



SEANAD ÉIREANN

**AN BILLE UM AN DLÍ COIRIÚIL (CIONTA GNÉASACHA),
2015**

CRIMINAL LAW (SEXUAL OFFENCES) BILL 2015

**LEASUITHE TUARASCÁLA
REPORT AMENDMENTS**

SEANAD ÉIREANN

AN BILLE UM AN DLÍ COIRIÚIL (CIONTA GNÉASACHA), 2015 —AN TUARASCÁIL

CRIMINAL LAW (SEXUAL OFFENCES) BILL 2015 —REPORT

Leasuithe Amendments

**Government amendments are denoted by an asterisk*

***1.** In page 6, between lines 6 and 7, to insert the following:

“ “image” means any photographic, film or video representation or any other form of visual representation, and any accompanying sound or any documents;”.

2. In page 6, line 14, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

3. In page 6, lines 15 and 16, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

4. In page 7, lines 12 and 13, to delete “to a fine or imprisonment for a term not exceeding 10 years, or both” and substitute “to imprisonment for a term not exceeding 10 years”.

—*Senators Jim Walsh, Diarmuid Wilson.*

5. In page 9, line 3, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

6. In page 9, line 19, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

7. In page 9, line 21, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

8. In page 10, line 3, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

9. In page 10, lines 4 and 5, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

10. In page 10, line 8, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

11. In page 10, line 10, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
12. In page 10, line 12, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
13. In page 10, line 20, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
14. In page 10, line 22, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
15. In page 10, line 23, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
16. In page 10, line 24, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
17. In page 10, line 30, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
18. In page 10, line 33, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
19. In page 11, line 10, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
20. In page 12, line 7, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
21. In page 12, line 8, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
22. In page 12, line 32, to delete “child pornography” and substitute “child sexual abuse material”.
—*Senators Jillian van Turnhout, Fiach Mac Conghail.*
- *23. In page 16, between lines 21 and 22, to insert the following:

“PART 3#

SEXUAL ACT WITH PROTECTED PERSONS

Definition

20. In this Part “sexual act” means—

- (a) an act consisting of—

- (i) sexual intercourse, or
- (ii) buggery,
- (b) an act described in section 3(1) or 4(1) of the Act of 1990, or
- (c) an act which if done without consent would constitute a sexual assault.”.

[# *The proposed new Part comprehends the inclusion of amendments 23 to 26, inclusive.*]

*24. In page 16, between lines 21 and 22, to insert the following:

“Sexual act with protected person

21. (1) A person who engages in a sexual act with a protected person knowing that that person is a protected person or being reckless as to whether that person is a protected person shall be guilty of an offence.
- (2) A person who invites, induces, counsels or incites a protected person to engage in a sexual act knowing that that person is a protected person or being reckless as to whether that person is a protected person shall be guilty of an offence.
- (3) In proceedings for an offence under this section, it shall be presumed, unless the contrary is shown, that the defendant knew or was reckless as to whether the person against whom the offence is alleged to have been committed was a protected person.
- (4) A person guilty of an offence under *subsection (1)* where the sexual act consisted of sexual intercourse, buggery or an act described in section 3(1) or 4(1) of the Act of 1990 shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.
- (5) A person guilty of an offence under *subsection (1)* where the sexual act consisted of an act which if done without consent would constitute a sexual assault shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years.
- (6) A person guilty of an offence under *subsection (2)* shall be liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years.
- (7) For the purposes of this section, a person lacks the capacity to consent to a sexual act if he or she is, by reason of a mental or intellectual disability or a mental illness, incapable of—
- (a) understanding the nature, or the reasonably foreseeable consequences, of that act,
 - (b) evaluating relevant information for the purposes of deciding whether or not to engage in that act, or
 - (c) communicating his or her consent to that act by speech, sign language or otherwise,
- and, in this section, such a person is referred to as a “protected person”.”.

*25. In page 16, between lines 21 and 22, to insert the following:

“Prosecutions

22. No proceedings for an offence under this Part shall be brought except by, or with the consent of, the Director of Public Prosecutions.”.

*26. In page 16, between lines 21 and 22, to insert the following:

“Repeals

23. Sections 5 and 6(2) of the Act of 1993 are repealed.”.

27. In page 16, between lines 21 and 22, to insert the following:

“20. (1) The Act of 1998 (as amended, in particular, by this Act) and any enactment (including but not limited to the Bail Act 1997 and the Sex Offenders Act 2001) that refers to the provisions of the Act of 1998 are amended by substituting the words “child sexual abuse material” for “child pornography” in each place those words appear such that any offence involving, related to or connected with child pornography shall henceforth be known as an offence of the same name save that the words “child sexual abuse material” shall replace the words “child pornography” in that name.

(2) Notwithstanding *subsection (1)*, no objection may be made or raised in respect of the use of the words “child pornography” in respect of an offence relating to or involving child sexual abuse material.”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

*28. In page 16, to delete lines 24 to 36, and in page 17, to delete lines 1 to 5 and substitute the following:

“Amendment of Act of 1993

20. The Act of 1993 is amended—

(a) in subsection (2) of section 1, by the deletion of paragraph (a),

(b) by the insertion of the following section after section 7:

“Payment etc. for sexual activity with prostitute

7A. (1) A person who pays, gives, offers or promises to pay or give a person (including a prostitute) money or any other form of remuneration or consideration for the purpose of engaging in sexual activity with a prostitute shall be guilty of an offence and shall be liable on summary conviction—

(a) in the case of a first offence, to a class E fine, and

(b) in the case of a second or subsequent offence, to a class D fine.

(2) In this section “sexual activity” means any activity where a reasonable person would consider that—

- (a) whatever its circumstances or the purpose of any person in relation to it, the activity is because of its nature sexual, or
- (b) because of its nature the activity may be sexual and because of its circumstances or the purposes of any person in relation to it (or both) the activity is sexual.”.

(c) in section 8, by the substitution of the following subsection for subsection (2):

“(2) A person who without lawful authority or reasonable excuse fails to comply with a direction under subsection (1) shall be guilty of an offence and shall be liable on summary conviction to a class D fine or imprisonment for a term not exceeding 6 months or both.”,

(d) in section 9, by the substitution of the following subparagraph for subparagraph (i):

“(i) on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both, or”,

(e) in subsection (1) of section 10, by the substitution of “to a class A fine or imprisonment for a term not exceeding 12 months or both” for “to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both”,

(f) in section 11, by the substitution of the following subparagraph for subparagraph (i):

“(i) on summary conviction to a class A fine or imprisonment for a term not exceeding 12 months or both, or”,

and

(g) in subsection (1) of section 13, by the insertion of “7A,” after “7.”.

29. In page 16, line 27, to delete “insertion of the following section after section 7” and substitute “deletion of section 7 and to insert the following section”.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

30. In page 16, line 28, to delete “7A. (1) A person” and insert “7. (1) A person”.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

31. In page 17, between lines 5 and 6, to insert the following:

“**21.** Section 9 of the Act of 1993 is amended—

- (a) in paragraph (i) by the substitution of “€10,000” for “£1,000”,
- (b) in paragraph (ii) by the substitution of “€50,000” for “£10,000”.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

32. In page 17, to delete lines 24 to 29 and substitute the following:

“23. The Act of 1908 is amended by the substitution of the following section for section 1 and 2:

“1. (1) Any person of or above the age of 17 years who has carnal knowledge of a person, who to his or her knowledge is his or her parent, child, brother, sister, grandparent or grandchild shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life or a lesser term of imprisonment.””.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

33. In page 17, to delete lines 33 and 34, and in page 18, to delete lines 1 to 6.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

34. In page 22, line 32, after “section” to insert “and in section 19B”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

35. In page 23, to delete lines 3 to 8 and substitute the following:

“ ‘relevant record’ means a record that has some probative or evidential value to the alleged sexual offence(s) subject of the criminal proceedings;”.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

36. In page 23, to delete lines 28 and 29.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

37. In page 24, between lines 8 and 9, to insert the following:

“(l) records relating to therapy or counselling shall form no part, partial or otherwise, of any assessment regarding a relevant record likely to be relevant to an issue at trial or to the competence of a complainant or witness to testify.”.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

38. In page 24, after line 39, to insert the following:

“(h) the risk of harm to the person to whom the record relates.”.

—*Senators David Cullinane, Trevor Ó Clochartaigh, Kathryn Reilly.*

39. In page 26, to delete lines 12 to 14 and substitute the following:

“(17) (a) This section and section 19B do not apply where a complainant or witness has expressly waived his or her right to non-disclosure of a relevant record without leave of the court.

(b) No complainant or witness shall be deemed to have expressly waived his or her right to non-disclosure unless he or she has been offered a reasonable opportunity to obtain independent legal advice

on the issue of disclosure rights before he or she is asked to sign any document purporting to waive his or her right to non-disclosure of a relevant record without leave of the court.

(18) In addition to the provisions of this section, section 19B shall apply to a relevant record relating to a child.

19B.(1) In this section and in section 19A(18) ‘relevant record relating to a child’ means a relevant record (or part of such record) relating to a sexual offence or sexual offences alleged to have been committed in respect of a person who was, at the time of the offence, under the age of 18.

(2) Without prejudice to the generality of section 19A, the content of a relevant record relating to a child shall not be disclosed to the accused and shall not be admissible as evidence in criminal proceedings save by order of the court and in compliance with the provisions of this section and section 19A.

(3) In determining an application for disclosure of a relevant record relating to a child, subject to the rules of the relevant court and in addition to the criteria set out in section 19A(9), the court shall take the following factors, in particular, into account:

(a) the extent to which the evidence contained in the relevant record relating to a child has substantial probative value;

(b) whether there is other evidence available to the accused that renders it substantially unnecessary to have regard to the relevant record relating to a child; and

(c) whether the public interest in disclosure or the constitutional and other rights of the accused person or both together outweigh the potential harm to the complainant.”.”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

40. In page 26, to delete lines 12 to 14 and substitute the following:

“(17) (a) This section does not apply where a complainant or witness has expressly waived his or her right to non-disclosure of a relevant record without leave of the court.

(b) No complainant or witness shall be deemed to have expressly waived his or her right to non-disclosure unless he or she has been offered a reasonable opportunity to obtain independent legal advice on the issue of disclosure rights before he or she is asked to sign any document purporting to waive his or her right to non-disclosure of a relevant record without leave of the court.”.”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

41. In page 26, between lines 14 and 15, to insert the following:

“(18) No complainant or witness shall be deemed to have expressly waived his or her right to non-disclosure unless he or she has been offered a reasonable opportunity to obtain independent legal advice on the issue of disclosure rights before he or she is asked to sign any document purporting to waive his or her right to non-disclosure of a relevant record without leave of the court.”.

—*Senators Denis O'Donovan, Diarmuid Wilson.*

*42. In page 29, to delete line 39, and in page 30, to delete lines 1 to 5 and substitute the following:

“(9) A harassment order shall take effect on notification of its making being given to the respondent.

(10) Oral communication to the respondent by or on behalf of the applicant of the fact that a harassment order has been made, together with production of a copy of the order, shall, without prejudice to the sufficiency of any other form of notification, be taken to be sufficient notification to the respondent of the making of the order.

(11) If the respondent is present at the sitting of the court at which the harassment order is made, he or she shall be taken for the purposes of *subsection (9)* to have been notified of its making.

(12) An order varying a harassment order shall take effect on notification of its making being given to the respondent and for this purpose *subsections (10)# and (11)#* shall apply with any necessary modifications.”.

[#*This is a reference to the subsection proposed to be inserted by this amendment.*]

*43. In page 30, to delete line 12 and substitute the following:

“(11) Proceedings for a harassment order shall be civil proceedings and shall be heard otherwise than in public.”.

44. In page 31, line 24, to delete “child pornography” and substitute “child sexual abuse material”.

—*Senators Jillian van Turnhout, Fiach Mac Conghail.*

45. In page 32, after line 10, to insert the following:

“PART 8

Abuse of a position of dependence and trust

47. The Criminal Law (Sexual Offences) Act 1993 is amended by substituting the following for section 5:

“Offence of abuse of position of dependence and trust

5. (1) Any person who being in a position of dependence and trust—

(a) takes advantage of his or her position, or

(b) aids, abets, counsels or procures another person to take advantage of his or her position,

and—

(i) induces or seduces a person to have sexual intercourse with him or her, or

(ii) commits any other sexual offence involving a person,

shall be guilty of an offence of abuse of position of trust and shall be liable upon conviction on indictment to imprisonment for a term of not less than ten years.

(2) Where a person charged with an offence under this section can establish that, in respect of the sexual act which had been engaged in, no offence would have been committed had the consent of the victim been granted prior to the act, it shall in those circumstances be a defense for a person who is charged with an offence under this section to prove that—

(a) the victim consented to the sexual act which had been engaged in, and

(b) that such consent was granted freely and in the absence of duress or coercion.

(3) In this section—

(a) ‘position of dependence and trust’ includes, but is not limited to, a person who—

(i) provides care,

(ii) is responsible for welfare,

(iii) occupies a position of authority,

(iv) provides education, or

(v) provides support services including therapy or counselling, to the victim,

(b) ‘sexual offence’ includes—

(i) a sexual offence within the meaning of section 3 of the Sex Offenders Act 2001,

(ii) an offence under section 2, 3 or 4 of the Criminal Law (Rape) (Amendment) Act 1990,

(iii) an offence under section 6 or 7 of the Criminal Law (Sexual Offences) Act 1993,

(iv) an offence under section 4 or 5 of the Criminal Law (Human Trafficking) Act 2008, or

- (v) any other offence of a sexual nature contained in any other enactment and which has been so prescribed in regulations made by the Minister for Justice and Equality under this section.

Consent

- 5A.** (1) 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, the existence of consent in respect of that act shall be determined in accordance with this section.
- (2) In determining the existence of consent, an agreement between the parties to engage in the specific act must be established.
 - (3) In determining the existence of an agreement between the parties to engage in the specific act—
 - (a) an examination of the communication between the parties immediately prior to the act shall be conducted, and
 - (b) each person must be shown at that time to have understood the nature of the act.
 - (4) An understanding of the nature of the act shall only require the person to understand the physical nature of the act and shall not require the person to understand possible physiological consequences of the act.
 - (5) (a) In determining whether a person has consented to engage in a sexual act, no higher standard of understanding shall apply to persons with disabilities than that which applies to persons without disabilities.
 - (b) In determining whether a person understood the nature of the act, the presence of a mental impairment shall not be a determinative factor.””.

—*Senators Katherine Zappone, Jillian van Turnhout.*