

October 2022

NWC Submission on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022

Introduction

Founded in 1973, the National Women's Council (NWC) is the leading national women's membership organisation. We represent and derive our mandate from our membership, which includes over 190 groups and organisations from a diversity of backgrounds, sectors and locations across Ireland. Our mission is to lead and to be a catalyst for change in the achievement of equality for women. Our vision is of an Ireland and of a world where women can achieve their full potential and there is full equality for women.

NWC chairs the [National Observatory on Violence Against Women](#) an independent network of over 20 grassroots and national organisations that convene quarterly to monitor progress on violence against women in Ireland. NWC established and chairs the [National Advisory Committee](#) supporting the Dept. of Higher Education's Framework *Safe, Respectful, Supportive and Positive – Ending Sexual Violence and Harassment in Irish Higher Education Institutions*. NWC leads [Beyond Exploitation](#) the Irish civil society campaign defending the human right not to be bought or sold for sex with partner organisations Ruhama and the Immigrant Council of Ireland.

NWC welcomes changes on aspects of the Criminal Law (Rape) Act 1981 dealing with knowledge or belief of consent, the integration of the O'Malley report recommendations and the amendments to the National Referral Mechanism for victims of Human Trafficking. We believe that these changes will improve legislation in relation to consent, enhance the operation of the National Referral Mechanism and that the system of identification of victims of human trafficking could significantly enhance the investigation, prosecution and prevention of human trafficking.

However, further recommendations in the O'Malley report need to be taken on board (such as the provision of free legal aid) and the General Scheme must take into account well-established best practice principles, in relation to the identification and support of victims of human trafficking.

Part 2

[Sexual Offences, Amendments of section 2 of Act of 1981](#)

The definition of consent, introduced by the Criminal Law (Sexual Offences) Act 2017 provides a positive definition of consent, where consent is freely and knowingly agreed to between the

parties, sending a clear message that consent to sexual acts must be negotiated and communicated between sexual partners¹. However, the honest belief defence as it stands on the Criminal Law (Rape) Act 1981 allows an unreasonable and unilaterally formed of belief that provides a defence for rape, it negates the need for negotiation and communication implicit in the definition of consent, as no evidence is required of the defendant to substantiate his belief in consent or his lack of knowledge that the act was not consensual, the defence is defined subjectively meaning that the belief does not need to be based on reasonable grounds.² This is especially problematic as evidence has repeatedly shown that stereotypical and prejudicial attitudes about rape and rape victims continue to influence juror deliberations in these cases.³ In addition, Women's Aid 2021 'Unheard and Uncounted' report gathered and analysed testimonies of victim-survivors' experiences of the criminal justice system which reported instances of negative responses from the Garda and members of the judiciary, with interviewees reporting feeling judged about how they behave in Court, reported a perception that they were not being believed, that the severity of their claim was dismissed or that the stakeholders sometimes lacked empathy⁴. Moreover, statutory services, including more particularly Court services and An Garda Síochána still struggle to understand the re-traumatising and re-victimising nature of the criminal legal system and, in some cases, replicate mechanisms of power when addressing DSGBV as highlighted by Women's Aid and Dublin Rape Crisis Centre who have reported on victim-survivors' negative experiences throughout their journey to justice.⁵ The development of objective frameworks are important to create a survivor centred culture throughout the justice system and its processes, not just in the actual court proceedings themselves. Therefore, the NWC welcomes that the Bill moves to an objective formulation of belief in consent, and that that a claim of belief must be based on reasonable grounds if it is to exculpate the accused.

¹ Women's Aid, Submission in response to the Law Reform Commission issue paper on knowledge or belief concerning consent in rape law (Women's Aid, October 2018).

² DRCC, Submission to the Law Reform Commission on Knowledge or Belief Concerning Consent in Rape Law (DRCC, November 2018).

³ Where criminal justice data are available for analysis, they have traditionally shown high 'attrition rates' for rape; in other words, conviction of rapists is low in comparison with the number of reported rapes. European Union Agency for Fundamental Rights, 2014, Violence Against Women: an EU-wide survey Main results.

⁴ Monica Mazzone and Women's Aid, Unheard and Uncounted, Women, Domestic Abuse and the Irish Criminal Justice System (Women's Aid, 2019).

⁵ Dublin Rape Crisis Centre, Submission to the Garda Síochána Inspectorate's inspection into the effectiveness and efficiency of the Garda Síochána's response to domestic abuse (DRCC, January 28th 2022),

Sexual Offences, Amendments of section 3, 4A, 6, 7, 8 of Act of 1981

The NWC welcomes the Amendments to the 1981 Act, such as the entitlement of victims to access legal aid when a relevant application for questioning on their sexual experience is been made at the preliminary trial, the extension of legal representation for victims in all sexual offence trials while the victim is being questioned on their sexual history, and the extension of privacy and anonymity in all sexual offence trials to further ensure the privacy and anonymity in all sexual offence trials. However, as the O'Malley review recommends, provision of free legal aid for all victims of sexual violence even when there is no prosecution⁶ should be included, as it acknowledges the gendered nature and gendered constraints that are experienced by victims of all gender-based violent crimes in accessing legal advice⁷.

Furthermore, NWC endorses the preliminary observations and areas of concern, as stated by the Dublin Rape Crisis Centre submission on Sections 3, 4 A, 6, 8 and 11 to the Department of Justice Consultation on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022.

NWC highlights from DRCC's submission the following observations and concerns on amendments to Sections of the Act of 1981:

- Section 3, it is welcomed the entitlement of victims to access legal aid when a relevant application for questioning on their sexual experience has been made at the preliminary trial as it is essential for a victim's understanding of proceedings. Legal representation should be available to the victim in relation to any application at preliminary hearing that might impact the victim.
- Section 4A, it is welcomed the extension of legal representation for victims in all sexual offence trials while the victim is being questioned on their sexual history. Currently, legal representation is not available to all sexual offences and in addition, the representation is only for the period during which the defence made the application to engage in such questioning of the victim's sexual history. The presence of legal representation to ensure the victim was fully and thoroughly prepared for a case, as well as to protect victims from re-traumatisation through the court process would greatly enhance the capacity of victims to give their best evidence and to recognise the rights of victims and the victims'

⁶ Tom O'Malley et al., Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (Irish Department of Justice, July 2020) para 5.23.

⁷ National Women's Council, NWC Submission on the Third National Strategy on Domestic, Sexual and Gender-Based Violence (June 2021) page 23. Available at: https://www.nwci.ie/images/uploads/NWC-3rd_National_Strategy_DSGBV_Submission_JUNE_2021.pdf

voices. The DRCC recommends that legal advice and legal representation be made throughout the entire trial process (during the investigation and trial process, the entire court trial or until such time as the prosecution case concludes), and not limited to the questioning of sexual history and certain other minor exceptions. In order to fulfil this, DRCC proposes that legal advice and legal aid will be provided through the Legal Aid Board and that the Board develops expertise and experience on criminal law matters in relation to sexual offences and the particular vulnerabilities of victims/survivors of sexual crimes, and provide a sufficiently trained and properly resourced unit within the Board in order to provide an adequate service to victims of sexual offences.

- Section 8, it should be amended to codify that waiving anonymity of both the convicted person and the victim be entirely at the behest of the victim without any necessary court approval.

Part 3

National Referral Mechanism for victims of Human Trafficking

The NWC welcomes the non-discriminatory and multi-agency approach that has been incorporated into the Bill, as it is in line with the provisions of the EU Anti-Trafficking Directive 2011/36/EU. The NRM and the system of identification of victims of human trafficking will enhance the investigation, prosecution and prevention of human trafficking. We specifically welcome that it appears that victims of human trafficking are not required to cooperate with criminal investigations in order to receive the full range of assistance and entitlements. If this is the case, this is a significant step forward from the current victim identification requirements.

However, there are significant gaps in the General Scheme and there are some issues that require clarification and need to be addressed. It is disappointing that the operational guidelines that will detail the functioning of the revised National Referral Mechanism (NRM) are not yet available.

Moreover, the NWC endorses the preliminary observations and areas of concern, as stated by the Irish Immigrant Council submission to the Department of Justice Consultation on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 2022.

The NWC highlights the following ICI's observations and concerns on the National Referral Mechanism for victims of Human Trafficking:

NWC Submission on the General Scheme of the Criminal Justice (Sexual Offences and Human Trafficking) Bill 4 2022

- Head 12. The definitions of types of ‘exploitation’, including sexual exploitation, labour exploitation, removal of organs and forced criminality are in keeping with the provisions of existing legislation, namely the Criminal Justice (Human Trafficking) Act 2008. The legislative drafters should ensure that the definition also cover the 2013 Act. ICI recommends that the legislation also defines ‘exploitation’ in sufficiently broad a manner to allow for new or emerging forms of human trafficking including coercion and commercial exploitation;
- Head 14. The introduction of an additional “credibility” test as to whether a person is a victim of human trafficking is provided for in the General Scheme, and it is not clear why it appears that a more elaborate test than that currently applied by the Competent Authority (the AGS). It introduces a standard that is not compatible with the EU Anti-Trafficking Directive 2011/36/EU Directive, which mandates that Member States shall take the necessary measures to ensure that a person is provided with assistance and support as soon as the competent authorities have a reasonable-grounds indication for believing that the person might have been subjected to any human trafficking offences;
- Head 15. It is important that further transparency is provided in the formulation and implementation of the operating guidelines, with clear timeframes to make further submissions and/or to submit an appeal;
- Head 16. The lack of a child specific provisions concerning the identification and application for recognition as a Victim of Trafficking do not consider the best interest of the child as per the Directive and Ireland’s obligations under the UN Convention on the Rights of the Child. ICI strongly recommends a child specific NRM, but if such a system is not legislated for, it must be the case that if a child victim of trafficking does not have a legal guardian that they are appointed with such a guardian;
- Head 18. Clarity needs to be provided on minimum qualifications and mandatory training required by the Competent Authority and Trusted Partners, as well as on the professional skills/competencies and selection process of those to ensure that all members (Operational Committee, Competent Authority and Trusted Partners) have relevant experience and knowledge of human trafficking and administrative decision making. Adequate funding and resourcing must be provided to ensure they can carry out their duties with appropriate care and professionalism;
- Head 19. Support and assistance to victims of trafficking should be provided on a consensual and informed basis. Victims should be informed of the NRM and the measures

involved and be supported to make their own decision about next steps that they want to take. Furthermore, Head 19 does not make any reference to access to any recovery and reflection period nor to providing access to residence permission for non-EEA nationals or provision of information relating to the possible granting of international protection. We are especially disappointed that the General Scheme refers to Direct Provision in the context of accommodation in a new Bill, which is not in compliance with the appropriate or safe accommodation or gender specific approach required by the Directive. It is also in direct contradiction to government policy to end the system and to the human rights and victim centred approach set out in the National Action Plan and the White Paper on Ending Direct Provision⁸. ICI recommends ensuring appropriate and safe accommodation for victims of trafficking within the new NRM as a matter of priority and that references to Direct provision are removed;

- Head 20 and 21. These Heads need to be drafted to ensure compliance with the requirements of Article 8 of the Directive, victims of human trafficking should be protected from prosecution or punishment for involvement in criminal activities, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.

For any queries and further information please contact:

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⁸ Government of Ireland. A White Paper to End Direct Provision and to Establish a New International Protection Support Service (Department of Children, Equality, Disability, Integration and Youth, 2021). Available at file:///C:/Users/IvannaY/Downloads/124757_ef0c3059-b117-4bfa-a2df-8213bb6a63db.pdf