Criminal Law (Sexual Offences) Act 2017 – The Offence Provisions

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The Criminal Law (Sexual Offences) Act 2017 is an extensive, though by no means comprehensive, piece of legislation. It creates new offences, principally relating to child sexual abuse, sexual exploitation of persons with mental disabilities, and indecency, and significantly amends the definitions of many existing offences. In formal terms, much of it consists of amendments to earlier legislation. And, as further proof that the law never stands still, the Act itself, although it came into force as recently as 27 March 2017, has already been amended, admittedly in minor ways, by the Criminal Justice (Victims of Crime) Act 2017 which was signed into law in early November 2017.[1] Each of these Acts must be read in conjunction with at least a half-dozen earlier statutes. Not only that, but there are currently two Private Member's Bills dealing with sexual offences before the Oireachtas, both exclusively concerned with sentencing. The state of the law in this area is now such as to make the case for a consolidated or codified Sexual Offences Act overwhelming.

In this paper "the 2017 Act" refers to the Criminal Law (Sexual Offences) Act and, in the time available, it will be possible to discuss no more than a few of its key offence provisions. At the outset, however, it may be helpful to give a broad outline of the Act as a whole.

New child abuse offences

The following new offences have been created by Part 2 of the 2017 Act:

(1) Obtaining or providing a child for the purposes of sexual exploitation (s. 3). A child for the purpose of this section is a person under the age of 18 years.

(2) Inviting, inducing, etc. a child to engage in sexual touching (s. 4). A child for the purpose of this section is a person under the age of 15 years.

(3) Engaging in sexual activity in the presence of a child (s. 5). A child for the purpose of this section is a person under the age of 17 years.

(4) Causing a child to watch sexual activity (s. 6). A child for the purpose of this section is a person under the age of 17 years.

(5) Meeting a child for the purpose of sexual exploitation (s. 7). A child for the purpose of this section is a person under the age of 17 years.

[1] The Criminal Justice (Victims of Crime) Act 2016, s. 6 repeals part of s. 36 and all of s. 38 of the Criminal Law (Sexual Offences) Act 2017. However, that part of s. 36 which protects a complainant from being cross-examined by the defendant remains intact.

(6) Using information technology to facilitate the sexual exploitation of a child (s. 8). A child for the purpose of this section is a person under the age of 17 years.

The first obvious point to note is that the definition of a child varies from one of these offences to another, although for most of them it is a person under the age of 17 years. They are intended mainly to fill longstanding gaps in the existing law. Ireland never introduced legislation equivalent to the (English) Indecency with Children Act 1960, and the offence of sexual assault did not cover certain abusive or exploitation behaviour towards a child which lacked an assault element. However, since 2008, there has been (we are almost sure) a general offence of sexually exploiting a child under the age of 18 years, an offence carrying a maximum sentence of life imprisonment.[2] The conduct that might constitute "sexual exploitation", as it was then defined, overlaps to a considerable extent with the conduct element of the some of the offences created in Part 2 of the 2017 Act. In fact, "sexual exploitation" is further re-defined in the 2017 Act itself.

Each of these offences is so defined that it may be committed by "a person" without further qualification. Under the English Sexual Offences Act 2003, some similar offences are so defined that they may be committed only by "a person aged 18 years or over…" Consider, therefore, the offence in s. 5 (of the 2017 Act) of sexual activity in the presence of a child, meaning a person under the age of 17 years. This is committed by:

[2] Section 3 of the Child Trafficking and Pornography 1998, as amended by s. 3 of the Criminal Law (Human Trafficking) Act 2008, created an offence of child sexual exploitation, although in a section that still (problematically) bore the marginal note "Child trafficking and taking etc, a child for sexual exploitation". Admittedly, s. 3 of the 1998 Act, even as originally enacted, made it an offence to "use a child" for the purpose of sexual exploitation. Judicial opinion has varied in respect of the scope of the offence created by the amended s. 3(2) of the 1998 Act. In *Minister for Justice v Adams* [2011] IEHC 366, Edwards J. suggested, without deciding, that indecency with a child (without an assault element) could perhaps be captured by s. 3(2) of the 1998 Act. In *Minister for Justice v AM* [2016] IEHC 568, Donnelly J was more certain of the matter, stating (at para. 11) that she was satisfied "that the allegations of indecency, if committed in the State on the date of issue of the EAW, would constitute an offence of sexual exploitation of a child contrary to s. 3(2)(a) of the 1998 Act." Both of these were European Arrest Warrant cases. However, in *People (DPP) v N.R.* [2016] IECCC 2, Eager J. (in the Central Criminal Court) seemed to take the opposite view, saying (at para. 13): "It is the view of the Court that sexual exploitation under s. 3 of the Child Trafficking and Pornography Act as amended is enmeshed in the offence of trafficking." However, it is difficult to escape from the plain words of the statute which, by all appearances, create an offence of child sexual exploitation without reference (apart from the marginal note) to trafficking. It is also perhaps significant that no amendment or clarification of this provision has been made in either the Criminal Law (Human Trafficking) (Amendment) Act 2013 or the Criminal Law (Sexual Offences) Act 2017. Moreover, the structure of the amended subsections (1) and (2) of s. 3 of the 1998 Act supports the view that a stand-alone offence of child sexual exploitation was being created. After all, subsection (1) creates a specific trafficking offence ("A person who trafficks a child for the purpose of sexual exploitation shall be guilty of an offence") while subsection (2) states: "A person who (a) sexually exploits a child, or (b) who takes, detains or restricts the personal liberty of a child for the purpose of sexual exploitation shall guilty of an offence." In any event, it seems that trial courts are generally prepared to accept child sexual exploitation as a stand-alone offence.

"A person who, for the purposes of obtaining sexual gratification from the presence of a child or corrupting or depraving the child, intentionally engages in sexual activity whether or not with another person [when the child is present or capable of observing the activity]."

"Sexual activity" is defined [in s. 2 of the 2017 Act] to include any activity where a reasonable person would consider that "whatever its circumstances or the purpose of any person in relation to it, the activity is because of its nature sexual…"

Would a 16-year-old male who masturbated in the presence of his 16-year-old girlfriend be guilty of this offence?

Three of the offences just mentioned (those created by ss. 5, 6 and 7) have a mens rea element of intention only. This may raise a question as to whether they are crimes of basic or specific intent, which is obviously important in the context of deciding if intoxication should provide a defence (or, more accurately, prevent the formation of the mens rea). However, on the basis of *R v Heard*[3] (which would probably be followed here as well), they are most likely crimes of basic intent which means that intoxication, even where found to exist to the requisite degree, is immaterial.

Also worth noting in this context is the recent judicial confirmation that a sexual assault need not entail actual physical contact with a victim. Assault essentially involves a movement or gesture which attempted or threatened the unlawful application of force, provided it intentionally or recklessly caused another to apprehend the application of unlawful force or physical touching.[4] Finally, several of the offences listed above are closely modelled on equivalents in other jurisdictions. For instance, s. 4 is based almost verbatim on s. 152 of the Canadian Criminal Code. Sections 5 and 6 are rather similar to ss. 11 and 12 of the English Sexual Offences Act 2003.

Amendment of existing child abuse offences

(1) Defilement of child under 15 years (s. 16)

(2) Defilement of child under 17 (s. 17)

(3) Sexual offence by person in authority with child under 18 years (s. 18).

These offences are considered in more detail below. Sections 17 and 18 must be read in conjunction with s. 15 which provides a revised definition of "person in authority."

[3] [2008] Q.B. 43.

[4] *Director of Military Prosecutions v Donaghy* [2016] IECA 191.

Child trafficking and pornography offences

(1) Definition of a child amended to mean a person under the age of 18 years (s. 9)

(2) New definition of "visual representation" for the purpose of child pornography (s. 9)

(3) New definition of "child sexual exploitation" (s. 10)

(4) New offence of organising or directing child prostitution or the production of child pornography (s. 11).

(5) Revised definition of producing or distributing child pornography (s. 12)

(6) New offence of causing etc. a child to participate in a pornographic performance (s. 13).

(7) Revised offence of possessing child pornography (s. 14).

The last-mentioned offence is the one most likely to arise in practice. As originally enacted, section 6 of the Child Trafficking and Pornography Act 1998 provided that any person who "knowingly possesses any child pornography" was guilty of an offence. The new section 6 (as inserted by the 2017 Act) broadens the scope of this offence by providing that anyone who "(a) knowingly acquires or possesses child pornography, or (b) knowingly obtains access to child pornography by means of information and communication technology" is guilty of an offence (which still carries a maximum sentence of five years' imprisonment, although it may also be prosecuted summarily).

Incest

(1) Definition of incest by a male slightly revised (s.28)

(2) Exclusion of public from incest proceedings (ss. 29, 30, 31, 32).

Until a fairly late stage in its passage through the Oireachtas, the Sexual Offences Bill proposed to equalise the maximum sentence for incest by a female with that for incest by a male (life imprisonment). For some inexplicable reason, this provision was dropped before enactment.

Prostitution

(1) New offence of payment for sexual activity with prostitute (s. 25). This offence is punishable with a fine only.

(2) Deletion of s. 2(1)(a) of Criminal Law (Sexual Offences) Act 1993 which has the effect that soliciting or importuning for the purposes of prostitution no longer includes "[offering] his or her services as a prostitute to another person."

Indecency offences

(1) Exposure and offensive conduct of a sexual nature (s. 45).

This section introduces a new offence of indecency (although that word is no longer used in the legislation) that may be committed in three different ways. It may be prosecuted either summarily or on indictment and, following conviction on indictment, carries a maximum of two years' imprisonment. This section is obviously intended to replace s. 18 of the Criminal Law Amendment Act 1935 which was invalidated by the High Court (Hogan J.) in *Douglas v DPP*[5] and *Mc Inerney v DPP*.[6] Note that, more recently, in *Douglas v DPP (No. 2)*[7] the High Court (McDermott J.) held that an offence of "outraging public decency contrary to common law" is unknown to Irish law but that there does exist a common law indictable offence of intentionally or recklessly committing an indecent act in public. However, as McDermott J. also rightly noted at the end of his judgment, conduct similar to that alleged against the applicant in *Douglas* may now be prosecuted under s. 5 or s. 45 of the 2017 Act. Indeed, there is a general principle (or, at least, a policy) under English law and, I would suggest, under Irish law as well, that where the alleged conduct comes with the definition of both a statutory offence and a more broadly defined common-law offence, a prosecution should be brought for the statutory offence.

Meaning of consent

(1) A statutory definition of consent is provided for the first time (s. 48).

Consent is now defined as free and voluntary agreement to engagement in an act. A non-exhaustive list of situations in which a person is deemed not to consent is provided, and this largely reflects the existing law. The section also specifies that consent may be withdrawn at any time before the act begins or at any time before it ends, thus giving statutory effect to *R v Kaitamaki.*[8]

[5] [2014] 1 I.R. 510.

[6] [2014] 1 I.R. 536.

[7] [2017] IEHC 248.

[8] [1985] A.C. 147.

Some procedural and evidential provisions

(1) Provision is made to allow a person under the age of 18 years to give evidence from behind a screen in a trial for a sexual or violent offence (s. 36).

(2) A person accused of a sexual or violent offence may not personally cross-examine a witness under 18 years of age (though a court may allow this to happen if the interests of justice so require (s. 36).

(3) In a sexual offence trial, the court may direct that the accused should not personally cross-examine the complainant even if the complainant has attained the age of 18 years (s. 36).

(4) Detailed provision is made for the disclosure of third-party records in criminal trials (s. 39).

Jurisdiction

(1) Some amendments are made to the Sexual Offences (Jurisdiction) Act 1996. Included is an amendment which defines "child" as a person under the age of 18 years, thereby bringing Irish law into harmony with certain international norms (s. 41 to 44).

Harassment order

(1) This is yet a further ancillary order that may be made following a conviction for a sexual offence. When imposing sentence or at any time before the offender is released from prison, the court may make "a harassment order" the purpose of which is to protect the victim from harassment or unwanted attention by the offender. Such an order shall cease to have effect, at the least, on the expiration of "such period not exceeding 12 months from the date of the [offender's release from prison] as the court may specify." The breach of such an order is an offence, which following conviction on indictment carries a maximum sentence of five years' imprisonment (s. 46).

COMMENCEMENT

Most of the earlier sections of the 2017 Act, including all the offence provisions (but excluding the redefinition of incest) entered into force on 27 March 2017.[9] The following sections have not yet been brought into force:

[9] S.I. 112/2017

28 to 40 (incest provisions, amendments to Criminal Evidence Act 1992, including provisions relating to giving evidence from behind a screen, restriction of cross-examination by defendant personally, third party disclosure).

46 and 47 (harassment orders).

51(b) (amending conditions in post-release supervision orders).

52 (amendment to schedule of Criminal Procedure Act 2010, to include incest by a female of or over the age of 17 years).

DEFILEMENT OFFENCES

Following the Supreme Court decision in *C.C. v Ireland*[10] it became necessary to replace ss. 1 and 2 of the Criminal Law Amendment Act 1935, particularly in order to provide a defence of mistake as to age. The opportunity was then taken to broaden out the definition of the two offences in question to include other sexual conduct and to express them in gender-neutral terms. For present purposes, the five salient characteristics of the new offences introduced by ss. 2 and 3 of the Criminal Law (Sexual Offences) Act 2006 were:

(a) The age of consent remained at 17 years, with a separate more serious offence of defilement of a person under the age of 15 years.

(b) The defendant had a defence if he/she could prove that he/she *honestly* believed that the other person had reached the age of 15 or 17 years, as the case may be.

(c) Consent on the part of the child provided no defence.

(d) A female child under the age of 17 years was not to be guilty of an offence under the Act by reason only of having engaged in sexual intercourse.

(e) The maximum sentence for defilement of a child under the age of 15 years was, in all cases, life imprisonment, but the maximum sentence for a section 3 offence (where the child was under 17 years) varied with a number of factors, including whether the defendant was a person in authority over the child. These maxima were further increased by the Criminal Law (Sexual Offences) (Amendment) Act 2007.

The 2017 Act substitutes new sections for ss. 2 and 3 of the Criminal Law (Sexual Offences) Act 2006.

[10] [2006] 4 I.R. 1.

In so far as s. 2 is concerned, the new version still makes it an offence, punishable with a maximum of life imprisonment, for a person to engage or attempt to engage in a sexual act with a child under the age of 15 years. As before, consent on the part of the child provides no defence. However, it is no longer sufficient for the accused to prove that he/she *honestly* believed that the child had attained the age of 15 years. Subsections (3) and (4) of the revised section 2 now state:

> (3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years.
>
> (4) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 15 years, the court shall consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age.

An objective element has now been introduced into the test of knowledge (which is, in effect, the mens rea for this offence). Yet, it can scarcely be said that the test is now entirely objective, in the sense of being determined exclusively by reference to an external factor. The question is still if *this particular defendant* was reasonably mistaken. To that extent, there is still a subjective element. Furthermore, subsection (4) provides that a jury may still have regard to what "a reasonable person" would have concluded regarding the complainant's age. Such a provision would scarcely be necessary if the test were entirely objective.

Difficult questions may arise in practice about the meaning of reasonable mistake as it is used in the revised sections 2 and 3 of the 2006 Act. Somewhat similar, though not always identical, formulae are used elsewhere. The Canadian Criminal Code (s. 150) provides that it is not a defence to a charge involving a sexual offence against a child that the accused believed that the child was 16 years or older "unless the accused took all reasonable steps to ascertain the age of the complainant." Under the Sexual Offences (Scotland) Act 2009 (s. 39) it is a defence to certain child abuse charges that the defendant reasonably believed that the complainant had reached the age of 16 years.[11]

[11] New Zealand has a more exacting test. Under the Crimes Act 1961 (s. 134A), a person charged with a sexual offence against a young person under 16 years of age has a defence only if he or she can prove that "(a) before the time of the act concerned he or she had taken reasonable steps to find out whether the young person concerned was of or over the age of 16 years, and (b) at the time of the act concerned, he or she believed on reasonable grounds that the young person was of or over the age of 16 years; and (c) that the young person consented."

One question that always arises in the application of an objective test, whether in relation to establishing liability or the availability of a defence, is the extent, if any, to which the actual characteristics of the accused should be taken into account. A "pure" objective test would require that liability be established solely by reference to a hypothetic reasonable person. A more modified test would adopt as an external standard a reasonable person having the same relevant characteristics of the offender. In the present context, those characteristics would probably include age and mental ability. Other factors, such as differences in cultural norms, would be decidedly more contentious. Under the English Sexual Offences Act 2003 (s.1) the *mens rea* for rape involves an objective test. It states:

> "A commits an offence if… A does not reasonably believe that B consents."
>
> "Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."

In *R v B*[12] the English Court of Appeal said:

> "Belief in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness and not by taking into account mental disorder which induced a belief which could not reasonably arise without it."

It did, however, say that this factor would be highly relevant at sentencing. It then said:

> "It may be that cases could arise in which the reasonableness of such belief depends on the reading by the defendant of subtle social signals and in which his impaired ability to do so is relevant to the reasonableness of his belief."

All of this, of course, had to do with belief in the presence of consent. But somewhat analogous situations might arise when it came to assessing the reasonableness of belief as to a person's age.

Irish law remains more liberal than that of other jurisdictions in the sense that the defence of reasonable mistake as to age is available in respect of any offence of a sexual act with a child under the age of 15 years. In other jurisdictions, including Scotland and New Zealand, there is no defence whatever of mistake as to age where the child is under 12 or 13 years. However, under the new Irish law, it is most improbable that a person could claim that to have been reasonably mistaken that a child under, say, 12 years was over 15 years.

[12] [2013] EWCA Crim. 3 at [40]

Young person's defence

Section 17 of the 2017 Act substitutes a new section 3 in the Criminal Law (Sexual Offences) Act 2006, creating an offence of a sexual act with a person under the age of 17 years. Again, there is a defence of reasonable mistake as to age. Consent on the part of the child provides no defence except in one set of circumstances. If the child is aged between 15 and 17 years and actually consents to the sexual act, the accused has a defence if (a) he is younger or less than two years older than the child; and (2) was not, at the time of the alleged offence, a person in authority over the child; and (3) was not, at that time, in a relationship with the child that was intimidatory or exploitative of the child. This is somewhat similar to the "young man's defence" which used to exist in English law in respect of unlawful carnal knowledge offences.[13] Under Irish law, as it now stands, a 15-year old male or a 17-year-old male who has sexual intercourse with a 16-year-old female has a defence has, if charged, a defence, but only if the female actually consented. A male aged 19 years or older would have no defence on this ground, because he is more than two years older than the female. The same applies to other sexual acts covered by the section.

A question may arise as to whether this new young person's defence introduced by the 2017 Act applies retrospectively. Overall, the revised version of the offence will apply prospectively only, in respect of offences committed since 27 March 2017. Thus, in respect of offences committed before that date (and since the 2006 Act entered into force), a subjective test of knowledge will apply in assessing any claim of mistake as to age. The more objective test now introduced will apply only to offences committed since 27 March 2017. However, the young person's defence is a provision which is clearly in ease of defendants. It exempts from liability certain individuals who engage in sexual acts with teenagers aged between 15 and 17 years, provided both parties were consenting. One could argue that this provision applies retrospectively, under the so-called *lex mitior* principle. This is a principle which applies mainly in relation to sentencing. When a maximum sentence if reduced (as happened in respect of sexual assault in this country under the Criminal Law (Rape) (Amendment) Act 1990), the reduced maximum is generally held to operate retrospectively. This is expressly provided for in the International Covenant on Civil and Political Rights, which has been ratified by Ireland and which states (Art. 15): "If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby."

There is no equivalent provision in Art. 7 of the European Convention on Human Rights (which prohibits the imposition of a *heavier* penalty than applied when the offence was committed). However, in *Scoppola v Italy (No. 2)*,[14] the European Court of Human Rights effectively read into Article 7 a rule of lenity similar to that in Art. 15 of the International

[13] Sexual Offences Act 1956, s. 6.

[14] (2009) 51 EHRR 12.

Covenant. That case, admittedly, had to do with sentencing. However, towards the end of its judgment, the Court expressed the principle of lenity in the following terms:

> "That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal law enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant."[15]

Assuming the Court chose this language deliberately – referring to more lenient "criminal law" as opposed to "penalty" – its judgment can certainly been interpreted as implying that the young person's defence introduced in the 2017 may have retrospective application.

Offences committed by persons in authority

Under the Criminal Law (Sexual Offences) Act 2006 (as amended), the maximum penalty applicable to an offence of defilement of a person under the age of 17 years varied depending on whether the defendant was a person in authority in respect of the child. That continues to be the case under revised s. 3 in the 2017 Act. The maximum sentence for either a completed or attempted offence is ordinarily seven years, but it increases to 15 years where the defendant was a person in authority. Under the previous law, the higher maximum did not apply unless the defendant was a person in authority at the time the offence was committed.[16] A new definition of "person in authority" is now contained in s. 15 of the 2017, and it includes, in addition to parents, step-parents and so forth, "any other person who is *or has been* responsible for the education, supervision, training, care or welfare of the child." (Emphasis added). Therefore, it now covers teachers, sports coaches, carers and others who were persons in authority in respect of the child at some time in the past, though not necessarily when the offence was committed. A similar change has been made in relation to a person who is or has been *in loco parentis* to the child, and also in relation to a guardian, foster parent, step-parent or partner of the child's parent.

Section 18 of the 2017 Act introduces an entirely new offence of a sexual act with a child aged between 17 and 18 years by a person in authority (defined as in respect of defilement offences). This offence carries a maximum sentence of 10 years' imprisonment. The defence of reasonable mistake as to age is available as for defilement offences. Again, the standard of proof is to the civil standard. Consent provides no defence. An accused person has a defence by proving "he or she has reasonable grounds for believing that he or she was not a person in authority in relation to the child against whom the offence is alleged to have been committed." A mistake of law will presumably be irrelevant for this purpose, by virtue of the general principle that ignorance of the law is no defence.

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[15] (2009) 51 EHRR 12, para. 109.

[16] [2016] IECA 325.

SEXUAL EXPLOITATION OF PROTECTED PERSONS

Criminal laws regulating sexual activity with or between persons with mental disabilities, mental illness or learning difficulties must attempt to strike a delicate balance between protection and autonomy. On the one hand, we want to protect such persons from being abused or exploited; on the other, we do not want to deprive them unnecessarily of their right to sexual freedom and fulfilment. This has always proved to be a difficult area for law reformers. Indeed, it is not just a problem for the criminal law. Individuals and organisations responsible for the care of persons with intellectual disabilities are often unsure and understandably concerned about the extent of their potential civil liability if a person in their care engages in a sexual relationship with another person (who may also have limited mental capacity). However, campaigners for criminal law reform in this area were highly critical of s. 5 of the Criminal Law (Sexual Offences) Act 1993 which outlawed sexual intercourse or buggery with a "mentally impaired person". (It also outlawed acts of gross indecency between males where one (possibly both) was mentally impaired). Mental impairment was defined as "suffering from a disorder of the mind, whether through mental handicap or mental illness, which is of such nature or degree as to render a person incapable of living an independent life or of guarding against serious exploitation."

This reflected a "categorical" approach. In other words, anyone who, by virtue of mental disorder, was "incapable of living an independent life or guarding against serious exploitation" was deemed to fall into the category of being mentally impaired and it was therefore a crime to engage in sexual relations with such a person. Reformers argued for a functional approach instead. They claimed that lack of capacity in respect of certain matters and decisions should not be taken to imply lack of capacity in respect of *all* matters and decisions. Therefore, capacity or the lack of it should be judged by reference to the particular decision which the person is called upon to make.[17] A person with an intellectual disability might not have the capacity to understand, say, a complex commercial transaction, but he or she might be capable of understanding the nature and possible consequences of a sexual act. In any event, capacity should be judged by reference to the particular decision that falls to be made, and not by way of a broad approach reflected in the 1993 Act.

Under s. 21 of the 2017 Act, which replaces s. 5 of the 1993 Act, a protected person is defined in the following terms:

> "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:

[17] For a useful discussion, see Home Office, *Setting the Boundaries: Reforming the Law on Sexual Offences,* Vol. 1 (London, 2000), Ch. 4.

(a) Understanding the nature, or the reasonably foreseeable consequences, of the act,
(b) Evaluating relevant information for the purpose 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.

Section 21(1) describes the essential elements of the new offence:

> "A person who engages in a sexual act with a protected person knowing that the person is a protected person or being reckless as to whether that person is a protected person shall be guilty of an offence."

A few other important points to note:

- In a prosecution for this offence, it shall be presumed, until the contrary is shown that the defendant knew the other party was a protected person or was reckless in that regard.

- In Ireland, the test of recklessness is subjective. In *People (DPP) v C.O'R,* the Supreme Court said:

> [32] "The mental element of rape requires the accused to know that the woman does not consent to intercourse or for him to be reckless as to whether she does or does not consent. Recklessness is the taking of an unjustifiable risk….
>
> "In cases of rape, recklessness means that the possibility that the woman was not consenting actually occurred in the mind of the accused. Where the accused decides to proceed with or continue with intercourse in spite of adverting to that risk; that is recklessness."

- A "sexual act", for the purpose of s. 21 is defined as consisting of vaginal sexual intercourse, buggery, conduct amounting to an aggravated sexual assault or rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990, and an act which, if done without consent, would constitute a sexual assault.

- The maximum sentence varies with the type of conduct involved. Where it consists of any of the forms conduct just listed, other than sexual assault, the maximum is life imprisonment. Otherwise, it is 14 years' imprisonment. The offence of inviting, inducing, etc. a protected person to engage in a sexual act carries a maximum sentence of 10 years' imprisonment.

Offence against relevant person by person in authority

Section 22 of the 2017 Act creates a new offence of engagement in a sexual act with "a relevant person" by a person in authority. For the purpose of this section only, a person in authority is defined as:

> "any person who as part of a contract of service or a contract for services is, for the time being, responsible for the education, supervision, training, treatment, care or welfare of the relevant person."

A relevant person is defined as:

> "a person who has (a) a mental or intellectual disability, or (b) a mental illness, which is of such a nature or degree as to severely restrict the ability of the person to guard himself or herself against serious exploitation."

The maximum sentence varies with the kind of conduct involved, but the highest maximum (applicable where, say, the conduct involved sexual intercourse) is 10 years' imprisonment. Consent on the part of the relevant person provides no defence. It is, however, a defence for the accused person to prove that he or she was reasonably mistaken that, at the time of the alleged offence, the other party was not a relevant person. Such a defence is seldom likely to succeed because, almost inevitably, the accused will have been aware or ought to be aware of the mental condition of the other party.