victim's, the protection of witnesses in the court room and giving evidence; Ultimately the resourcing and practice of delivering a client focused criminal justice service to the victim.

While the RCNI has long advocated for these measures, many of which are resource and practice issues and not legislative, we firmly believe that they are no substitute for Absolute and Strict Liability. Special measures are ill equipped to address the particular difficulties in prosecuting cases involving grooming. They cannot keep the child from facing victim blaming questions. They do not signal to

society that children are not sexually available to adults in the manner that Absolute and Strict Liability does.

Without Absolute Liability, special measures in court will remain insufficient. This will mean that the DPP may decide not to prosecute, even in cases where the sexual exploitation of a child by an adult is evident. The potential harm to the child victim must be considered. This is the worst possible outcome for children, they will be failed by our legal system.

### **A Referendum**

It is the RCNI's understanding that legal opinion to the committee has advised that a referendum is needed to secure both Absolute and Strict liability. Therefore we would urge this committee to make such a recommendation as we believe these laws are both vitally important and urgently needed.

-----End-----

## Endnotes

- i. James Hamilton, DPP, Centre for Criminal Justice & Human Rights Annual Criminal Law Conference, Friday 27<sup>th</sup> June 2008.
- ii. Amnesty International survey of Northern Ireland Campuses, September 2008
- iii. National Rape Crisis Statistics, 2007, RCNI unpublished
- iv. Sexual Abuse and Violence in Ireland Report, Hannah McGee et al Royal College of Surgeons, (2002)
- v. Studies of young women (largely in US campuses) find that between 40 – 73% of rapes are categorised as unacknowledged. Unacknowledged rapes are characterised by less physical force, less resistance, are more likely to have involved some current or previous romantic involvement and are more likely to have involved alcohol. Victims of unacknowledged rape are much more vulnerable to Revictimisation. This is because they are found to have an inability to recognise risky sexual situations and their boundaries and tolerance are much more lenient. Littleton, Heather, Breitkopf, C. R., Berenson, A., 'Beyond the Campus: Unacknowledged Rape Among low income women', Violence Against Women, Vol. 14 (3) March 2008 pp. 269 – 286
- vi. James Hamilton, DPP, Centre for Criminal Justice & Human Rights Annual Criminal Law Conference, Friday 27<sup>th</sup> June 2008.