



Bill Digest

Criminal Law (Sexual Offences) (Amendment) Bill 2018

Bill No. 93 of 2018

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Abstract

The [*Criminal Law \(Sexual Offences\) \(Amendment\) Bill 2018*](#) aims to equalise the penalty for the crime of incest for male and female offenders at a maximum of 10 years, and to introduce a regime of presumptive minimum sentences for repeat sexual offenders.

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Summary

Objective

According to the Explanatory Memorandum accompanying the Bill, the main purposes of the Bill are to amend the [Punishment of Incest Act 1908](#) to address a gender anomaly in penalties, and to amend the [Criminal Law \(Sexual Offences\) Act 2017](#) to provide for presumptive minimum sentences for repeat sexual offenders.¹

Background

This Bill addresses two largely distinct policy areas with distinct backgrounds.

Incest

With regard to incest, there has been concern for some time at the gender anomaly which exists in the current law. While a male convicted of the crime may be sentenced to a maximum of life imprisonment, the same conviction for a female would result in a sentence up to a maximum of seven years. It had previously been proposed in the *Criminal Law (Sexual Offences) Bill 2015* that this anomaly would be rectified by increasing the penalty for a female to a maximum of life imprisonment. However this proposal was removed from that Bill in its final stages amid concerns it was overly harsh. This Bill proposes to correct the anomaly by instead equalising the penalty for males and females at a maximum of 10 years.

Repeat sexual offenders

With regard to the sentencing of repeat sexual offenders, these provisions originated in a Private Members' Bill sponsored by Deputy Kevin 'Boxer' Moran and introduced in Dáil Éireann in May 2017.² Deputy Moran was subsequently appointed as Minister of State at the Department of Public Expenditure and Reform with special responsibility for the Office of Public Works and Flood Relief. In July 2017 it was announced that Government would be drafting its own legislation which would broadly reflect the proposal put forward by Deputy Moran.³

¹ The Explanatory Memorandum accompanying the Bill can be found here:
<https://data.oireachtas.ie/ie/oireachtas/bill/2018/93/eng/memo/b9318d-memo.pdf>

² Criminal Justice (Commission of Sexual Offences)(Amendment) Bill 2017, available here:
<https://www.oireachtas.ie/en/bills/bill/2017/73/>

³ 'Government approves proposals to strengthen penalties for repeat sexual offenders and to amend existing incest laws', Department of Justice and Equality press release, 11 July 2017, available here:
<http://justice.ie/en/JELR/Pages/PR17000233>

Pre-legislative Scrutiny

The General Scheme of this Bill was published in March 2018⁴ and was subsequently referred to the Oireachtas Joint Committee on Justice and Equality for Pre-Legislative Scrutiny.⁵ The Committee decided not to undertake Pre-Legislative Scrutiny on the Bill.

Cost and implications

No Regulatory Impact Assessment was published alongside the Bill. Thus the L&RS is not aware of any assessment which may have been conducted by the Department regarding potential costs, implications, or expected impact of this proposal.

Such potential costs could include increased costs associated with longer terms of imprisonment for repeat sexual offenders.

Commencement and Implementation

This Act will come into operation by order of the Minister and different provisions may come into operation on different days. A summary of the provisions of the Bill is presented in Table 1 below.

⁴ The General Scheme can be found here:
[http://justice.ie/en/JELR/General_Scheme_of_Criminal_Law_\(Sexual_Offences\)_ \(Amendment\)_ Bill_2018_6_March_2018.pdf/Files/General_Scheme_of_Criminal_Law_\(Sexual_Offences\)_ \(Amendment\)_ Bill_2018_6_March_2018.pdf](http://justice.ie/en/JELR/General_Scheme_of_Criminal_Law_(Sexual_Offences)_ (Amendment)_ Bill_2018_6_March_2018.pdf/Files/General_Scheme_of_Criminal_Law_(Sexual_Offences)_ (Amendment)_ Bill_2018_6_March_2018.pdf)

⁵ <https://www.oireachtas.ie/en/debates/question/2018-05-08/187/?highlight%5B0%5D=incest>

Table 1: Summary of the Bill's provisions

Section	Title	Effect
1	Definitions	Standard provision setting out definitions to be used in the interpretation of the Bill. Defines 'Act of 1908' as the Punishment of Incest Act 1908 and 'Act of 2017' as the Criminal Law (Sexual Offences) Act 2017 .
2	Amendment of section 1 of Act of 1908	Reduces the maximum penalty for a man convicted of incest from life imprisonment to 10 years' imprisonment.
3	Amendment of section 2 of Act of 1908	Increases the maximum penalty for a woman aged of 17 years or more convicted of incest from 7 years to 10 years.
4	Amendment of Act of 2017	Inserts a new s.58 into the <i>Criminal Law (Sexual Offences) Act 2017</i> setting out arrangements for the sentencing of repeat sexual offenders.
5	Offences for purposes of section 58 of Act of 2017	Inserts a new Schedule into the Act of 2017, setting out the offences to which the provisions of the new s.58 will apply.
6	Short title and commencement	Standard provision defining the short title of the Bill and provides for commencement by Ministerial order. Different sections of the Act may be commenced at different times.

Source: Prepared by the L&RS based on the *Criminal Law (Sexual Offences) (Amendment) Bill 2018*

Introduction

The [Criminal Law \(Sexual Offences\) \(Amendment\) Bill 2018](#) ('the Bill') was published on 27 July 2018 by the Minister for Justice and Equality, Charlie Flanagan T.D. ('the Minister'). The Bill would, if enacted:

- equalise the maximum penalty for incest at 10 years for both male and female offenders, and
- introduce presumptive minimum sentences for repeat sexual offenders.⁶

In publishing the Bill, the Minister said:

*"Sexual offences are among the most serious crimes faced by our society, and the effect on victims is devastating. This Bill forms part of a Government commitment to strengthen the law in this area through the introduction of stronger sentencing provisions."*⁷

As noted in the press release accompanying publication of the Bill, the revised penalties for repeat sexual offenders are based on proposals brought forward by Minister of State Kevin 'Boxer' Moran in a 2017 Private Members' Bill.⁸ He welcomed publication of this Bill, saying:

*"I am very pleased to see the publication of this Bill. I have very serious concerns around repeat sexual offenders and I am confident that this Bill will help to address these concerns by introducing stricter penalties for repeat offenders."*⁹

⁶ The Explanatory Memorandum accompanying the Bill can be found here:
<https://data.oireachtas.ie/ie/oireachtas/bill/2018/93/eng/memo/b9318d-memo.pdf>

⁷ <http://justice.ie/en/JELR/Pages/PR18000250>

⁸ Criminal Justice (Commission of Sexual Offences)(Amendment) Bill 2017, available here:
<https://www.oireachtas.ie/en/bills/bill/2017/73/>

⁹ <http://justice.ie/en/JELR/Pages/PR18000250>

Penalties for the crime of incest

What is incest?

As noted by Leahy and Fitzgerald O'Reilly, "[i]ncest refers to sexual intercourse between individuals who are closely related by blood. Unlike other sexual offences, incest is punished not because one individual's consent is lacking but because the individuals are blood relatives."¹⁰

The current law in relation to incest in Ireland dates from 1908. The *Punishment of Incest Act 1908* makes it a criminal offence for a male to have carnal knowledge of a female person, who is to his knowledge his grand-daughter, daughter, sister or mother. The consent of the female in question is not a defence. It is also an offence for a female to allow such carnal knowledge to happen.

The penalty for incest has been raised for males on a number of occasions and now stands at life imprisonment. It has been suggested that increases in the severity of sentences for males committing incest happened as a reaction to high profile incest cases.¹¹

The maximum penalty for women remains at 7 years.¹² The 2009 Roscommon Incest case¹³ highlighted the need for reform of this gender anomaly, and appears to be the only case ever prosecuted for incest by a female.¹⁴

Table 2 below sets out the penalties for incest offences for males and females since 1908:

¹⁰ Leahy, S. and Fitzgerald O'Reilly, M. (2018) *Sexual Offending in Ireland: Laws, Procedures and Punishment*, Dublin Clarus Press, p. 84.

¹¹ <https://www.oireachtas.ie/en/debates/debate/dail/2014-03-07/2/>

¹² A 2012 PMB proposed raising the sentence to up to life imprisonment for females: <http://www.oireachtas.ie/documents/bills28/bills/2012/4312/b4312d.pdf>. This Bill is listed as having lapsed with the subsequent dissolution of the Dáil and Seanad.

¹³ <http://www.rte.ie/news/2009/0122/113023-roscommon/>

¹⁴ O'Malley, T. (2017) The New Law on Sexual Offences, *Irish Criminal Law Journal*, 27(3) , pp. 78-89.

Table 2: History of penalties for incest offences

Act	Male	Female
<i>Punishment of Incest Act 1908</i>	3-7 years penal servitude. Life in penal servitude where girl was under 13 (later 15) ¹⁵	3-7 years penal servitude for women over 16 (later 17). ¹⁶ This is now 3-7 years imprisonment
<i>Criminal Justice Act 1993 (s.12)</i>	Liable to imprisonment for a term not exceeding 20 years	Not amended by the Act
<i>Criminal Law (Incest Proceedings) Act 1995</i>	Liable to life imprisonment	Not amended by the Act
<i>Criminal Justice (Sexual Offences) Act 2017</i>	Liable to life imprisonment	Not amended by the Act

Source: Compiled by Oireachtas Library & Research Service

Reasons for the criminalisation of incest

The question of whether a specific offence of incest is required at all has been raised. O'Malley notes:

“Whether an incest offence is needed at all could usefully be debated. Sexual conduct with younger persons, whether related to the offender or not, are already adequately covered by other offences, as are non-consensual sexual acts between adult relatives. This leaves the question of whether close adult relatives who engage in consensual sexual intercourse...should be subject to criminal sanction.”¹⁷

The issue of whether incest should be subject to criminal penalty has arisen in international case law, most notably before the European Court of Human Rights in the 2012 case of [Stubing v Germany](#), the facts of which are outlined in Text Box 1 below:

¹⁵ <http://www.irishstatutebook.ie/eli/1935/act/6/section/12/enacted/en/html#sec12>

¹⁶ <http://www.irishstatutebook.ie/eli/1935/act/6/section/12/enacted/en/html#sec12>

¹⁷ O'Malley, T. (2017) The New Law on Sexual Offences, *Irish Criminal Law Journal*, 27(3) , pp. 78-89.

Text Box 1: Case Note - *Stubing v Germany*¹⁸

The applicant in the case was removed from his natural family at the age of three. He made contact with them again as an adult and embarked on a relationship with his adult sister. They lived together for several years and had four children together.

On three occasions, he was prosecuted and convicted of incest contrary to the German Criminal Code. On the third occasion, he was sentenced to 16 months' imprisonment. His sister was also convicted, but due to a personality disorder and mild learning disabilities, she was not sentenced.

Mr Stubing argued before the German Constitutional Court that his conviction was unconstitutional. His complaint was rejected by that court, at which point he applied to the European Court of Human Rights, where he argued that his conviction violated his right to "respect for his private and family life" as protected by Article 8 of the [European Convention on Human Rights](#).

The Court accepted that the applicant's criminal conviction had an impact on his family life. However it stated that interference with a person's private family life can be compatible with Article 8(2) where it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and "is necessary in a democratic society" for the aforesaid aim or aims.

The question then arose as to whether the aims pursued by the criminal prohibition on incest were legitimate and necessary in a democratic society. The Court noted that there is no general consensus among Member States as to the whether consensual sexual intercourse between adult siblings should be criminally sanctioned, with different States taking different approaches. However it stated that "State authorities are...in a better position than the international court to give an opinion, not only on the exact content of the requirements of morals in their country, but also on the necessity of a restriction intended to meet them."¹⁹

The Court concluded that "domestic authorities enjoy a wide margin of appreciation in determining how to confront incestuous relationships between consenting adults, notwithstanding the fact that this decision concerns an intimate aspect of an individual's private life."²⁰ The Court held that while Mr Stubing's application was admissible, there was no violation of his Article 8 rights.²¹

¹⁸ Application no. 43547/08, available here: [https://hudoc.echr.coe.int/eng#{\"fulltext\":\[\"stubing v germany\"\],\"documentcollectionid2\":\[\"GRANDCHAMBER\",\"CHAMBER\"\],\"itemid\":\[\"001-110314\"\]}](https://hudoc.echr.coe.int/eng#{\)

¹⁹ Judgment at paragraph 60.

²⁰ Judgment at paragraph 61.

²¹ Judgment at paragraph 67.

International Comparison

When considering the Stubing case in 2007, the German Constitutional Court requested an expert report from the Max Planck Institute for Foreign and International Criminal Law.²² It did this in order to determine which of the legal systems studied prohibit consensual sexual activity between relatives and which do not, and to examine the reasoning for the decision for or against criminalisation.

The laws of 22 countries from a representative selection of legal systems and regions were studied. Because of the differences in how various countries may define “incest” in their laws, a specific fact pattern was chosen for comparison between states. That fact pattern chosen was consensual sexual activity between adult family members.

In 14 of the 22 countries studied, there was a criminal prohibition on incest. These were: The Australian states, Canada, Chile, Denmark, England & Wales, Germany, Greece, Hungary, Italy, Poland, Romania, Sweden, Switzerland, and almost all states of the USA. The remaining jurisdictions had no prohibition on consensual incest between adults.²³

Grounds for criminal prohibition or non-prohibition

The study notes that the justifications for having a criminal prohibition on incest vary greatly in the various legal systems, and in practice there is generally a mix of different reasons.

Religious and moral grounds

According to the study, religious grounds for prohibition no longer play much of a role, apart from in those countries following Islamic criminal law, and “[e]ven moral considerations are increasingly taking a back seat and are usually only implicitly mentioned. This is because the task of criminal law in many enlightened countries is not the maintenance of morality but rather the protection of legal interests from socially harmful behaviour.”²⁴ Occasionally, there is a mention of maintaining “the incest taboo in society.”

Eugenic grounds

In a similar way, the goal of preventing the birth of “genetically defective offspring” is no longer the sole justification for a criminal provision prohibiting incest in any of the jurisdictions examined.

²² Research can be accessed here:

https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest/inzeststrafbarkeit.html

²³ These jurisdictions were France, the Netherlands, Turkey, Ivory Coast, Russia, China, Spain, Israel and the three US States of Rhode Island, New Jersey and Michigan.

²⁴ https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest/inzeststrafbarkeit.html

However some jurisdictions refer to it as a kind of “supplementary justification”.

The Max Planck study notes, however, that such a justification is problematic for several reasons.²⁵

- The genetic risks associated with incest are not necessarily greater than other existing genetic risks;
- Treating the conception of children with disabilities as “damage” or “harm” negates the right to life of those children;
- The risk of conceiving children with malformations is not punished under other factual circumstances, and
- This risk can be addressed more effectively by sex education and contraception.

Protection of the family unit

Protection of the family unit is of great importance in many legal systems. However the Max Planck study notes that this justification for criminal incest provisions is questionable because the harm to the family unit is usually not the result, but rather the cause of incest.

Non-criminalisation

With regard to those jurisdictions which do not criminalise incest, this is generally justified by a belief that it is not the role of the criminal law to punish consensual sexual activity between adults. “Furthermore, the ordinary sexual offen[c]e provisions, it is said, provide adequate protection from force and abuse as well as adequate protection for minors.”²⁶ Additionally, it is claimed that the “social taboo” is sufficient.

Extent of criminalisation

According to the study, of the jurisdictions with a criminal prohibition, a core group restricted that prohibition to activities between close blood relatives that could lead to procreation. In nine of the jurisdictions, this meant that only relatives in a direct line, as well as full and half-siblings, could be guilty of incest. In only three countries, other blood relatives were included.

²⁵ The specific research findings on the issue of incest in criminology and genetics can be found here: https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest/inzest_krim.html

²⁶ https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest/inzeststrafbarkeit.html

Six jurisdictions recognised only heterosexual sexual intercourse as the act required for the offence of incest, while the remaining countries also recognised lesser sexual activities in both heterosexual and homosexual relationships.

In terms of the penalties for incest, maximum sentences ranged from six months to life imprisonment. However in most of the jurisdictions, the maximum was between two and five years' imprisonment.²⁷

Reforming incest law in Ireland

The Law on Sexual Offences: A Discussion Paper by the Department of Justice, Equality and Law Reform from May 1998²⁸ raised many issues in relation to how the law on incest could be reformed. The majority remain relevant today such as:

- extending the family nexus,
- gender aspects and penalties, the age of criminal responsibility for a male,
- and the criminalisation of a consensual carnal relationship within a family.

However, the law (apart from increasing penalties for males) and the intent behind the law are largely unchanged since 1908.

The Special Rapporteur on Child Protection Geoffrey Shannon in 2007²⁹ stated that the law in relation to incest was in need of 'a substantial amount of reform.' He recommended that the following changes be made:

*'The current law only allows full intercourse to be charged as incest. However, as **acts of abuse often fall short of full intercourse**, the law should be drafted so as to include such acts and therefore reflect the aggravated impact on the victim arising from the corresponding abuse of the familial relationship. Such legislation would allow for moral equivalence to be made between various types of familial abuse, but allow for a differentiation to be made at the sentencing stage.*

*Secondly, **the relationships to which incest applies should be broadened** and include uncles/aunts and step-parents, and adopted children.*

*Thirdly, **gender neutrality should** be imposed on the offence. Although the incidence of incest perpetrated by women is small, the law should allow for these cases.*

²⁷ https://www.mpicc.de/en/forschung/forschungsarbeit/gemeinsame_projekte/inzest/inzeststrafbarkeit.html

²⁸ <http://www.justice.ie/en/JELR/SexualOffencesLawPaper.pdf/Files/SexualOffencesLawPaper.pdf>

²⁹ http://www.dcy.gov.ie/documents/child_welfare_protection/Report_of_Special_Rapporteur_on_Child_Protection_Geoffrey_Shannon.PDF

Fourthly, any change in the age of consent to relationships for persons in authority, should be mirrored in incest legislation so as to avoid an anomaly in the law.

*Finally, although the primary purpose of legislation on incest must be to protect children from abuse, it also needs to take account of the **investigative methods** used in presenting a case. This is to avoid false accusations against adults and to ensure that minors are not subject to inappropriate assessment.'*

Previous consideration of this issue – Criminal Law (Sexual Offences) Bill 2015

When originally published, s.23 of the *Criminal Law (Sexual Offences) Bill 2015*³⁰ proposed to increase the penalty for incest by a female to life imprisonment, thus equalising the penalties for males and females. In the final stages of the Bill, that provision was removed due to concerns that the penalty of life imprisonment for this offence was too harsh overall.³¹ Speaking at the time in the Report Stage debate, Deputy Jonathan O'Brien, who proposed removing the provision, said:

*"The Minister...has not demonstrated to me the public good that would be served by increasing a sentencing ranging from a maximum of seven years to a minimum of three years to a life sentence. The only rationale she has given is that she wants to equate the sentences that would apply to the male and the female."*³²

Supporting Deputy O'Brien's amendment, Deputy Jim O'Callaghan expressed his view that "a penalty of life imprisonment for incest in the context of the offences that already exist on our Statute Book is excessive" and that "it would have been better if the penalty for both was three to seven years."³³

Other issues with the current law on incest

There are a number of other issues in relation to the current law on incest which this Bill does not address:

- Males may be prosecuted for incest from the age of 12.³⁴ A female must be aged 17 or over in order to be prosecuted. This is a further gender anomaly.³⁵
- The wording still presumes ('any female who permits') that females cannot initiate incest.

³⁰ Available here: <https://data.oireachtas.ie/ie/oireachtas/bill/2015/79/eng/initiated/b7915s.pdf> . Later enacted as the *Criminal Law (Sexual Offences) Act 2017*.

³¹ See Dáil Éireann debate from Tuesday, 7 February 2017, Report and Final Stage debate, available here: <https://www.oireachtas.ie/en/debates/debate/dail/2017-02-07/27/?highlight%5B0%5D=incest&highlight%5B1%5D=incest&highlight%5B2%5D=incest&highlight%5B3%5D=incest&highlight%5B4%5D=incest&highlight%5B5%5D=incest>

³² Ibid.

³³ Ibid.

³⁴ http://www.dcy.gov.ie/docs/Age_of_Criminal_Responsibility/167.htm

³⁵ <http://www.justice.ie/en/JELR/SexualOffencesLawPaper.pdf/Files/SexualOffencesLawPaper.pdf>

- Similarly, it does not acknowledge that a male could take part in incest without his consent. In 2006 the then DPP James Hamilton acknowledged this anomaly stating that “it would appear likely that the legislator did not consider the possibility that a man could have sexual intercourse against his will or while his will was overborne as otherwise this distinction could be difficult to justify.”³⁶
- Incest is limited to carnal knowledge only. This means that lesser sexual activities are not penalised under incest legislation.
- The requirement for carnal knowledge to take place limits incest to opposite-sex relationships. It does not take account, for example, of an incestuous relationship between a mother and a daughter. Though not explicitly stated, it seems clear that the offence is intended to be limited to relationships which could result in procreation. This may be why a relationship between a grandmother and grandson does not fall within the definition, while a relationship between a grandfather and granddaughter does.
- The family nexus is limited. It does not include uncles, aunts, nieces, nephews etc.

What does the Bill propose?

Incest by males

Section 2 of the Bill proposes to amend s.1(1) of the *Punishment of Incest Act 1908* to reduce the maximum penalty for men under the Act from life imprisonment to 10 years.

Incest by females of or over 17 years of age

Section 3 of the Bill proposes to substitute section 2 of the *Punishment of Incest Act 1908*, increasing the penalty from 7 to 10 years imprisonment for incest by a female. It provides that:

“any female person of or above the age of 17 years, who with consent permits her grandfather, father, brother or son to have carnal knowledge of her (knowing him to be her grandfather, father, brother or son, as the case may be), shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for a term not exceeding 10 years.”

³⁶ https://www.dppireland.ie/filestore/documents/THE_CRIMINAL_LAW_RELATING_TO_SEXUAL_OFFENCES_AGAINST_CHILDREN_PDF_260906.pdf

Sentencing for repeat sexual offenders

Recidivism among sexual offenders

Of all types of offender, those convicted of a sexual offence are likely subject to the most intense public concern and mistrust in their ability to be rehabilitated.³⁷ The inherently violent nature of sexual offences, and the significant harm caused to victims perhaps justifies the particular stigma attaching to those convicted. However sexual offenders are not a homogenous group, and not all sexual offenders pose the same level of risk. Research in this area has shown that sexual offenders have a lower rate of reoffending than most other types of offender.³⁸ Though it should be noted that statistics on sexual offences should be treated with some caution as they relate only to offences where the perpetrator was charged and convicted. As it is generally accepted that there is a significant degree of under-reporting of offences in this area, statistics may underestimate the rates of recidivism.

What does the Bill propose?

Section 4 of the Bill proposes to insert a new section 58 into the Act of 2017 titled '*Commission of another offence specified in Schedule within specified period.*' The proposed new section mirrors another provision already in Irish law, namely [section 25](#) of the *Criminal Justice Act 2007*, which provides for a regime of enhanced custodial sentences for offenders convicted of certain serious offences, explained in Text Box 2 below.

Text Box 2: Section 25 of the *Criminal Justice Act 2007*

Where an adult (the section does not apply to those under 18 years of age) is convicted on indictment (i.e. by a jury) of one of the serious offences listed in Schedule 2 to the Act, and is sentenced to a term of imprisonment of at least 5 years, and they are convicted of another Schedule 2 offence within 7 years of the first conviction, the court must sentence them to a minimum sentence which amounts to three quarters of the maximum sentence for the subsequent offence.

³⁷ Leahy, S. and Fitzgerald O'Reilly, M. (2018) *Sexual Offending in Ireland: Laws, Procedures and Punishment*, Dublin Clarus Press, p. 263.

³⁸ Department of Justice and Equality, *The Management of Sex Offenders: A Discussion Document*, January 2009, p.19. Available here: <http://www.justice.ie/en/JELR/FINAL%20REPORT.pdf/Files/FINAL%20REPORT.pdf>

For the purposes of calculating the 7 year period, the court disregards any period of imprisonment for the first or subsequent offence. However section 25 can be triggered by a subsequent offence which is committed while in prison.

If the maximum sentence available is a life sentence, the minimum term for the subsequent offence will be 10 years. There are certain situations in which section 25 does not apply, such as where the subsequent offence already carries its own mandatory term of imprisonment set down in legislation, such as murder, or drugs/firearm offences which already carry mandatory sentences for repeat offenders.

As already noted, the provisions related to presumptive minimum sentencing in the Bill mirror those contained in s.25 of the *Criminal Justice Act 2007*. If enacted, the Act will provide for the sentencing regime described below.

Proposed sentencing regime

Where an adult³⁹ was convicted on indictment of an offence specified in the Schedule (the first offence) and was sentenced to imprisonment for at least 5 years, and is subsequently convicted of another scheduled offence committed within 10 years⁴⁰ of the first conviction,⁴¹ a presumptive minimum sentence applies in relation to the second conviction. This sentence would be at least three quarters of the maximum sentence which can be imposed for the second offence. If the maximum term is life imprisonment, the minimum sentence should be at least 10 years.⁴²

If the Court is satisfied that it would be disproportionate in the circumstances to impose such a sentence, the Court may deviate from it.⁴³ As this provision mirrors that of s.25 of the *Criminal Justice Act 2007*, O'Malley's comments on that provision are of interest. He describes this as "a significant safety valve"⁴⁴, in what would otherwise be "quite a swingeing provision that could result in remarkably harsh sentences for certain offences which, while inherently serious for the most part, might not always merit the minimum sentences apparently required by the section." He notes

³⁹ 18 years or more.

⁴⁰ Note: This 10 year period is a departure from the 7 year period in s.25 of the *Criminal Justice Act 2007*. This is likely due to the perceived seriousness of sexual offences in particular, though this has not been explicitly stated by the Department.

⁴¹ For the purposes of calculating this 10 year period, the Court will disregard any period of imprisonment in respect of the first or subsequent offence, unless the subsequent offence was committed during such a term of imprisonment. See also proposed s.58(9).

⁴² Proposed s.58(1).

⁴³ Proposed s.58(2).

⁴⁴ O'Malley, T. (2016) *Sentencing Law and Practice*, 3rd ed. Dublin, Round Hall, p. 238.

that “proportionality requires that a sentence should always reflect personal circumstances as well as offence seriousness.”⁴⁵

The sentencing regime described will only apply to a person where their second offence is committed after the commencement of this section. However the first offence may have been committed prior to commencement.⁴⁶

Only the term of imprisonment imposed is relevant in deciding whether the provisions in the proposed s.58(1) will apply to an offender. So if part of the sentence is suspended for the first offence, the suspended part cannot be taken into account for the purposes of calculating the relevant 5 year period.⁴⁷ For example, if the Court imposes a sentence of 7 years imprisonment, with 3 of those years suspended, the relevant period will be 4 years and s.58(1) would not apply.

The sentencing regime contained in the proposed s.58(1) would not apply to a person if their conviction for the first offence was subsequently quashed on appeal or otherwise.⁴⁸ Similarly, if a sentence for the first offence is varied on appeal, it will be the sentence as varied that will be considered when sentencing for a second offence.⁴⁹

The proposed s.58(7) clarifies that a “period of imprisonment” for these purposes refers to the time a person is remanded in custody, serving a sentence in prison, or is temporarily released under s.2 of the [Criminal Justice Act 1960](#).

If a person is convicted of a second offence and sentenced pursuant to the regime set out in s.58(1), and their first conviction is either subsequently quashed on appeal or varied so that it would no longer bring them within the ambit of s.58(1), that person may apply to the Court which imposed the second sentence to have that sentence reviewed and varied. The Court may do so if it considers it appropriate.⁵⁰

The proposed s.58(11) envisages a situation where a person was convicted of a scheduled offence and the sentence imposed did not bring them within this sentencing regime. However their sentence is varied (i.e. increased) following an appeal or otherwise such that it does fall within the

⁴⁵ O'Malley, T. (2016) *Sentencing Law and Practice*, 3rd ed. Dublin, Round Hall, p. 238.

⁴⁶ Proposed s.58(3).

⁴⁷ Proposed s.58(4).

⁴⁸ Proposed s.58(5).

⁴⁹ Proposed s.58(6).

⁵⁰ Proposed s.58(10).

regime. If that person has committed a subsequent scheduled offence, the DPP may apply to the Court to review the sentence for the subsequent offence with the s.58(1) provisions in mind.⁵¹

Standard rules and practice in terms of remission for good conduct will apply to prisoners serving sentences imposed in accordance with this regime.⁵² However, statutory powers of special remission, commutation or early release cannot be exercised for the duration of the prescribed minimum sentence for the subsequent offence. Temporary release for a limited duration may only be granted for grave reason of a humanitarian nature.⁵³

The proposed s.58(16) clarifies that this sentencing regime will also apply to those who participate as an accomplice of a person who commits a scheduled offence, as well as to the offences of attempting or conspiring to commit, or inciting the commission of a scheduled offence.

Text Box 3: Inchoate Offences

Attempt, conspiracy, and incitement are known in the criminal law as the three inchoate offences. As O'Malley notes, while there are some specific statutory instances of inchoate offences, such as conspiracy to murder and incitement to hatred, they generally remain governed by the common law.⁵⁴ "In the absence of any particular statutory provision to the contrary, a common-law offence triable on indictment is punishable by a fine or a term of imprisonment at the discretion of the court."⁵⁵

However a limitation on this discretion is that a person convicted of an attempt to commit a particular offence cannot receive a punishment greater than the maximum punishment set out by statute that they would have received if they had completed the offence.⁵⁶

⁵¹ Proposed s.58(11).

⁵² Proposed s.58(13).

⁵³ Proposed ss.58(12) and 58(14).

⁵⁴ O'Malley, T. (2016) *Sentencing Law and Practice*, 3rd ed. Dublin, Round Hall, p. 96.

⁵⁵ Ibid.

⁵⁶ Section 10(2) of the *Criminal Law Act 1997*.

What are the Scheduled Offences?

Section 5 of the Bill proposes to amend the Act of 2017 by inserting a new Schedule which would set out the relevant offences for the purposes of the sentencing regime described above. These crimes are:

- Incest by a male and incest by a female over 17 years under the [Punishment of Incest Act 1908](#).
- A rape offence under s.1 of the [Criminal Law \(Rape\) Act 1981](#), as amended.⁵⁷
- A number of offences under the [Criminal Law \(Rape\) \(Amendment\) Act 1990](#) including sexual assault,⁵⁸ aggravated sexual assault,⁵⁹ and rape under s.4 of that Act.⁶⁰
- A number of offences under the [Sexual Offences \(Jurisdiction\) Act 1996](#). These include sexual offences committed outside the state,⁶¹ offence of transporting a person for the purpose of enabling an offence under s.2(1) of that Act,⁶² and the offence of publishing information likely to promote etc. the commission of an offence under s.2(1) of that Act.⁶³
- A number of offences under the [Child Trafficking and Pornography Act 1998](#). These include child trafficking for the purpose of sexual exploitation,⁶⁴ allowing a child to be used for child pornography,⁶⁵ organising child prostitution or the production child pornography,⁶⁶ producing or distributing child pornography,⁶⁷ causing the participation of a child in pornographic performance,⁶⁸ and possession of child pornography.⁶⁹

⁵⁷ These are rape, attempted rape, burglary with intent to commit rape, aiding, abetting, counselling and procuring rape, attempted rape or burglary with intent to commit rape, incitement to rape, rape under section 4 of the Act (see footnote 29 below), attempted rape under section 4, aiding, abetting, counselling and procuring rape under section 4 or attempted rape under section 4 and incitement to rape under section 4.

⁵⁸ [Section 2](#) of the *Criminal Law (Rape) (Amendment) Act 1990*.

⁵⁹ [Section 3](#) of the *Criminal Law (Rape) (Amendment) Act 1990*.

⁶⁰ Rape under [section 4](#) of the *Criminal Law (Rape) (Amendment) Act 1990* is a sexual assault which includes penetration (however slight) of the anus or mouth by the penis, or of the vagina by any object held or manipulated by another person. Section available here: <http://www.irishstatutebook.ie/eli/1990/act/32/enacted/en/print#sec4>

⁶¹ [Section 2](#) of the *Sexual Offences (Jurisdiction) Act 1996*.

⁶² [Section 3](#) of the *Sexual Offences (Jurisdiction) Act 1996*.

⁶³ [Section 4](#) of the *Sexual Offences (Jurisdiction) Act 1996*.

⁶⁴ [Section 3](#) of the *Child Trafficking and Pornography Act 1998*.

⁶⁵ [Section 4](#) of the *Child Trafficking and Pornography Act 1998*.

⁶⁶ [Section 4A](#) of the *Child Trafficking and Pornography Act 1998*.

⁶⁷ [Section 5](#) of the *Child Trafficking and Pornography Act 1998*.

⁶⁸ [Section 5A](#) of the *Child Trafficking and Pornography Act 1998*.

⁶⁹ [Section 6](#) of the *Child Trafficking and Pornography Act 1998*.

- The offence of causing or encouraging a sexual offence upon a child.⁷⁰
- A number of offences under the [Criminal Law \(Sexual Offences\) Act 2006](#). These include the defilement of a child under 15 years of age,⁷¹ defilement of a child under 17 years of age,⁷² and an offence by a person in authority.⁷³
- The offence of soliciting or importuning a trafficked person for the purposes of prostitution.⁷⁴
- A number of offences under the [Criminal Law \(Sexual Offences\) Act 2017](#): obtaining or providing a child for the purpose of sexual exploitation,⁷⁵ invitation to sexual touching,⁷⁶ sexual activity in the presence of a child,⁷⁷ causing a child to watch sexual activity,⁷⁸ meeting a child for the purpose of sexual exploitation,⁷⁹ the use of information and communication technology to facilitate sexual exploitation of a child,⁸⁰ engaging in a sexual act with a protected person,⁸¹ and an offence against a relevant person by a person in authority.⁸²

It is worth noting that several of these scheduled offences carry a maximum term of imprisonment of 5 years.⁸³ It is commonly accepted that the statutory maximum sentence for a crime “should be reserved for the most serious instances or manifestations of the offence to which it applies.”⁸⁴

⁷⁰ [Section 249](#) of the *Children Act 2001*.

⁷¹ [Section 2](#) of the *Criminal Law (Sexual Offences) Act 2006*.

⁷² [Section 3](#) of the *Criminal Law (Sexual Offences) Act 2006*.

⁷³ [Section 3A](#) of the *Criminal Law (Sexual Offences) Act 2006*.

⁷⁴ [Section 5](#) of the *Criminal Law (Human Trafficking) Act 2008*.

⁷⁵ [Section 3](#) of the *Criminal Law (Sexual Offences) Act 2017*.

⁷⁶ [Section 4](#) of the *Criminal Law (Sexual Offences) Act 2017*.

⁷⁷ [Section 5](#) of the *Criminal Law (Sexual Offences) Act 2017*.

⁷⁸ [Section 6](#) of the *Criminal Law (Sexual Offences) Act 2017*.

⁷⁹ [Section 7](#) of the *Criminal Law (Sexual Offences) Act 2017*.

⁸⁰ [Section 8](#) of the *Criminal Law (Sexual Offences) Act 2017*.

⁸¹ [Section 21](#) of the *Criminal Law (Sexual Offences) Act 2017*. Under the Act, a protected person is a person who lacks the capacity to consent to a sexual act due to a mental or intellectual disability or mental illness which makes them incapable of understanding the nature or reasonably foreseeable consequences of that act, evaluating relevant information to decide whether or not to engage in the act, or communicating their consent by speech, sign language or otherwise.

⁸² [Section 22](#) of the *Criminal Law (Sexual Offences) Act 2017*. ‘Relevant person’ in this context means a person who has a mental or intellectual disability or mental illness which is of such a nature or degree as to severely restrict their ability to guard themselves against serious exploitation. A ‘person in authority’ is defined as a person who, as part of a contract of service, is responsible at the time for the education, supervision, training, treatment, care or welfare of the relevant person.

⁸³ Section 6 of the *Child Trafficking and Pornography Act 1998* (Possession of child pornography), section 5 of the *Criminal Law (Human Trafficking) Act 2008*, and section 8 of the *Criminal Law (Sexual Offences) Act 2017* (use of information and communication technology to facilitate sexual exploitation of a child.)

⁸⁴ O'Malley, T. (2016) *Sentencing Law and Practice*, 3rd ed. Dublin, Round Hall, p. 89.

Thus, a person convicted of one of these crimes as the first offence would have to be sentenced to the absolute maximum term of imprisonment available, with no reduction for mitigating factors, and no portion of the sentence suspended, in order for them to be subject to the proposed sentencing regime for a second scheduled offence.

Implications of the proposed sentencing regime

No Regulatory Impact Assessment was published alongside the Bill. Thus the L&RS is not aware of any assessment which may have been conducted by the Department regarding potential costs, implications, or expected impact of the Bill.

However, as this proposal mirrors that contained in s.25 of the *Criminal Justice Act 2007* so closely, O'Malley's assessment of the impact of that section may be of interest to Members:

*"How much impact s.25 has had on sentencing practice is impossible to identify. Arguably, a court sentencing a person to whom it applies should always begin by identifying the minimum term to be specified and then decide if that term would be disproportionate in all the circumstances. One suspects, however, that s.25 seldom impinges on day-to-day practice, save to the extent that courts will have regard to relevant previous convictions as a matter of course."*⁸⁵

For a comprehensive assessment of s.25 of the *Criminal Justice Act 2007*, and its effectiveness in terms of the conceptual framework of criminal sanctions and sentencing, Members may be interested in the Law Reform Commission's 2013 *Report on Mandatory Sentences*.⁸⁶

⁸⁵ O'Malley, T. (2016) *Sentencing Law and Practice*, 3rd ed. Dublin, Round Hall, p. 238.

⁸⁶ See particularly Chapter 5. Available here: <https://publications.lawreform.ie/Portal/External/en-GB/RecordView/Index/37369>



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