

**LAUNCH OF REPORT ON:**  
**KNOWLEDGE OR BELIEF CONCERNING CONSENT IN RAPE LAW**

**Opening Remarks**

At the outset may I welcome you all to the launch of the Commission's most recent Report entitled:

*Knowledge or Belief Concerning Consent in Rape Law,*

I am very grateful for the fact that my colleague, Commissioner Tom O'Malley, who is the leading expert on sexual offences in this jurisdiction, is here this Friday evening to explain the changes to the law recommended by the Commission in the Report. Accordingly, I propose to limit my observations to explaining the source of the Commission's review of this topic and the overall context in which it was considered.

As I am sure you are all aware, under the Law Reform Commission Act 1975 one of the functions of the Commission is at the request of the Attorney General, to undertake an examination of and conduct research in relation to any particular branch or matter of law and, if so requested, to formulate and submit to the Attorney General proposals for its reform. In April 2017, the then Attorney General, Máire Whelan, made such a request to the Commission. The Commission was asked to:

“...examine and make recommendations on whether changes should be made to the element of knowledge or belief in the definition of rape in section 2 of the Criminal Law (Rape) Act 1981, as amended, taking into account the jurisprudence in relation to this definition, and, in particular, the judgment of the Supreme Court in *The People (DPP) v C O'R*”.

As the terms of the request indicate, in this project the Commission was being asked to examine the current law on a specific element of the law on rape and to recommend whether the current law should be changed. The current law on that element, as legislated for in section 2 of the Act of 1981, as amended, had then been recently considered by the Supreme Court in *The People (DPP) v C O'R*. The judgment of the Supreme Court was delivered on 11<sup>th</sup> January 2016 by Charleton J, with whom the other six judges of the Supreme Court concurred, and it is now reported at [2016] 3 IR 322. What was stated unequivocally by the Supreme

Court in that judgment was that, unlike the position which prevails in some other common law jurisdictions, in section 2 of the Act of 1981, as amended, the relevant test is not what a reasonable man would have believed as to the presence of consent, but rather what the accused actually believed. In other words, as has been stated in the Report, that test is primarily subjective, rather than being primarily objective.

Another significant feature of the chronology of this project is that it arose against the immediate background of the wide-ranging reform of the law on sexual offences which resulted in the Criminal Law (Sexual Offences) Act 2017. That Act made significant amendments to the general law on rape and other sexual assault offences. When the Bill was going through the Oireachtas, it debated whether to include in the Act of 2017 reform of the law concerning knowledge or belief under section 2 of the Act of 1981, but it ultimately decided that it would be preferable to have the matter referred to the Commission for further analysis.

In general terms, in its consideration of the Attorney General's request, the Commission was required to assess whether the current primarily subjective test as to knowledge or belief should be retained, or whether a different test should be put in place that would include more objective elements.

In 2018 the Commission published an Issues Paper on the project. It received many submissions from individuals and bodies with an interest in this area of the law. The Commission very much appreciates the contributions of the consultees, as is acknowledged in the Report, which identifies the consultees. The importance to the work of the Commission of consultation with the public and relevant stakeholders cannot be too strongly emphasised.

The outcome of the Commission's consideration of the Attorney General's request is the Commission's recommendations in the Report, which will be explained by Commissioner O'Malley. A draft Bill is included in the Report at Appendix B which is drafted to give effect to the recommendations for the change in the law.

I just wish to make a few more observations to put the Report and its launch at this time in context.

First, the Gillen Review in Northern Ireland on the law and procedures in serious sexual offences was ongoing in 2018 contemporaneously with the Commission's work on the Attorney General's request. The Report of the Gillen Review was

published in 2019 and the Commission has had regard to its content and conclusions in it.

Secondly, the Report also notes the establishment by the Department of Justice and Equality of an expert working group (chaired by Commissioner O'Malley) to review the investigation and prosecution of a sexual offences in the State, which reflects the Gillen Review. The remit of that expert working group is far broader than the narrow remit of the Commission under the Attorney General's request. In its Report, the Commission has been very careful not to encroach on the remit of the expert working group.

Thirdly, another matter which is alluded to in the Report is that one of the projects in the Commission's *Fifth Programme of Law Reform* is entitled "*Review and Consolidation of the Law on Sexual Offences*", which covers the whole spectrum of the law on sexual offences including, for example, the Act of 2017 referred to earlier and the more recent Criminal Law (Sexual Offences) (Amendment) Act 2019. While the Commission intends embarking on that project in the near future, because of the enormity of its range, the Commission has considered that it is appropriate that its recommendations in this Report should not be delayed until the completion of that project.

Finally, I would like to explain why the Commission considered it appropriate to launch this Report today. The Commission's Annual Conference 2019 takes place next Wednesday, 13<sup>th</sup> November 2019. It is addressing two themes, one being *Reform of Sexual Offences Law*. There will be two speakers on this topic: Noeline Blackwell, Chief Executive Officer of Dublin Rape Crisis Centre; and Commissioner O'Malley. It was considered appropriate to get this Report into the public domain so that it can be discussed at the Conference next Wednesday.

Incidentally, the other theme, while very different, is also very interesting: *Technology and Privacy in the Digital Era*.

With Commissioner O'Malley we will now return to the substance of the Report.

## **Closing Remarks**

My closing remarks will be brief.

First I want to express my gratitude and that of my colleagues to Commissioner O'Malley for being here this evening for his invaluable explanation of the substance of the Report.

Originally, the Principal Legal Researcher for the Report was Ciara Dowd who had done very substantial work on the Report before she left us last November to go to the Irish Human Rights and Equality Commission. We are very grateful for her contribution to the Report. James Egleston took over as Principal Lead Researcher following Ciara's departure. He worked very hard to have the Report ready for launch today and we are all very grateful to him. James was lucky to have the guidance of the Deputy Director of Research, Dr. Robert Noonan, who, as always was very helpful to James, as was Commissioner Byrne.

I am very conscious of the fact that the timeline for having the Report printed for the launch today when its final version was approved, just seven days ago, was very tight indeed. Our Administration team deserve full praise for succeeding in getting it printed and back here yesterday. So particular thanks to Bríd Rogers, Head of Administration and her very industrious assistants – Ger Mooney, Ros Dalton and Gavin Walsh. I would also like to express thanks to Órla Gillen, Library and Information Manager, and also the many researchers who assisted in getting this particular show, that is to say, the launch, on the road.

Finally, my colleagues on the Commission and I are very conscious of the seriousness of the issue which is addressed in this Report and we hope that it will be of assistance to the Government and the Oireachtas in the short term.