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Oireachtais  
Houses of the  
Oireachtas

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An Comhchoiste um Dhlí agus Ceart

Tuarascáil maidir le Fianaise Íospartaigh i  
gcásanna éignithe agus ionsaithe ghnéasaigh  
Meitheamh 2021

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Houses of the Oireachtas  
Joint Committee on Justice

Report on Victim's Testimony in cases of rape and  
sexual assault

June 2021

33/JC/05

## COMMITTEE MEMBERSHIP

### Joint Committee on Justice

#### Deputies



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Jennifer Carroll MacNeill TD  
(FG) [Leaschathaoirleach]



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(GP)



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Michael McDowell  
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Lynn Ruane  
(IND)



Barry Ward  
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Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil on 3<sup>rd</sup> September 2020.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 25<sup>th</sup> September 2020.
3. Deputy James O'Connor discharged and Deputy Niamh Smyth nominated to serve in his stead by the Fifth Report of the Dáil Committee of Selection as agreed by Dáil Éireann on 19<sup>th</sup> November 2020.

## CATHAOIRLEACH'S FOREWORD

In identifying the topic of *Victim's testimony in cases of rape and sexual assault* as a key priority issue for the Joint Committee on Justice to examine, the Committee acknowledged the urgent need to reform the criminal justice and the court system for these vulnerable victims.

A renewed focus in this area in recent times has seen progress being made. The Committee notes in particular, the progress of the Criminal Procedure Bill 2021 which proposes to introduce Preliminary Hearings, identified as a welcome development which, it is hoped, will help to reduce the current delay in trials proceeding.

Recognising that legislation is only one element of reform, the Committee decided to hold a public meeting on 23<sup>rd</sup> March 2021 with relevant stakeholders to discuss in more detail areas for reform within the criminal justice system for victims of rape and sexual assault, in order to better understand the issues that need to be addressed, and where the system can be improved.

The witnesses provided the Committee with an insight into several areas for reform, where it appears that the current system, for a variety of reasons, fails to adequately support victims engaging with it, at what is an extremely difficult and emotive time in victim's lives. Among these key areas identified by the witnesses and Committee include the issue of delays in court trials proceeding, the need for specialist training of front-line professionals that interact with vulnerable victims and the need for improved court services and facilities to make them more suitable for victims.

Throughout the Report the term 'victim' is used. The use of this term is based on the definition used in the Victims Rights Directive<sup>1</sup>. This defines a victim as a natural person who has suffered harm (including physical, mental or emotional harm or economic loss) directly caused by a criminal offence — regardless of whether an offender is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between them.

The Committee has made a number of recommendations for these areas and it is hoped that these will receive due consideration.

A copy of this report and recommendations will be sent to the Minister for Justice and the Committee looks forward to working proactively and productively with the Minister to address the issues identified within the criminal justice system for victims of sexual assault and rape.

I would like to express my gratitude on behalf of the Committee to all the witnesses who attended our public hearing to give evidence and those who forwarded written submissions.



James Lawless TD (FF) [Cathaoirleach]  
June 2021

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<sup>1</sup> DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>

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## SUMMARY

The Joint Committee on Justice identified *Victim's testimony in cases of rape and sexual assault* a key priority issue for inclusion in its 2021 Work Programme.

Of serious concern to the Committee were reports which suggested that less than 10% of victims report incidences of sexual assault or rape to the Gardaí<sup>2</sup> and that the rate of prosecution and conviction of these crimes is much lower than that of other serious offences.

It is reported that in 2008 only 8% of reported rape cases resulted in a conviction with only a slight increase to 11% in 2018.

In an effort to get a clearer understanding of the reason for under-reporting of cases of rape and sexual assaults, the Committee invited written submissions seeking the views of various stakeholders.

Stakeholders, in addition to any general points on the topic, were asked to comment on how victims are treated during the reporting, investigation and trial processes.

The Committee's examination suggests that one of the main reasons for the level of under-reporting is directly linked to the experiences of victims throughout the justice process and suggests that the current system does not adequately recognise the effect and the trauma of such assaults on victims.

Based on the evidence to the Committee, it is clearly necessary to ensure that the criminal justice processes and the services available for victims of sexual assault adopt a more victim-centred approach, that they support victims throughout the entire process, that they minimise any re-traumatisation victims may experience during the trial processes and that as a result, more victims would feel encouraged to come forward to report such crimes.

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<sup>2</sup> [Rape victims will be treated with 'dignity, respect and support', says McEntee \(irishtimes.com\)](https://www.irishtimes.com/news/crime-and-law/rape-victims-will-be-treated-with-dignity-respect-and-support-says-mcentee-1.4548484)

## RECOMMENDATIONS

The following recommendations were made by the Committee in relation to the topic:

1. An Impact Assessment should be undertaken to prioritise a victim-centred approach to cases of sexual assault and to better understand the elements of the courtroom experience that trigger re-traumatisation in victims.
2. Increase the number of judges (and support staff) that are appointed to conduct trials to help alleviate the delay in court trials proceeding, particularly in the aftermath of Covid-19.
3. Ensure the availability of specialist training and guidelines for practice regarding the questioning of vulnerable witnesses is rolled out as soon as possible for members of the legal profession who practise criminal law and who wish to avail of such training.
4. Ensure the refurbishment of court premises progresses as fast as possible and that such structural improvements occur consistently in courts throughout the country.
5. Make smaller changes to court services in the meantime; for example, ensure the victim and the accused sit as far away from each other as possible in the courtroom and arrange staggered entry and exit times for the victims and the accused.
6. The Committee recommends the commencement of court familiarisation and court accompaniment services as a matter of urgency.
7. Ensure that separate legal representation to support victims of sexual assault is provided throughout the entire trial process, as appropriate, but particularly when questioned about their sexual history during cross-examination. It is important that comparable resources are made available, *on a par* with the legal representation afforded to the Prosecution and Defence to ensure the balance between a victim's rights and the fair procedures to which a defendant is entitled.
8. Acknowledge the benefits of current legislation which allows all victims of sexual assault to utilise special measures before and during the trial, including the use of screens, the ability to provide evidence by video link and the use of intermediaries.
9. Ensure the rollout of a scheme for the training and accreditation of intermediaries progresses as quickly as possible and is monitored with a view to its implementation on a nationwide basis.
10. Increase the use of video technology in the courts in the aftermath of Covid-19. Implement resources accordingly to provide more video technology in courts throughout the country.
11. The Committee recommends that consent must be incorporated within the new RSE curriculum at both primary and secondary and that programmes of consent are rolled out at third level as a matter of urgency.
12. Encourage more awareness of domestic abuse and sexual assault against men. Amend legislation to acknowledge female to male and male to male rape and ensure that any legislation going forward is gender neutral in terms of such offences. Consider providing refuge options for men fleeing domestic abuse and

providing funding for further research on the topic of sexual abuse against men to inform future policy decisions.

The Committee also wishes to acknowledge and highlight the prevalence of sexual violence within the LGBT+ community, in particular the high levels of sexual violence experienced by those who identify as being transgender or non-binary.

13. The Committee recommends that consideration be given to re-evaluating the way in which statistics regarding cases of rape and sexual assault offences are compiled. Assess the potential to compile these statistics by use of a singular body or database or through developing a system which would apply an individual identifying number to each case, to better track such cases as they progress through different State institutions including data from the Family Law Courts, if appropriate.
14. The Committee recommends undertaking special examination of experiences of minors within the criminal justice system in cases of rape and sexual assault.

## CHAPTER 1 Engagement with Stakeholders

### Introduction

The Joint Committee on Justice invited submissions from stakeholders on the topic of *Victim's testimony in cases of rape and sexual assault*.

[On 23<sup>rd</sup> March 2021](#), the Committee held a public engagement with several of these stakeholders, as laid out in the table below:

**Table 1: List of Stakeholders present at Committee meeting on 23rd March 2021**

<b>Organisation</b>	<b>Witnesses</b>
<b>Rape Crisis Network Ireland</b>	Ms Caroline Counihan, BL, Legal Policy Director
<b>Men's Aid</b>	Ms Kathrina Bentley, Chief Executive Officer Ms Andrea McDermott, Social Care Manager
<b>One in Four</b>	Ms Maeve Lewis, Chief Executive Officer Ms Deirdre Kenny, Advocacy Director
<b>The Bar of Ireland</b>	Mr Dara Hayes, BL Ms Fiona Murphy, Senior Counsel
<b>Department of Justice</b>	Ms Ciara Carberry, Principal Officer, Criminal Justice Legislation Mr Deaglán Ó Briain, Principal Officer, Criminal Justice Policy

The primary focus of these engagements was to allow the stakeholders to present to the Committee the areas of reform they believed were most urgent regarding the current criminal justice process for vulnerable victims in cases of sexual assault and rape. The aim was to establish what areas could be improved and strengthened in order to create a more supportive system with the lowest levels of trauma for those involved in proceedings.

## *Overview of the legislation on sexual assault and rape in Ireland*

The substantive law on sexual offences in Ireland is quite modern and comprehensive as it currently stands. Many of the key provisions, including anonymity rights of the victim (as provided for by section 7 of the Criminal Law (Rape) Act 1981) and the provisions and special measures for victims under 18 or those with an intellectual disability (under the Criminal Evidence Act 1992 (as amended)) dating from the 1980s and 1990s respectively.

In particular, the introduction of victim impact statements under section 5 of the Criminal Justice Act 1993 was viewed as a landmark decision in recognition of victim's rights. This provided victims the opportunity, during the trial process, to be heard and to express to the court the personal impact that the offence had had on them, which they had not previously been facilitated to do.

In recent times, the introduction of the Criminal Justice (Victims of Crime) Act 2017 gives effect to the European Union Victims' Rights Directive (from 2012), which confers certain rights on the victim irrespective of the outcome of trial proceedings. Among these rights include the victim's right to information on a range of matters including procedures for making a complaint; their right to be kept informed of the progress of the investigation, of any criminal proceedings that follow, and of sentencing, imprisonment or release of the accused; and the victim's right to request a review of any decision made not to prosecute the accused.

While the current law is quite comprehensive, it is spread among several statutes and consideration should be given to codifying all provisions into a single statute.

In addition, several stakeholders argue that legislation regarding special measures for victims should be updated to allow *all* vulnerable victims of sexual assault to access the range of special measures [listed in Point 6 \(of Chapter 2\)](#)

Consideration should also be given to the introduction of legislation to extend the anonymity of victims of sexual assault who have a mental illness or mental or intellectual disability.

## CHAPTER 2 SUMMARY OF EVIDENCE AND RECOMMENDATIONS

In the course of the public hearing, a number of important points were raised. A summary of the main areas discussed in evidence to the Committee follows, together with the Committee's recommendations:

### 1. Impact of current system on victims - Re-traumatisation/re-victimisation

The Committee was advised that several elements of the courtroom experience, as it currently stands, are causing victims to feel re-traumatised, invoking a recurrence of physical and psychological symptoms that may have been managed up until that point.

One witness described their experience in the courtroom as follows:

*I think overall I was probably on the stand for, give or take, four hours. I can't tell you how horrific it is being cross-examined. To this day I can hear that barrister's voice in my ear crystal clear to this day.<sup>3</sup>*

The experience of cross-examination, delays in trials proceeding and trial dates being postponed at the last minute can cause significant distress to victims (discussed further in [Point 2](#)). Additionally, such experiences can impair the victim's testimony on the day of the trial due to stress or could even discourage victims of sexual assault from progressing with their case. Thus, submissions and witnesses highlighted that reforming the courts process for victims requires immediate attention.

It was recommended to the Committee that a comprehensive Impact Assessment be undertaken to gauge which particular elements of the courts process may trigger victims and to tailor further reforms according to the specific needs expressed by victims.

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<sup>3</sup> 1in4 Opening Statement, p.2.

## **2. Delays in court trials proceeding**

The Committee was informed that delays in court trial dates has a serious impact on the experience of victims of sexual assault crime during the courts process.

Witnesses can feel that their lives are on hold while awaiting trial dates and in cases where trial dates are postponed at short notice, this causes the victim to feel stress and apprehension which can re-traumatise them.

In addition to this, trials that take place years after a crime has been committed can result in witnesses not recounting their evidence in precisely the same detail as in the pre-recordings. This may result in their testimony appearing less credible.

Witnesses and Members acknowledged that delays in trials proceeding would now be more acute due to restrictions caused by Covid-19. The Committee heard that prior to Covid, cases in Dublin Circuit Court were delayed by about 15 to 18 months. Now, in some cases, court dates that should have occurred in 2019 are now being re-scheduled for 2023, meaning that victims may be waiting for a total of six or seven years to have their crime processed through the courts system.

It was put to the Committee that the appointment of additional judges may be necessary to help counter the inevitable delays in trial dates due to Covid restrictions.

In addition to the suggestion to appoint additional judges, the Committee views the proposed introduction of Preliminary Trial Hearings, as provided for in the Criminal Procedures Bill 2021, as a way of addressing the current delay in cases being processed through the criminal justice system. This Bill will allow decisions to be made at the Preliminary Trial Hearing regarding the use of any special measures and disclosure of evidence, including questions regarding a victim's sexual history, that will be utilised during the trial. It will also remove some of the uncertainties of the current trials process, where potential issues may arise after a trial has started and cause the victim distress.

### **3. Specialist training for members of the legal profession**

The Joint Committee was told that the experience of being cross-examined by barristers and other members of the legal profession during trials can multiply the trauma experienced by victims. The legalese, technical language and the tone used by some barristers can be offputting and can appear hostile to victims.

Sometimes cross-examination can criticise or refute the victim's evidence, (which may have been fragmented due to the difficulty of communicating under pressure) and this can further re-traumatise victims.

This current approach does not put the victim at its centre, and it can make victims feel that there is little recognition of the trauma they have experienced.

Some witnesses proposed that a Code of Conduct be drawn up for members of the legal profession when questioning vulnerable witnesses, in order to advise them as to best practice regarding the use of accessible language and questioning.

The Committee was also told that specialist training for barristers on how to interact with vulnerable victims should be prioritised and participation in such training should be made mandatory rather than voluntary.

This suggestion concurs with points raised in the wider submissions, which recommends that specialist training be provided for those dealing with victims first-hand such as Gardaí, barristers, judges and those working within State Agencies. Such training would ensure that proceedings are more trauma-informed and would better prepare these groups, who may also experience psychological effects or 'vicarious trauma' after hearing certain distressing testimonies from victims.

It should be noted that progressing such training for members of the legal profession forms one of the aims of [Supporting a Victim's Journey](#) and a separate subgroup with members from various relevant agencies are currently designing the format of this training. Similarly, training for all members of the Garda Síochána on how to best engage with victims of sexual assault and to understand their experience as a victim is being progressed throughout 2021 and 2022.

The Committee welcomed the fact that Garda Divisional Protective Services Units have already been rolled out across the country which ensures that every Garda division has a specialised unit to investigate crimes of sexual assault and domestic abuse.

#### 4. Improvement of court services and premises

The Committee was informed of the need to ensure that court premises are suitable to accommodate vulnerable victims.

Court premises should be refurbished to make them more user-friendly, for example, by creating more witness suites where victims can wait in privacy prior to their trial beginning. It was proposed that changes in court premises must occur consistently in courts throughout the country.

Aside from refurbishment or structural changes to court facilities, witnesses made reference to other improvements that could be made to court services.

The proximity of the witness to the accused during trial was highlighted and can be very offputting for witnesses as it can re-invoke trauma upon being so close to the accused during their cross-examination.

The use of screens during cross-examination could help ensure the victim does not feel intimidated by the accused and it should be ensured, where possible, that the victim and the accused are not seated in close proximity to each other during the trial.

To avoid both parties encountering each other before the trial, staggered arrival times could be arranged for the witness and accused, or the victim could be permitted to wait in a private suite prior to trial.

The Committee also heard that familiarising victims with the courts prior to their trial and improving services that allow witnesses to be accompanied at court are also viewed by stakeholders as essential services to help familiarise and prepare the victim for the trial proceedings.

The Committee noted that as part of [Supporting a Victim's Journey](#), the Department of Justice is currently providing funding to NGOs and working alongside them to identify areas throughout the country where the court accompaniment service is not provided and to ensure that this gap can be filled with services from relevant organisations. This plan also aims, in the first quarter of 2021, to examine the structures and resources necessary to provide a court familiarisation service to all victims of sexual offences throughout the country.

## 5. Separate legal representation for victims

Another area of concern highlighted in hearings related to the provision of separate legal representation for victims.

The Committee heard that victims are not legally represented in the Irish legal system unless an application is made to a trial judge for the sexual history or the counselling records of the victim to be raised in the trial. Such applications are judged in a private hearing where the victim will receive separate legal representation through the Civil Legal Aid Board.

The Committee was informed that reforms should be made to the the current system, so that when a victim is questioned about their sexual history in a trial involving sexual assault they will be entitled to separate legal representation, as this provision currently applies only to questioning of sexual history in a trial involving rape charges.

The Committee noted that the O'Malley Review also recommended extending the legal representation of victims beyond the pre-trial period so that legal representatives could accompany witnesses during cross-examination, to ensure that the questioning does not stray past what was permitted by the trial judge.

It was proposed to the Committee that separate legal representation should be provided to witnesses for the entire trial process, while others referenced a need for separate legal representation to be available to victims regardless of their sexual history being brought into question.

The Department of Justice confirmed that work is underway on extending the right to legal representation to cover cross-examination of a witness during a trial and this will form part of the Sexual Offences Bill to be published later in the year.

In deciding the extent to which separate legal representation should be provided to victims of sexual assault, the Committee recommends that the level of resources available should be evaluated as should the balance between a victim's rights and the fair procedures to which a defendant is entitled.

Members queried if judges had access to guidelines to assist them in deciding which elements of a victim's sexual history could be discussed in court.

Stakeholders clarified that the judges are reluctant to allow people to be questioned about something so personal and that the relevance bar at which a victim's sexual history is permitted to be discussed at court is very high.

In all cases, the defence must make it very clear why such evidence is relevant and the judge must explain the reasons for their decision to permit any evidence. Stakeholders also informed the Committee that frequently, there is agreement and understanding to some extent from the victims themselves as to the extent of the questioning.

Finally, stakeholders and Members of the Committee stressed that the idea of 'victim-blaming', where a victim may be blamed for the offence based on their clothes or whether they had consumed drugs or alcohol on the night of the offence, must not inform the deliberations against victims.

## 6. Special measures

Throughout the submissions and hearings, the Joint Committee was told that changing the current restrictive criteria surrounding the use of special measures would be beneficial to support victims during the trial process. Currently use of special measures is restricted to those under the age of 18 and those with certain mental or intellectual disabilities.

However, it was suggested that current legislation be amended so that these measures be open to *all* victims of cases of sexual assault, who should be regarded as vulnerable witnesses due to the nature of cases involving rape or sexual assault.

Special measures would include the use of intermediaries, the use of screens, providing evidence by video link, and restrictions in relation to questioning prior sexual history.

The use of intermediaries to assist in the communications process during court was highlighted by witnesses. It was suggested to the Committee that their role could be expanded to allow intermediaries to take questions for vulnerable witnesses in court and to provide answers on their behalf, where deemed appropriate.

Their services could also be provided to witnesses when giving initial statements at Garda stations and furthermore intermediaries could be provided to the accused to ensure there is equal treatment of the witness and the accused.

The Committee learned that the particular vulnerability inherent to sexual offence cases may mean that many victims in these trials should be eligible for the help of an intermediary based on such an understanding.

The Committee was informed that the Department has ambitious aims regarding the rollout of a cohort of trained intermediaries. Work has already begun on enlisting a group of candidates to receive training and accreditation to have a supply of intermediaries available, with some of these working full-time. The service will be piloted for 12 months in two areas after which a costed plan would be prepared to extend the service throughout the State and consider any necessary legislative amendments to facilitate this. The plan will encourage intermediaries to be available to the witness in court and also to assist the witness at earlier stages, including at Garda interviews of the victim.

The potential to use video evidence more frequently was also raised, particularly considering the increased use of technology during Covid-19. Some stakeholders even suggested that pre-recordings of cross-examination be introduced to help limit the retraumatisation of victims during cross-examination, as is practice in [several other common law jurisdictions](#).

The Committee was informed that while this had been facilitated during Covid-19, the issue of sufficient resources would be the main stumbling block preventing the roll out of such technology on a large scale. Many courts are not equipped with the correct video recording equipment to facilitate this and any increase in the number of victims opting to utilise video recordings would lead to a further backlog in trials proceeding.

The use of video recordings to undertake all victim testimonies at their initial presentation to Garda stations was also recommended over the current approach, which involves undertaking a lengthy handwritten statement. The Committee noted that this suggestion is covered by a proposal to allow the Minister to amend the Judges' Rules, proposed in section 2 of the Criminal Procedure and Related Matters Bill 2021.

## **7. Public awareness and education around consent**

The issue of education around the topic of consent was also discussed in the Committee hearing.

The Committee noted that one of the central goals of [Supporting a Victim's Journey](#), is to create a national campaign to spread awareness and understanding of the meaning of consent and to change attitudes surrounding this topic. This campaign will be conducted between the Department of Education, Department of Further and Higher Education, Research, Innovation and Science, and the Dublin Rape Crisis Centre and the formation of this campaign is currently ongoing.

In welcoming this initiative, Members also raised the potential for the Joint Committee on Justice to liaise with the Joint Committee on Education, Further and Higher Education, Research, Innovation and Science regarding the formation of a new programme of relationship and sexual education for children in primary and secondary school, in line with the development of education around consent for older age groups.

Such a programme could ensure conversations around this topic could begin in an age appropriate way at a younger age.

## 8. Information, support and resources for vulnerable victims

Evidence at the meetings stressed the need for more information and resources to be available to victims of sexual assault. It was put to Members that victims needed continuous support beyond the trial itself.

Legal advice and specialist supports were seen as essential pre-trial preparations and after-trial supports including counselling and mental health services should be formalised. It was also suggested that once notification has been given at a preliminary trial hearing of intention to apply for leave to question a victim, the Legal Aid Board should be immediately consulted with to ensure representation was available. The Legal Aid Board, or the appropriate body tasked with same, in turn, should endeavour to ensure that the victim is represented by counsel of a level of seniority similar to that of counsel representing the prosecution and defence. Additionally, an information gap was identified as many victims were unaware of their rights as victims or regarding the legal process of criminal proceedings and the courts system.

The Committee was informed that multi-annual funding commitments are provided to those NGOs who provide essential post trial supports such as counselling services and the Committee supports any necessary legislative amendments which are necessary to provide these and other such services, including increased legal aid to victims.

The Committee also heard of the need to increase awareness around the issue of domestic abuse and sexual assault committed against men. The Committee was informed that research from 2005 showed that approximately 1 in 7 men experience domestic violence in their lifetime and yet 95% of abuse experienced by men is not reported to Gardaí.<sup>4</sup>

Dublin Rape Crisis Centre recently reported that 1 in 10 calls made to their Helpline is from a man disclosing that he has experienced rape.<sup>5</sup> Factors that discourage men from reporting such crimes include feelings of shame and stigma, masculinity and gender bias and a fear of not being believed.

Therefore, it was highlighted to Members the importance of reducing the stigma experienced by these victims, to acknowledge the trauma they experience and of the need to support and encourage these victims to come forward and report such crimes.

It was suggested that the possibility of a refuge option being provided for men fleeing domestic violence, of which there are currently none in Ireland is worthy of consideration based on the evidence to the Committee. Legislation could also be altered to be more gender neutral and to include rape of men by a female perpetrator as a crime.

Finally, the Committee heard evidence from witnesses regarding the disparate nature of the statistics system to track victims and crimes of rape and sexual assault.

Currently three different bodies collect figures relating to crimes of rape and sexual assault, including the Garda reported crime figures, figures from the Director of Public Prosecutions (DPP) and figures from the Courts Service. In addition, the figures from each body in a given year may not reflect those gathered by the other bodies in the same year due to the time it takes for case to progress through the criminal justice system.

Witnesses explained that statistics regarding the proportion of sexual offence files which result in a prosecution and the reasons they might not be prosecuted are not currently available. This makes it hard to track a case, complaint or victim from the beginning right through the process, and makes it difficult for voluntary agencies that support victims to answer questions they may ask about the statistical likelihood of their case progressing through to the DPP or further.

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<sup>4</sup> Men's Aid, Opening Statement

<sup>5</sup> Men's Aid Submission, p.2

## CHAPTER 3 Recommendations of the Joint Committee on Justice

Based upon engagements and through the wider submissions, the Committee arrived at the following conclusions and recommendations:

The following recommendations were made by the Committee in relation to the topic:

1. An Impact Assessment should be undertaken to prioritise a victim-centred approach to cases of sexual assault and to better understand the elements of the courtroom experience that trigger re-traumatisation in victims.
2. Increase the number of judges (and support staff) that are appointed to conduct trials to help alleviate the delay in court trials proceeding, particularly in the aftermath of Covid-19.
3. Ensure the availability of specialist training and guidelines for practice regarding the questioning of vulnerable witnesses is rolled out as soon as possible for members of the legal profession who practise criminal law and who wish to avail of such training.
4. Ensure the refurbishment of court premises progresses as fast as possible and that such structural improvements occur consistently in courts throughout the country.
5. Make smaller changes to court services in the meantime; for example, ensure the victim and the accused sit as far away from each other as possible in the courtroom and arrange staggered entry and exit times for the victims and the accused.
6. The Committee recommends the commencement of court familiarisation and court accompaniment services as a matter of urgency.
7. Ensure that separate legal representation to support victims of sexual assault is provided throughout the entire trial process, as appropriate, but particularly when questioned about their sexual history during cross-examination. It is important that comparable resources are made available, *on a par* with the legal representation afforded to the Prosecution and Defence to ensure the balance between a victim's rights and the fair procedures to which a defendant is entitled.
8. Acknowledge the benefits of current legislation which allows all victims of sexual assault to utilise special measures before and during the trial, including the use of screens, the ability to provide evidence by video link and the use of intermediaries.
9. Ensure the rollout of a scheme for the training and accreditation of intermediaries progresses as quickly as possible and is monitored with a view to its implementation on a nationwide basis.
10. Increase the use of video technology in the courts in the aftermath of Covid-19. Implement resources accordingly to provide more video technology in courts throughout the country.

11. The Committee recommends that consent must be incorporated within the new RSE curriculum at both primary and secondary and that programmes of consent are rolled out at third level as a matter of urgency.
12. Encourage more awareness of domestic abuse and sexual assault against men. Amend legislation to acknowledge female to male and male to male rape and ensure that any legislation going forward is gender neutral in terms of such offences. Consider providing refuge options for men fleeing domestic abuse and providing funding for further research on the topic of sexual abuse against men to inform future policy decisions.  
The Committee also wishes to acknowledge and highlight the prevalence of sexual violence within the LGBT+ community, in particular the high levels of sexual violence experienced by those who identify as being transgender or non-binary.
13. The Committee recommends that consideration be given to re-evaluating the way in which statistics regarding cases of rape and sexual assault offences are compiled. Assess the potential to compile these statistics by use of a singular body or database or through developing a system which would apply an individual identifying number to each case, to better track such cases as they progress through different State institutions including data from the Family Law Courts, if appropriate.
14. The Committee recommends undertaking special examination of experiences of minors within the criminal justice system in cases of rape and sexual assault.

## APPENDICES

### APPENDIX 1- THE CRIMINAL JUSTICE SYSTEM FOR VICTIMS OF SEXUAL ASSAULT IN OTHER JURISDICTIONS

In submissions and during the hearing, stakeholders pointed to examples of best practices in other jurisdictions regarding vulnerable witnesses during trials of sexual assault which may be of benefit when considering any appropriate changes in an Irish context.

The subject of Rape Shield Law was highlighted throughout the submissions and hearings. This provision limits the ability to cross-examine complainants about their past sexual behaviour or to use this as evidence during the trial. Rape Shield Legislation is in place in the US, Canada and Australia and New Zealand.

In an Irish context, there is no Rape Shield legislation, however, the Committee was told by the Department of Justice that similar safeguards are already in place when asking about a victim's sexual history, including the requirement that this line of questioning must first be allowed by the trial judge in each case.

Several stakeholders also highlighted the potential for witnesses to have their testimonies and/or cross-examination pre-recorded, which could be used in court in place of them testifying. This could lessen the trauma felt by victims and using video evidence that was recorded directly after the incident could help to ensure that the details of their testimony remain accurate, in situations where the victim may be testifying at trial years after the event. Victim's testimony and cross-examination of witnesses is allowed to be pre-recorded in advance of trials in Scotland, Wales and England.

In Iceland, the 'burden of proof' enactment means that the onus is on the defendant to prove that they obtained consent from the victim. This removes pressure from the victim as the burden of proof is no longer on them to prove that they did not consent.

During engagements, the RCNI highlighted that Scotland has made significant progress in their criminal justice procedures for vulnerable victims in recent years and provides a good model for Ireland to emulate in this area. Similarly, Northern Ireland has also made several improvements in their criminal justice system regarding victims of sexual assault.

# APPENDIX 2- ORDERS OF REFERENCE OF THE COMMITTEE

## COMMITTEE ON JUSTICE

### ORDERS OF REFERENCE

#### Functions of Departmental Select Committees.

**95.** (1) The Dáil may appoint a Departmental Select Committee to consider and, unless otherwise provided for in these Standing Orders or by order, to report to the Dáil on any matter relating to—

(a) legislation, policy, governance, expenditure and administration of—

(i) a Government Department, and

(ii) State bodies within the responsibility of such Department, and

(b) the performance of a non-State body in relation to an agreement for the provision of services that it has entered into with any such Government Department or State body.

(2) A Select Committee appointed pursuant to this Standing Order shall also consider such other matters which—

(a) stand referred to the Committee by virtue of these Standing Orders or statute law, or

(b) shall be referred to the Committee by order of the Dáil.

(3) The principal purpose of Committee consideration of matters of policy, governance, expenditure and administration under paragraph (1) shall be—

(a) for the accountability of the relevant Minister or Minister of State, and

(b) to assess the performance of the relevant Government Department or of a State body within the responsibility of the relevant Department, in delivering public services while achieving intended outcomes, including value for money.

(4) A Select Committee appointed pursuant to this Standing Order shall not consider any matter relating to accounts audited by, or reports of, the Comptroller and Auditor General unless the Committee of Public Accounts—

(a) consents to such consideration, or

(b) has reported on such accounts or reports.

(5) A Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann to be and act as a Joint Committee for the purposes of paragraph (1) and such other purposes as may be specified in these Standing Orders or by order of the Dáil: provided that the Joint Committee shall not consider—

- (a) the Committee Stage of a Bill,
- (b) Estimates for Public Services, or
- (c) a proposal contained in a motion for the approval of an international agreement involving a charge upon public funds referred to the Committee by order of the Dáil.

(6) Any report that the Joint Committee proposes to make shall, on adoption by the Joint Committee, be made to both Houses of the Oireachtas.

(7) The Cathaoirleach of the Select Committee appointed pursuant to this Standing Order shall also be Cathaoirleach of the Joint Committee.

(8) Where a Select Committee proposes to consider—

- (a) EU draft legislative acts standing referred to the Select Committee under Standing Order 133, including the compliance of such acts with the principle of subsidiarity,
- (b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,
- (c) non-legislative documents published by any EU institution in relation to EU policy matters, or
- (d) matters listed for consideration on the agenda for meetings of the relevant Council (of Ministers) of the European Union and the outcome of such meetings, the following may be notified accordingly and shall have the right to attend and take part in such consideration without having a right to move motions or amendments or the right to vote:
  - (i) members of the European Parliament elected from constituencies in Ireland,
  - (ii) members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and
  - (iii) at the invitation of the Committee, other members of the European Parliament.

(9) A Select Committee appointed pursuant to this Standing Order may, in respect of any Ombudsman charged with oversight of public services within the policy remit of the relevant Department consider—

(a) such motions relating to the appointment of an Ombudsman as may be referred to the Committee, and

(b) such Ombudsman reports laid before either or both Houses of the Oireachtas as the Committee may select: Provided that the provisions of Standing Order 130 apply where the Select Committee has not considered the Ombudsman report, or a portion or portions thereof, within two months (excluding Christmas, Easter or summer recess periods) of the report being laid before either or both Houses of the Oireachtas.<sup>6</sup>

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<sup>6</sup> Retained pending review of the Joint Committee on Public Petitions.

## **Powers of Select Committees.**

**96.** Unless the Dáil shall otherwise order, a Committee appointed pursuant to these Standing Orders shall have the following powers:

(1) power to invite and receive oral and written evidence and to print and publish from time to time—

(a) minutes of such evidence as was heard in public, and

(b) such evidence in writing as the Committee thinks fit;

(2) power to appoint sub-Committees and to refer to such sub-Committees any matter comprehended by its orders of reference and to delegate any of its powers to such sub-Committees, including power to report directly to the Dáil;

(3) power to draft recommendations for legislative change and for new legislation;

(4) in relation to any statutory instrument, including those laid or laid in draft before either or both Houses of the Oireachtas, power to—

(a) require any Government Department or other instrument-making authority concerned to—

(i) submit a memorandum to the Select Committee explaining the statutory Instrument, or

(ii) attend a meeting of the Select Committee to explain any such statutory instrument: Provided that the authority concerned may decline to attend for reasons given in writing to the Select Committee, which may report thereon to the Dáil,

and

(b) recommend, where it considers that such action is warranted, that the instrument should be annulled or amended;

(5) power to require that a member of the Government or Minister of State shall attend before the Select Committee to discuss—

(a) policy, or

(b) proposed primary or secondary legislation (prior to such legislation being published),

for which he or she is officially responsible: Provided that a member of the Government or Minister of State may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil: and provided further that a member of the Government or Minister of State may request to attend a meeting of the Select Committee to enable him or her to discuss such policy or proposed legislation;

(6) power to require that a member of the Government or Minister of State shall attend before the Select Committee and provide, in private session if so requested by the attendee, oral briefings in advance of meetings of the relevant EC Council (of Ministers) of the European Union to enable the Select Committee to make known its views: Provided that the Committee may also require such attendance following such meetings;

(7) power to require that the Cathaoirleach designate of a body or agency under the aegis of a Department shall, prior to his or her appointment, attend before the Select Committee to discuss his or her strategic priorities for the role;

(8) power to require that a member of the Government or Minister of State who is officially

responsible for the implementation of an Act shall attend before a Select Committee in relation to the consideration of a report under Standing Order 197;

(9) subject to any constraints otherwise prescribed by law, power to require that principal office-holders of a—

(a) State body within the responsibility of a Government Department or

(b) non-State body which is partly funded by the State, shall attend meetings of the Select Committee, as appropriate, to discuss issues for which they are officially responsible: Provided that such an office-holder may decline to attend for stated reasons given in writing to the Select Committee, which may report thereon to the Dáil;

and

(10) power to—

(a) engage the services of persons with specialist or technical knowledge, to assist it or any of its sub-Committees in considering particular matters; and

(b) undertake travel;

Provided that the powers under this paragraph are subject to such recommendations as may be made by the Working Group of Committee Cathaoirleach under Standing Order 120(4)(a).'

### **Standing Orders 107 and 109 – Committees meeting in Private**

That Standing Order 107 be amended by the addition of the following paragraph after paragraph (2):

'(3) Where a Standing, Select or Special Committee, by Order, meets in private, such meeting may be held on such specified videoconferencing platform as may be approved and provided by the Houses of the Oireachtas Commission: Provided that minutes of Private Meetings will be proposed and decided at the next (public) Meeting of the Committee.'

That Standing Order 109 (*‘Quorum of Select Committees’*) be amended by the inclusion in paragraph (4) of *‘or, for the purpose of Standing Order 107(3) taking part in proceedings on such specified videoconferencing platform as may be approved and provided by the Houses of the Oireachtas Commission,’* after *‘present’*, and by the addition of the following proviso:  
*‘Provided further that references in Standing Orders to being present, taking part in proceedings, attending and participating shall be construed accordingly.’*

## **APPENDIX 3- LIST OF STAKEHOLDERS AND SUBMISSIONS**

- The Bar Council of Ireland
- One in Four
- Department of Justice
- Victim's Alliance
- The Rape Crisis Network Ireland (RCNI) – supported by Safe Ireland
- The Law Society
- Men's Aid
- The Dublin Rape Crisis Centre
- National Women's Council of Ireland



THE BAR  
OF IRELAND

*The Law Library*

**SUBMISSION TO THE JOINT COMMITTEE  
ON JUSTICE  
VICTIM'S TESTIMONY IN CASES OF RAPE  
AND SEXUAL ASSAULT**

February 2021

## INTRODUCTION

The Council of The Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,150 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

The Council has prepared these submissions at the invitation of the Joint Committee on Justice in consideration of the topic of “**Victim’s testimony in cases of rape and sexual assault**”.

## CONTEXT

1. The Sexual Abuse and Violence in Ireland (“SAVI Report”) found that in the year 2000, from the point of victim complaint to Court conviction, there was an overall prosecution success rate of 4.91% for sexual assault offences insofar as 549 offences were reported to Gardaí, 401 offences were detected by Gardaí, prosecutions were commenced in 130 cases and 27 court convictions occurred.<sup>1</sup> Almost 20 years later, the CSO’s initial recorded Crime Detection Statistics<sup>2</sup> reported in 2019 that the detection rate for reported sexual offences was 12%,<sup>3</sup> the lowest detection rate of any crime.<sup>4</sup> By way of contrast, the CSO’s initial recorded Crime Detection Statistics for 2019 had a detection rate of 87.9% for controlled drug offences and 84% for public order and other social code offences.<sup>5</sup> The SAVI Report also reported that 42% of women and 28% of men reported some form of sexual abuse or assault in their lifetime.<sup>6</sup> In terms of criminal justice reform efforts, there is doubtless a strong social and moral impetus to focus reform efforts on this area of the law, to evaluate recent reforms and to improve the experiences of victims of sexual offences should they choose to engage with the criminal justice system.

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<sup>1</sup> McGee, H. M. & Dublin Rape Crisis Centre. 2002. *The SAVI Report: Sexual Abuse and Violence in Ireland*, Dublin, Liffey Press in association with Dublin Rape Crisis Centre - Centre Table 4.31, p. 136

“results of cases dealt with on indictment (i.e. referred to Director of Public Prosecution) or summarily (not referred) were combined. In this report, all cases were reported as concluded.”

<sup>2</sup> According to the CSO website, “Recorded Crime Detection statistics provide a snapshot of the extent to which crime incidents reported to An Garda Síochána (AGS) have been detected. A crime is considered detected when AGS have identified and sanctioned a suspected offender for the crime. The publication is based on data recorded by AGS on its PULSE (Police Using Leading Systems Effectively) and FCPS (Fixed Charge Penalty System) databases.” Additionally, these CSO statistics are “under reservation.” According to the CSO website “these statistics are categorised as Under Reservation. This categorisation indicates that the quality of these statistics do not meet the standards required of official statistics published by the CSO. An Garda Síochána have undertaken to introduce an effective data quality management system for the production of crime statistics and this work is underway. The categorisation of Statistics Under Reservation applies to all statistical outputs sourced from PULSE in the interim.”

<sup>3</sup> A marginal improvement might be expected when these figures are reviewed as was the case in 2018.

<sup>4</sup> CSO Figure 1.1, Detection Rates for Crime Reported in 2019 by Selected Offence Groups, data extracted 1 September 2020 - <https://www.cso.ie/en/releasesandpublications/ep/p-rcd/recordedcrimedetection2019>.

<sup>5</sup> CSO Figure 1.1, Detection Rates for Crime Reported in 2019 by Selected Offence Groups, data extracted 1 September 2020 - <https://www.cso.ie/en/releasesandpublications/ep/p-rcd/recordedcrimedetection2019/>.

<sup>6</sup> McGee and Dublin Rape Crisis, 2002, p. xxxiii

2. Victim testimony in cases of rape and sexual assault is a particularly important way to think about these broader issues. Testimony is effectively words spoken to a Court – a story told. Victim testimony has a legal and evidential role within a criminal trial. However, from a victim’s perspective, testimony is their account, their truth and their voice. The hearing of this voice is closely linked to effective outcomes in the realising of justice for victims. Therefore, considering victim’s testimony captures key challenges of reform in this area of the criminal law.
3. Recent statutory reform efforts have seen the practice of criminal law adapt to a more nuanced understanding of the importance of victim’s testimony in cases of rape and sexual assault. The challenge of modern criminal practice is to prioritise continued reform efforts and to ensure that protections that exist are executed to a high standard. In circumstances where past failures are being remedied, safeguarding avenues of reform and providing oversight and accountability to reform processes becomes particularly important.

### **How Victim’s Testimony in Cases of Rape and Sexual Assault is Currently Conducted within the Criminal Justice System in Ireland/the Criminal Justice System in Other Common Law Jurisdictions.**

#### *4. Overview of How Victim’s Testimony in Cases of Rape and Sexual Assault is Currently Conducted within the Criminal Justice System in Ireland*

4.1. A victim’s testimony will be given to the court in the course of the trial. This will usually be given live, with the victim appearing in court either in person or by way of a video link. The testimony will comprise an examination in chief, conducted by prosecution counsel, during which she or he will be guided through the giving of evidence by a series of non-leading questions based on the statement that will have been previously given to a member of An Garda Síochána. On completion of the examination in chief, the victim will be cross-examined by defence counsel to test the evidence given and allow the witness comment on any contrary case that might be made by the accused person. In the case of certain victims, a video recording may have been made of an interview that the witness previously had with a Garda specialist interviewer and this video will be played as the direct evidence of the victim, thereby dispensing with the examination in chief. At the end of the trial, should the accused be convicted of the offences charged, the victim can choose to give victim impact evidence in the course of the sentencing hearing.

4.2. Dr. Miriam Delahunt B.L. provides a concise non-exhaustive list of assistance and support measures available to vulnerable witnesses on the website *vulnerablewitness.com*.<sup>7</sup> Dr Delahunt provides details of various protections that are also available to a victim outside the trial process. Some of the principal protections available to a victim in the course of the trial are briefly summarised below.

4.2.1. A victim is entitled to anonymity by virtue of s.7 Criminal Law (Rape) Act, 1981;

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<sup>7</sup> <https://www.vulnerablewitness.com/support-measures-available>.

- 4.2.2. The hearing will be otherwise than in public by virtue of provisions such as s.6 Criminal Law (Rape) Act, 1981 as amended; s.20 Criminal Justice Act, 1951 as amended; ss.19 & 20 Criminal Justice (Victims of Crime) Act, 2017; or s.34 Domestic Violence Act, 2018. Those permitted to be in the courtroom when a hearing is conducted otherwise than in public include persons accompanying or supporting the victim and *bona fide* representatives of the press.
- 4.2.3. A victim has the right to be accompanied in court by a parent, relative, friend or support worker. In practice the support worker will usually be a person from one of a number of victim support groups. See for example s.20 Criminal Justice (Victims of Crime) Act, 2017.
- 4.2.4. One or more special measures can be used during the victim's testimony such as:
- 4.2.4.1. Evidence via video link (see s.13 Criminal Evidence Act 1992 or s.39 Criminal Justice Act, 1999);
  - 4.2.4.2. The placing of a screen between the witness and the accused (see s.14A Criminal Evidence Act, 1992);
  - 4.2.4.3. Evidence through an intermediary (see s.14 Criminal Evidence Act, 1992); or
  - 4.2.4.4. The use of a video recording of a specialist Garda interview (see s.16 Criminal Evidence Act, 1992).
- 4.2.5. A restriction on the cross-examination of a victim about previous sexual history without the leave of the court and the availability of separate legal representation for the victim where such an application is made or allowed (see ss.3 & 4 Criminal Law (Rape) Act, 1981 as amended). There is also a restriction in relation to the cross-examination about the private life of a victim (see s.19 Victims of Crime Act, 2017);
- 4.2.6. There are restrictions on the cross-examination of a victim by an accused person (as opposed to through counsel) (see s.14C, Criminal Evidence Act, 1992 as amended); and
- 4.2.7. Restrictions on the disclosure to the defence of counselling records without either the consent of the victim or the leave of the court (see s.19A Criminal Evidence Act, 1992).
- 4.3. In addition, victims have available to them the use of dedicated witness suites where available. Where such suites are not available, steps should be taken to provide such facilities.
- 4.4. The list at 4.2 above, and other measures detailed in Dr Delahunt's list, provide an arsenal of legal protections for victims which come into play during the many steps of a victim's engagement with the criminal justice system. For example, a victim may choose not to give testimony unless they are fully informed of what a criminal trial will involve by the Gardaí to whom they lodge their initial complaint. It may come into play in the run up to a case at the initial stages of a trial when decisions are made about how a victim will give testimony. These

legal protections most obviously come into play when a victim gives testimony in court and the interplay between the victim's testimony and the law/evidential rules is realised.

5. *Criminal Justice (Victims of Crime) Act 2017 (hereinafter, the "Act" or the "2017 Act")*

5.1. Two relevant provisions of the 2017 Act which provide enhanced protection to victims' testimony are Sections 15 and Section 19. Section 15(1)(c) of the Act provides for consideration as to what extent the victim may, due to their particular vulnerability to secondary and repeat victimisation, intimidation and retaliation, benefit from (i) special measures during the course of an investigation of the alleged offence, and (ii) special measures during the course of any criminal proceedings relating to the alleged offence. Section 19 of the Act provides for special measures during criminal proceedings such that where a victim of an alleged offence has been assessed under Section 15 and specific protection needs have been identified that the Garda Síochána or the Director of Public Prosecutions will address the following provisions in determining whether to make an application to the Court:

(a) the exclusion of the public or any particular person or persons from the court during such criminal proceedings:

(b) directions under Section 21 regarding the questioning of the victim in respect of his or her private life: and / or

(c) measures under Part III of the Criminal Evidence Act 1992 enabling the victim to give evidence through a live television link or an intermediary or enabling a screen or other similar device to be used in the giving of evidence.

6. *Part III of the Criminal Evidence Act 1992*

6.1. Section 30 of the 2017 Act extends protections afforded to vulnerable witnesses under Part III of the Criminal Evidence Act 1992 to sexual offences. As such, victims of sexual offences can give evidence through television link (Section 13 of the Criminal Evidence Act, 1992, as amended). To date this has been the most commonly used of the various protections afforded under the relevant legislation.<sup>8</sup> Additionally, the court, on application by the prosecution or the accused, may exercise its discretion and require that any questions to be put to the witness be put through an intermediary (Section 14 of the Criminal Evidence Act, 1992, as amended) or erect a screen such that the Accused is physically guarded whilst giving testimony (Section 14A of the Criminal Evidence Act 1992, as amended). Pursuant to Section 14AA of the Criminal Evidence Act, 1992 (as amended), the Court, in making these decisions, shall have regard to the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation and will take into account the nature and circumstances of the case, and the personal characteristics of the victim.

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<sup>8</sup> Charleton & McDermott, *Criminal Law & Evidence*, 2<sup>nd</sup> ed. para. 2.77

- 6.2. Section 19A of the Criminal Evidence Act, 1992 (as amended by Section 39 of the Criminal Law (Sexual Offences) Act 2017 and by Section 30 of the 2017 Act) deals with disclosure of third-party records. In particular, Section 19A deals with the law surrounding the court's exercise of discretion as it relates to the disclosure of counselling records.<sup>9</sup> Section 19A was a significant development in the law relating to the disclosure of a victim's counselling records and brought some much-needed clarity. Where a complainant has waived her or his right to non-disclosure, the procedures set out in the section do not apply. Otherwise, where the defence seeks the disclosure of such records or the prosecution intends to disclose them, an application must be made to court, during which the complainant and the person holding the records have an entitlement to be heard and be legally represented. The court will determine whether the contents, or any part, shall be disclosed. S.19A(10) list the factors to be taken into account by a court in determining whether the records should be disclosed. To a degree, it involves a balancing between the interests of the complainant and the likelihood of any harm that might be caused to her or him by the disclosure and the interests of an accused, the accused's ability to defend the charges against them and the risk of an unfair trial.
- 6.3. The *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (the "O'Malley Report") makes the following recommendation in relation to Section 19A<sup>10</sup>:

6.3.1. "*Effective steps should be taken to bring the existence of section 19A of the Criminal Evidence Act 1992 regarding the disclosure of counselling records to the attention of victims and any persons who are advising them. It is important that victims should be aware of their right to object to the disclosure of such records*".

## 7. Prior Sexual History Evidence / Separate Legal Representation

- 7.1. Under the Criminal Law (Rape) Act, 1981 as amended, the issue of a complainant's previous sexual experience, whether with the accused or any other person, can only be raised with the leave of the trial judge. In general terms, the test that will be applied by a trial judge is whether it is more likely than not that the particular question or line of cross-examination, if allowed, might reasonably lead a properly directed jury to take a different view of the complainant's evidence from that which they might take if the questions were not allowed. Broadly, where the questioning is sought to be introduced for the purpose of in some way attacking the complainant's character, it will not be allowed. Where it is relevant to the issue of whether the complainant was consenting to the sexual intercourse or that the accused mistook her or him as so consenting, it is likely to be allowed.
- 7.2. The application is generally made at the outset of a trial, although it may not always be apparent at that stage that an application will be necessary. Once the prosecution has been notified of the intention to make an application, the complainant will be put on notice and advised of her entitlement to be separately legally represented. This can necessarily cause

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<sup>9</sup> *Ibid* para. 11.142

<sup>10</sup> O'Malley, 2020, Appendix 4, p. 136

some delay while the Legal Aid Board instructs counsel and the solicitor and counsel take instructions from the complainant. Should the court allow the questioning, the complainant's legal representatives will remain in court while she or he gives evidence.

7.3. It is anomalous that the entitlement to be separately legally represented when the question of previous sexual history is in issue does not extend to sexual assault cases. This should be corrected. Such correction is recommended in the O'Malley Report.

7.4. Charleton & McDermott note that:

*A recent New Zealand study found that questioning about the complainant's prior sexual history (including with third parties) was introduced in 43% of recent cases.<sup>341</sup> According to Scottish statistics, applications to admit sexual history evidence have been made in 72% of sexual offence trials (with 20% of such evidence relating to third parties) and 7% of the applications were refused.<sup>342</sup> In Ireland, figures have estimated between a third and two-thirds of trials involve sexual history evidence being admitted."<sup>11</sup>*

7.5. Section 21 of the Act provides protections in relation to questioning in respect of the private life of a victim in any proceedings relating to an offence and reads as follows:

*"21. In any proceedings relating to an offence, where a court is satisfied that—*

*(a) the nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and*

*(b) it would not be contrary to the interests of justice in the case,*

*the court may give such directions as it considers just and proper regarding any evidence adduced or sought to be adduced and any question asked in cross-examination at the trial, which relates to the private life of a victim and is unrelated to the offence."*

7.6. The O'Malley Report makes several suggestions in relation to such applications with which the Council agrees. These include, where possible, the earlier hearing of such applications where greater notice and information are given to a complainant a where the complainant is afforded legal representation more on a par with that available to the prosecution and defence. There is currently a Bill before the Oireachtas that would, if enacted, allow the earlier hearing of such applications. The O'Malley Report includes the following recommendations<sup>12</sup>:

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<sup>11</sup> Charleton & McDermott, *Criminal Law & Evidence*, 2<sup>nd</sup> ed. paras. 11.136-11.138

<sup>12</sup> O'Malley Report, 2020, Appendix 4, p.136.

7.6.1. *“The right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experience) should be extended to include trials for sexual assault”.*

7.6.2. *“Where the defence intends to apply to the trial judge for leave to question a victim about other sexual experience under the terms of s. 3 of the Criminal Law (Rape) Act 1981, it should be required to notify the judge conducting the preliminary trial hearing of that intention. It is only in exceptional circumstance that such an application should be permitted at trial unless it has been notified at the preliminary trial hearing”.*

7.6.3. *“Once notification has been given at a preliminary trial hearing of intention to apply for leave to question a victim at trial under the terms of section 3 of the Criminal Law (Rape) Act 1981, the Legal Aid Board should be immediately informed. The Legal Aid Board, in turn, should endeavour to ensure that the victim is represented by counsel of a level of seniority similar to that of counsel representing the prosecution and defence”.*

## 8. Pre-Trial Hearings / Ground Rules Hearing

8.1. Ground rules hearings are hearings, held either before a trial or at its commencement, where “ground rules” are set for the fair and effective participation of vulnerable witnesses and defendants in criminal proceedings. In general, the court will hear representations from the prosecution and defence and, where appropriate, any intermediary, about issues relating to the treatment and participation of the vulnerable witness and any steps or protections necessary to assist the giving of evidence. Issues will often include the manner and duration of any questioning and the timing of breaks, if necessary. While it remains an informal procedure in Ireland, it is underpinned by legislation in England & Wales. One of the issues is that, until legislation allows for pre-trial hearings, the ground rules hearing can only take place at the commencement of the trial. Such legislation is presently being considered by the Oireachtas.

8.2. The O’Malley Report makes the following recommendations<sup>13</sup>:

8.2.1. *“Legislation should be introduced, along the lines proposed in the General Scheme for a Criminal Procedure Bill drawn up in 2015 by the Department of Justice and Equality, to provide for the establishment of preliminary trial hearings. We recommend the introduction of the necessary legislation as soon as possible”.*

8.2.2. *“Any issues relating to the appointment or role of an intermediary, and any other special measures required for vulnerable witnesses, should also be addressed at a preliminary trial hearing.”*

## 9. Cross-Examination by the Accused

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<sup>13</sup> O’Malley, 2020, Appendix 4, p. 135

- 9.1. Section 14C of the Criminal Evidence Act, 1992 (as amended) provides that, where a person is accused of a sexual offence, the court may exercise its discretion to direct that the accused may not personally cross-examine the victim of the alleged sexual offence. albeit the accused's legal representative or the court's choice of legal representative may cross-examine the victim of the alleged sexual offence. The judge may also give a warning to the jury to prevent any perceived prejudice to the accused person by virtue of the exercise of this section.

## **The Effect the Current Process has on Victims/the Accused/Practitioners and How an Alternative System can be Applied in Ireland**

### *10. The Effect the Current Process has on Victims*

- 10.1. When developing reform proposals in this area it is important to seek advices from victims of rape and sexual assault who have already been through the experience of giving testimony in Court. It is also important to seek advices from key stakeholders who work with victims in this area.
- 10.2. Perhaps government affiliated and independent academic research could be funded at PhD, Research Fellow or research project level such that qualitative and quantitative methods could be adopted to find out what effect the current process has on victims.
- 10.3. An important question to pose is what does justice look like for victims of sexual assault and rape? Many victims of serious sexual assaults and rape have not engaged with the criminal justice system. There is extensive academic commentary on alternative and or complimentary avenues of reform such as restorative justice.
- 10.4. Any legal reform efforts should give serious consideration to matters such as victim trauma, secondary victimisation and restorative justice schemes.
- 10.5. Many victims will be acutely aware of their own experience as a victim and of the oral testimony that they are giving however they will likely not be at all familiar with the formal legal processes of a criminal trial. Therefore, there is an informational bridge that must be built by the nexus of professionals who work in this space to guide the victim through the process such that these rights and protections are realised. It is noted that recommendations for the better communication of information to victims are contained in the O'Malley Report. As reforms are made it is important that the views of victims of sexual offences should be considered.

### *11. The Effect the Current Process has on the Accused*

- 11.1. In every criminal trial an accused person has the benefit of a number of constitutional protections designed to protect against wrongful conviction. These include the presumption of innocence, the right to a trial in due course of law, the right to silence and the burden of

proof falling on the prosecution. It is important that these rights be realised and balanced with protections surrounding the testimony of victims.

- 11.2. The Council is not aware of any research into the effect that the current process has on the accused that might assist the Committee. Perhaps government affiliated and independent academic research could be funded at PhD, Research Fellow or research project level such that qualitative and quantitative methods could be adopted to find out what effect the current process has on the Accused.

## 12. *The Effect the Current Process has on Practitioners*

- 12.1. The issue of potential secondary victimisation or vicarious trauma has emerged as a significant concern for practitioners in Criminal Law, from both the prosecution and defence sides.

- 12.2. The study and evaluation of this issue is perhaps at a less-developed stage in Ireland than in other similar jurisdictions. One study was conducted in 2014 by Bulbulia, Quigley, Trimble & Gordon.<sup>14</sup> The paper cites a number of international studies including one that suggests that criminal lawyers are considered to require a higher degree of emotional fortitude than those practising civil law. The authors describe the “armoury of resilience” that practitioners tend to develop to help protect against vicarious trauma. While their study group was relatively small, they describe the views of participants that the work can coarsen and harden a person. Several members of the group reported having experienced symptoms such as recurring nightmares, intrusive memories, or feelings of hypervigilance especially around personal safety or the safety of family members.

- 12.3. The authors of that study suggest that future research may focus on an understanding of the factors that sustain the professional well-being of those whose work exposes them to second-hand or vicarious trauma as well as the risks inherent in such work. Perhaps government affiliated and independent academic research could be funded at PhD, research fellow or research project level such that qualitative and quantitative methods could be adopted to further study this area.

- 12.4. In addition to the informal or formal measures that individual barristers utilise for themselves, the Bar of Ireland has developed a number of resources to assist members. There is a hub on the Bar’s website which guides members to external supports and internal resources. These include the Consult a Colleague Helpline, which is a confidential helpline whereby members can seek assistance from colleagues to discuss both personal and professional problems.

- 12.5. In an international context, the Bar of England & Wales has developed a dedicated website<sup>15</sup> which provides well-being support to practitioners. Australian research includes a

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<sup>14</sup> Impact of Vicarious Trauma on Barristers Practising Criminal Law: An Armoury of Resilience – Bulbulia et al. Cork Journal of Applied Psychology (2015) 33-45

<sup>15</sup> <https://www.wellbeingatthebar.org.uk/>

study into vicarious trauma in lawyers and mental health professionals. 36 lawyers and 30 mental health professionals participated in the study which found that lawyers were significantly more susceptible to experiencing symptoms of vicarious trauma than professionals in the mental health field who have received trauma-specific training and access to informed peer support. This suggests that trauma-specific training is important. A 2003 American study made similar findings.<sup>16</sup> In the Australian state of Victoria a lawyer formerly employed in the Office of Public Prosecutions was awarded significant damages for PTSD arising from her work in that office's special sexual offences unit.<sup>17</sup> Also in Australia, in 2019 a journalist was awarded significant damages against her employer for PTSD arising from vicarious trauma experienced in reporting criminal trials.<sup>18</sup>

12.6. The wealth of experience that judges, barristers and solicitors who practice in this area have is a valuable asset in reforming this area of the law. Law reform efforts should be made in consultation with these professionals whose daily judicial, advisory and advocacy practices are central to the outcome for those victims of sexual assault and rape who engage with the Criminal Justice System and trial process.

12.7. The O'Malley Report makes the following recommendations<sup>19</sup>:

12.7.1. *"All judges presiding over criminal trials for sexual offences and all lawyers appearing in such trials should have specialist training which equips them with an understanding of the experience of victims of sexual crime. They should also have training in connection with the questioning of witnesses who are especially vulnerable by virtue of youth or disability"*.

12.7.2. *"It is recommended that the Judicial Studies Committee, established by the Judicial Council Act 2019, should consider providing such training for judges"*.

12.7.3. *"The Law Society of Ireland and the Bar Council should take steps as soon as possible to provide specialist training for solicitors and barristers, respectively, who deal in any professional capacity with victims of sexual crime. This training can be delivered within existing CPD frameworks unless the professional bodies in question decide that such training can be more effectively provided by other means"*.

12.7.4. *"The Director of Public Prosecutions, the Minister for Justice and Equality, the Legal Aid Board and any other public authority responsible for briefing professional lawyers in sexual offence trials should be entitled to receive, upon request, from the Law Society and the Bar Council a list of solicitors and barristers, respectively, who have satisfactorily completed the prescribed course of specialist training"*.

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<sup>16</sup> Vicarious Trauma in Attorneys, Levin & Greisberg 24 Pace Law Review 245 (2003)

<sup>17</sup> <https://www.abc.net.au/news/2020-02-20/former-prosecutor-awarded-435k-after-court-finds-opp-breache/11981966>

<sup>18</sup> <https://lsj.com.au/articles/taking-on-the-trauma/>

<sup>19</sup> O'Malley, 2020, Appendix 4, p. 139

12.7.5. “Steps should be taken to ensure that all personnel in State Agencies who are likely to have to deal with victims of sexual crime should have appropriate training”.

12.8. The Bar Council had, before the O’Malley Report, commenced the provision of training in areas related to vulnerable witnesses as part of its Continuing Professional Development programme and Advanced Advocacy courses. Since the publication of the report a working group has been established to develop a course of training as recommended in the report.

### 13. Useful Resources

13.1. Dr. Miriam Delahunt BL has collated important information in relation to vulnerable witnesses on her website <https://www.vulnerablewitness.com>.

13.2. The O’Malley Report (2020) provides a concise and contemporary review of this area. In particular, Appendix 4: Complete list of recommendations, pages 134-140, summarises key recommendations and reform proposals.

13.3. The ‘O’Malley Implementation Plan’ developed on foot of the O’Malley Report (2020) has seen the Department of Justice producing a document entitled *Supporting a Victim’s Journey: A plan to help victims and vulnerable witnesses in sexual violence cases* ([http://www.justice.ie/en/JELR/Supporting\\_a\\_Victims\\_Journey.pdf/Files/Supporting\\_a\\_Victims\\_Journey.pdf](http://www.justice.ie/en/JELR/Supporting_a_Victims_Journey.pdf/Files/Supporting_a_Victims_Journey.pdf)) which captures their roadmap for reform in this area. Furthermore, a *Victim’s Charter* is available at <https://www.victimscharter.ie/>.

13.4. The *Report Into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations* (the “Gillen Report”) (2019) contains 16 key recommendations and 253 overall recommendations in relation to the law and procedures in serious sexual offences in Northern Ireland.

13.5. *The Advocate’s Gateway* is an excellent resource which “provides free access to practical, evidence-based guidance on vulnerable witnesses and defendants” and includes a litany of useful toolkits available for download (<https://www.theadvocatesgateway.org/>).

13.6. In an Irish context Dr. Conor Hanly and Professor Deirdre Healy have been a focal point for research in this area (see Hanly, C., Healy, D., Scriver, S. & Rape Crisis Network Ireland 2009, *Rape and justice in Ireland: a national study of survivor, prosecutor and court responses to rape*, The Liffey Press, Dublin).

13.7. The *Good Practice Guidelines* 2003 for An Garda Síochána based on the *Achieving Best Evidence in Criminal Proceedings: Guidance on Interviewing Victims and witnesses, and using Special Measures*, England and Wales (Ministry of Justice) (March 2011), “assist the Specialist Interviewer in observing fair procedures while conducting the interview so that it may be admitted at trial” (Delahunt) (see - <https://www.vulnerablewitness.com/good-practice-guidelines-2003>).

- 13.8. *Criminal Procedure Rules and Practice Directions*, published 5 October 2020, England and Wales (Ministry of Justice) is available here (<https://www.gov.uk/guidance/rules-and-practice-directions-2020>).
- 13.9. The Advocacy Training Council's *Raising the Bar* 2011 is "the first major research project in England and Wales to focus on how best to train advocates in the handling of vulnerable people in court" and can be found here - <https://www.icca.ac.uk/raising-the-bar/>. *Raising the Bar* is a useful resource which includes toolkits for practitioners.

## One in Four Submission to Joint Committee on Justice

Victim's testimony in cases of rape and sexual assault.

**One in Four** provides programmes to help adults who have experienced childhood sexual abuse, their families and those who have engaged in sexually harmful behaviour. We work in all aspects of sexual violence in an effort to break the cycle of abuse.

One in Four provides a safe place for men and women to explore the impact childhood sexual abuse has had on their lives. Each year our Case Managers support on average of 35 survivors through the criminal trial process.

### 1. Re-traumatisation

Through our experience of supporting people through their criminal justice journeys, we have become very familiar with the risk of re-victimisation and re-traumatisation, an observation that is borne out by both national and international research. Among the contributory factors to the problem are the adversarial nature of our criminal justice system (Bacik et al., 1998; Brereton, 1997; Herman, 2005; ICCL, 2008) and the particular nature of the impact of sexual violence on the victim (Bacik et al., 1998; Bridgeman & Millns, 1998).

In 2016 One in Four completed a study called Only a Witness. The aim of this study is to bring to the forefront the voices of the victims, as co-researchers, in order to identify their experiences of the criminal justice system as complainant witnesses and to provide constructive analysis. Some of the strongest reflections expressed by the participants related to their experience of taking the stand and giving evidence. They expressed particular distress about the degrading and disrespectful way in which they perceived they were treated while being questioned.

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*He looked at me like I was dirt, like I had no dignity, like I had no respect for myself or anybody else in the court room and I was nothing. So what happened to me, in effect, meant nothing to him. It was just another case that was lost, he'd lost it. They can get away with saying the most stupid things to people in order to try and crack them and break them down. There's cruelty in there that there doesn't need to be. (Anne, Only a Witness 2016)*

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### 2. Traumatic stress

The court requires the witness to give a sworn testimony of traumatic events in an environment that often mirrors the power and authority dynamics of the persons' past experiences of sexual abuse; they become distressed and can only respond in the same way as they did to the original trauma. Harvard Professor of Psychiatry, Judith Herman, remarks that "if one sets out intentionally to design a system for provoking symptoms of traumatic stress it would look very much like a court of law" (2005m p.574).

## One in Four Submission to Joint Committee on Justice

Victim's testimony in cases of rape and sexual assault.

The power imbalance felt by victims when they encounter the authority of the system influences their interaction with the process. In order to facilitate witnesses to give the best account of themselves in court it is important to understand how the trauma is triggered in a court setting. Traumatic stress can effect a witness's ability to deliver a consistent and credible account, casting doubt on the reliability of their testimony.

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*When we did go ahead I just found the trial completely on the side of the accused. Why does it have to be so unbalanced, in the favour of someone who is allegedly the wrong-doer? And the alleged victim is the one who gets the roasting and the horrible time. To be spoken to in the way that you are. From their wording, from the way they look at you, it's all a show. It's like going to the theatre, except it's much more serious for the people involved. But that's what the barristers do, they play a big thing and it's horrible to see. (Barbara, Only a Witness 2016)*

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Through the work One in Four does in supporting witnesses in court we have observed how language, tone of voice, the style of questioning and the use of silence are all devices that can either reassure or trigger a traumatic stress response in a witness. This is an area we feel deserves immediate attention. A code of conduct for barristers in questioning vulnerable witnesses could be very useful in address these issues.

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*It's an environment where people are actually talking about you, over you. Legal terms are explained to the jury and all they can do is look at you to see well do I believe her or not, and then look at him [the accused]. And in some instances you can kind of see how juries can get really confused. The whole thing was really quite confusing and to try to keep your head above it in a time that you're actually in a very bad place. (Megan Only a Witness 2016)*

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### **3. Special Measures**

The special measures for vulnerable witnesses introduced in Ireland in recent years are not easily accessed by adult survivors of child sexual abuse. The eligibility of victims for these special measures often causes confusion for Gardaí and solicitors. An application for the use of these measures must be made to the trial judge and so cannot be guaranteed in advance of a trial. It is also important to note that while Video Link evidence creates a distance from the accused, it does not necessarily make the experience less traumatic.

## One in Four Submission to Joint Committee on Justice

Victim's testimony in cases of rape and sexual assault.

Screens are not commonly used yet in Ireland; recently a client was shown the screen in the court room before her case was due to go ahead. She declined the opportunity to have the DPP apply for use of the screen as she could see her own reflection in the screen and felt it would not be helpful. For some witnesses it can also be just as distressing not to be able to see those around them in the court room. For this reason video link and screens are not always suitable.

In most courtrooms in Ireland the accused person sits quite close to the witness box. The witness must walk passed in front of or behind the accused. Again this can be very intimidating and off putting for a witness. In a recent case our client could hear the accused whispering, in reaction to her testimony.

### **4. Professional Support**

Our clients have also told us how important it has been to have the support of a skilled advocacy case manager throughout the trial. The advocacy case manager can provide practical and emotional support and can also act as an interpreter of the often obscure and arcane trial procedures. It is crucial that such a support person should have training and expertise in recognising and containing the manifestations of trauma.

### **One in Four recommends**

- An Impact assessment be carried out on how the court environment and procedures impact on complainant witnesses in trials of sexual crime.
- A code of conduct on the questioning of complainant witnesses in trials of sexual crimes should be introduced.
- The decision to give video linked evidence or use a screen should rest with the adult complainant witness rather than the trial judge. The type of screens used should also be reviewed.
- The courtroom layout should be reviewed in relation to the proximity of the witness to the accused person.
- Complainants be automatically provided with a specialist support person for the duration of the criminal trial whose role is to explain and clarify the various processes and procedures which emerge. It is crucial this professional should also be trained in recognising and containing the manifestations of trauma.

**People who experience sexual violence rely on the legal system to in part allow them to address those traumatic events. Unfortunately the system fails to use the insights of psychology into the impact of trauma to inform its personnel, rules and procedures. This oversight will always be an obstacle for those who testify in relation to their experience of sexual violence.**

## One in Four Submission to Joint Committee on Justice

Victim's testimony in cases of rape and sexual assault.

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**Submission by the Secretary General, Department of Justice on the topic of victim’s testimony in cases of rape and sexual assault to the Joint Committee on Justice.**

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## Introduction

I would like to thank the Joint Committee on Justice for the opportunity to make a submission on behalf of the Department of Justice on the important topic of victim's testimony in cases of rape and sexual assault.

Improving the justice system for victims, particularly for vulnerable victims, is a key priority for the Department and our Minister, Helen McEntee TD, who is driving major reform through the implementation of *'Supporting a Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases'* published in October of 2020. The Department recently published our Statement of Strategy 2021-2023 which also commits to implementing these changes in full and to reforming the criminal justice system at every point a victim comes into contact with it.

These changes, together with a number of measures already introduced over the past number of years, will ensure we have both the legislation needed to bring perpetrators to justice and a criminal justice system that places victims at its centre and removes the fear that many victims have of coming forward to report what happened to them. Our aim is a system that supports, informs and empowers vulnerable victims at every point.

This submission will outline measure which are currently being progressed and also those which have been introduced in recent years, including -

1. A brief summary of the *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*, which has become known as the O'Malley Review
2. An overview of *Supporting a Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases*, which is a detailed implementation plan to give full effect to each of the recommendations contained in the O'Malley Review (with a particular emphasis in this submission on the elements of that plan which focus on improving how victims of sexual crime engage with the criminal justice system and give testimony)
3. An overview of the Criminal Procedure Bill 2021 which will introduce Preliminary Trial Hearings
4. Details of how the Department's new structure better supports and prioritises work
5. Information on measure to prevent Sexual Violence
6. A brief synopsis of ongoing work being led by Departmental of Justice to improve services and supports for victims of DSGBV
7. Information on key pieces of legislation enacted over the past number of years which have a direct impact on victims of sexual crime
8. An overview of the operation of the Courts

It is important to note that the range of supports being introduced by the Department for vulnerable victims will not only apply during court proceedings. The Department is conscious that victims of crime, particularly victims of sexual crime, need support regardless of whether or not they report the crime. We are working to create a victim-centred system that supports and empowers victims and gives them the confidence to engage with all services knowing they will be supported, informed and treated with respect and dignity at every point and by every person they come into contact with. The supports being introduced will be provided regardless of whether or not criminal proceedings are in train and will extend beyond the trial and verdict because victims do not stop needing support at the end of a trial.

## 1. The O'Malley Review

The Review Group included representatives from the main agencies involved in the investigation, prosecution and trial of sexual offences: An Garda Síochána, the Office of the Director of Public Prosecutions, the Courts Service and the Probation Service. The Chair of the Group, Tom O'Malley, is a barrister, a former Commissioner at the Law Reform Commission, Senior Lecturer in Law at National University of Ireland Galway, and author of the definitive legal texts on sexual offences law in Ireland.

The review, published by the Minister in August 2020, contains 52 actions with with four overarching recommendations:

1. Promoting better awareness of victims' rights legislation;
2. Promoting education about the meaning and importance of consent;
3. Improving inter-agency co-operation and exchange of information, especially in relation to services for victims; and
4. Ensuring consistency in service delivery.

Minister McEntee prioritised a number of key actions and started work on the full implementation plan.

## 2. Implementation Plan: *Supporting a Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases*

The plan to fully implement the recommendations of the O'Malley Review was published in October 2020. *Supporting a Victims Journey - A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases* builds on the recommendations, sets out a detailed roadmap for implementing each of the 52 O'Malley recommendations and specifies which agencies and Departments need to work together to deliver them. It also lays down clear timeframes for achieving each one. Under budget 2021, funding of €2.3 million was provided to implement the justice elements of the plan.

For victims to be empowered to take the first step on their journey they need to be able to access information on reporting and supports available. The plan will improve reporting services and make sure all victims, regardless of their situation, background, or language ability, have access to the information and services they need. Specially trained intermediaries will be available to assist those that need it and supports and facilities will be available to a consistently high standard throughout the country.

Victim-centred policing will ensure the views and needs of victims are not only heard, but are met by specially trained members of the An Garda Síochána who will deal sensitively with the reporting and investigation of sexual assault cases. The national rollout of Garda Divisional Protective Services Units (DPSUs) was completed in September 2020.

Delays in trials reaching courts can have a deeply traumatising effect on victims. Preliminary trial hearings will be introduced to help prevent delays and to deal with defence applications about sensitive legal approaches that may be taken. This will include questioning a victim about his or her sexual experience. If such an application is to be made at the pre-trial stage, the victim will have the right to be represented by the same barrister at the Pre-Trial and during the actual trial itself, when being questioned about their previous sexual experience.

The legislation to introduce preliminary trial hearings (Criminal Procedure Bill 2021) passed second stage in Dáil Éireann on February 10. A more detailed summary of the Bill's provisions is set out in section 3 (page 5) below.

*Supporting a Victims Journey* also has a range of actions to support victims through the legal system without fear of re-victimisation or re-traumatisation. Victims will be supported through the court proceedings, including through the provision of legal advice, through court familiarisation services and through the entitlement to have personal support during criminal proceedings. This right to legal advice will apply even if no prosecution is being taken by the DPP.

During the trial victims will be kept informed, they will be supported and will have their rights protected. Judges and lawyers will be trained on how to question vulnerable victims<sup>1</sup>. Victims in all sexual assault trials will remain anonymous irrespective of the outcome of a case.

Support will not cease when the trial is over. Victims will be offered counselling, therapy and other support services by qualified professionals. Victim's views will be sought on their experience to provide them with an avenue to feedback into the system. This will ensure that victims have a voice in how proceedings take place and their voice will be listened to. For those with special communications needs, work has started as recommended in the O'Malley Report on putting a system of intermediaries in place to assist communication between the victim, An Garda Síochána, legal professionals and the courts. The intention is to pilot an approach in two areas for a 12 month period before rolling the service out throughout the State.

The right to be heard will also apply when it comes to applications for parole. The Parole Act 2019 provides for an independent statutory Parole Board and sets out criteria for how the Board will reach its decisions, independent of the Minister of the day. This includes what factors will be taken into account in making those decisions, who may make submissions - which includes the victim's right to make a formal submission to the Board - as well as a number of other details. A senior judge has recently been appointed as Chair and the objective is to ensure commencement of the Parole Act by July 2021.

I realise that, for a victim, the release, or even the prospect of the release, of the person that harmed them can be a difficult, frightening and upsetting time. Victims will be kept informed of any significant developments in the management of the perpetrators sentence, including any impending release and offered appropriate supports.

*Supporting a Victims Journey* includes actions to improve how we deliver information to victims of crime, including the redevelopment of the Victims Charter website. A new Victims Charter was published in 2020 and sets out the rights of victims and describes the criminal justice system from the perspective of a victim of crime, so that they can understand what to expect from their interaction at every step. This new website, which was launched earlier this month, allows the user access that information in an accessible and user-friendly way that will allow victims of crime to quickly and easily find the information they need at whatever stage they are at on their own personal journey.

The new Victims Charter website has a dedicated section for victims of sexual crime, which informs users about a range of topics such as:

- Support available to them from Sexual Assault Treatment Units (SATUs) and Rape Crisis Centres in the immediate aftermath of sexual violence;
- Support in coming to terms with sexual violence, whether recently or in the past, and how that can be reported;
- The availability of specially trained Gardaí who will be able to meet their needs, and
- What will happen if they are asked to attend Court as a witness and the supports available to help them to do so.

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<sup>1</sup> *'Supporting a Victims Journey'* includes the provision of specific training for all of the key personnel a victim comes into contact with during the course of their journey throughout the criminal justice system. Such personnel includes the Gardaí, the DPP, the judiciary and the legal profession. Engagement on development of training programmes for serving Gardaí, the legal professions and members of the judiciary who are participating in sexual offences investigations and trials has already started, and it is expected this training will be rolled out in 2021.

The website aims to provide the user with every bit of information needed to begin their individual process of recovery. Victims of sexual violence need to know the supports that are available whether they are ready to report the crime or not. We want people to have confidence in our criminal justice system and research tells us that the availability of full and transparent information on the process is vital in building that confidence.

### **3. The Criminal Procedure Bill 2021**

The principal purpose of the Criminal Procedure Bill 2021 is to legislate for preliminary trial hearings, so that certain matters can be dealt with in advance of a criminal trial.

Preliminary Trial Hearings will be able to deal with certain matters ahead of the beginning of the trial so as to ensure that the parties are ready to proceed on the day of the trial, and to minimise interruptions to the unitary nature of the trial while it is in train.

When a trial does not go ahead as planned, or is subject to multiple interruptions for whatever reason, there are negative impacts for the business of the courts, but also for defendants, jury members, witnesses and for victims. The benefits of preliminary hearings will include:

- (i) making it less likely that the jury will be sent away immediately after being sworn in, or sent away multiple times during the trial
- (ii) reducing the impact on the victim who is likely to find the trial very stressful, and will have prepared themselves mentally, only for the trial not to start on the designated day, or to be interrupted, potentially multiple times, dragging out the experience and making it more difficult.
- (iii) delivering significant resource efficiencies where trials are ready on the day they are due to start, and more likely to proceed smoothly to a conclusion.

Preliminary hearings allow the court/the judge to deal with many of the issues that currently arise during a trial which require the jury to be excused while the judge considers them. The judge can also use a preliminary hearing to deal with issues that might currently prevent a trial from going ahead on the day it is supposed to, for example problems with disclosure or a need for specific practical measures or technology.

Victims have told us how difficult it is for them when they have mentally prepared for a trial date and it doesn't go ahead or how upsetting it is if something unexpected is brought up during the trial. While we can't take away the fact that a trial is an adversarial process, that an accused person is entitled to defend themselves robustly and that events can unfold in unexpected ways, the introduction of preliminary trial hearings should make trials more predictable, shorter and run smoother.

There are currently strong protections in law around questioning victims about their prior sexual history. If the defence wishes to pursue this line of questioning during a trial, they must apply to the judge for permission, and the victim is entitled to legal representation while the application is being heard. What this legislation does, is allow for this to be dealt with at the preliminary hearing stage, so that it can be determined before the trial starts. This is something that was recommended in The O'Malley Review.

From the point of view of an accused, if a trial is going to fail because of the inadmissibility of evidence for example, this should be uncovered as early as possible, to avoid the person being put through a trial unnecessarily. Uncovering such difficulties at the preliminary hearing stage would mean the accused would not have to go through the trial process for a case that was inevitably going to fail.

It is also in the interest of the jury that the information presented to them during a trial should flow more smoothly and without interruption. It should also reduce the length of the trial which as we know can be considerable, sometimes in part owing to repeated adjournments.

The trial court shall, in holding a preliminary trial hearing in relation to the trial of an offence, have all the powers it would have in conducting the trial, including the power to receive evidence. Preliminary hearings will not deal with matters which are currently dealt with when the jury is present.

In addition to various case management matters, section 6(8) sets out the types of order or decision of the court that can be made at a preliminary hearing. They are being brought forward to be dealt with at the preliminary stage to the greatest extent possible. The orders include whether a group of defendants is to be tried together or separately, whether questioning in relation to prior sexual history is to be permitted, whether a victim's counselling notes are permitted to be examined, and many others, including any order relating to the conduct of the trial of the offence as appears necessary to the court to ensure due process and the interests of justice. The section also permits the court to make a 'relevant order', which is an order relating to the admissibility of evidence.

Section 10 prohibits the publication or broadcast of the content of a preliminary hearing before the conclusion of the trial, except where the court permits. This provision is included in part to prevent possible contamination of the jury pool, where, for example inadmissible evidence might be discussed at such a hearing, before the jury is sworn in.

The introduction of preliminary trial hearings in criminal proceedings is likely to lead to significant efficiencies in the conduct of criminal trials and there is considerable potential for cost savings in this area.

Preliminary Trial Hearings can be used for any indictable offence, the judge can decide a preliminary hearing is needed. There are also certain kinds of offences (called relevant offences in the legislation) where a preliminary hearing will be held if either the prosecution or the defence requests one. These are:

1. Offences which carry a maximum sentence of ten years or more (including a life sentence), and
2. Offences which the Minister has specified via a Ministerial Order.

#### **4. The Department's new structure**

The transformation of the Department of Justice has shifted it from the traditional Civil Service model where work was structured by subject matter, to a new functional model where work is structured by functional areas. This allows us, as a Department, to more proactively develop comprehensive, strategic, evidence-based policy and procedures, to be more accessible and accountable to the citizen, to engage and collaborate better with our stakeholders, and to increase overall transparency and improve how we communicate about and explain our work.

Under this new model, social issues such as Domestic, Sexual and Gender-Based Violence and Victims' Rights, are now approached from multiple angles allowing different areas of expertise to focus on developing improvements in their own specific areas, while ensuring a more collaborative approach that allows their expertise to be reflected in planning across the Department.

New cross-functional teams have been established and this means the legislative, policy, governance and service delivery functions can contribute to solving complex problems from the perspective of their area of expertise. This ensures a broader perspective and more dedicated resources than previously, when one individual or team was often responsible for all aspects of an issue in the first instance.

One of the key themes of the Transformation Programme has been how best to generate public value through supportive relationships with our partners and stakeholders. The new model facilitates more meaningful engagement with external experts and stakeholders to meet the needs of the public. This is particularly important in the DSGBV area of our work where the voices of victims and those of the frontline organisations must inform our work to prevent these crimes and improve supports for victims of crime.

This means for example, that policy related to the prevention of domestic, sexual and gender-based violence is now researched by the relevant policy team. Similarly the legislation function can draft legislation if needed with the policy issues more fully thought through. Public consultation and information campaigns are now led by the Transparency function in collaboration with an advisory group of partner organisations, both state and community based. A dedicated Funds Unit, with specialists handling grant applications in areas such as victims of crime has been established. All these teams are developing specific expertise in relation to their area of work but collaborating across the Department to ensure a comprehensive approach.

## **5. Measures to Prevent Sexual Violence**

Preventing such awful crime will also remain an important part of the work the Department does in tackling sexual violence. *Supporting a Victims Journey* has a range of actions focused on educating people on the meaning and importance of consent with a view to creating a national shared understanding of the issue. These consent specific actions include: a public awareness raising campaign on the meaning and importance of consent through various media, a standalone website and age appropriate education for schools and for individuals with physical or intellectual disabilities.

This important work follows the ‘No Excuses’ campaign that was launched by this Department in May 2019, as a three year campaign which aims to:

- increase the awareness of sexual harassment and sexual violence
- bring about a change in long established societal behaviours and attitudes
- activate bystanders with the aim of decreasing and preventing this violence

The ‘No Excuses’ campaign was paused during the Covid crisis to allow a broader public awareness campaign (“Still Here”) to be run, highlighting the continued availability of services for victims of domestic abuse during the pandemic. ‘No Excuses’ resumed with new Covid-appropriate advertisements in November 2020 and will run until the end of 2021.

## **6. Ongoing work being led by Departmental of Justice to improve services and supports for victims of DSGBV**

The Department is committed to the development of a third National Strategy on Domestic, Sexual and Gender Based Violence (DSGBV), which will place a priority on prevention and reduction and will include a National Preventative Strategy. The Department has partnered with two key stakeholders in the sphere of DSGBV, Safe Ireland and the National Women’s Council, to provide expert support in relation to the development of a new National Strategy to be agreed by Government before the end of 2021.

The new strategy follows the Second National Strategy on Domestic, Sexual and Gender-based Violence 2016 – 2021, which is a whole of Government response to Domestic and Sexual Violence. The bulk of the Strategy's actions are aimed at changing societal attitudes through awareness raising to help prevent domestic and sexual violence, improving services to victims and holding perpetrators to account.

Separately, and in line with the Programme for Government Commitment, an audit of how responsibility for DSGBV is segmented across Government has also begun. It is the intention that this audit will be used to inform how we plan and deliver the services and supports that victims need in the most comprehensive way. The results of the audit will inform development of the third national DSGBV strategy with proposals on what infrastructure is needed to ensure the issue is dealt with in the most effective manner possible. The audit, being undertaken by external consultants, involves relevant NGOs and service providers, as well as input from Departments and Agencies, who will, as part of their work, be required to take account of the views of those working at the frontline.

## **7. Key legislation enacted over the past number of years which have a direct impact on victims of sexual crime**

### **Criminal Justice (Victims of Crime) Act 2017**

The Criminal Justice (Victims of Crime) Act, 2017 transposes the European Union's Directive (2012/29/EU) establishing minimum standards on the rights, support and protection of victims of crime into national law. The Act, which was enacted in November 2017, provides for a set of new statutory rights for victims of crime.

Under this Act, victims will receive comprehensive information on the criminal justice system and their role within it and on the range of services and entitlements they may access from their first contact with An Garda Síochána or Garda Síochána Ombudsman Commission.

On request, victims will be provided with information concerning the progress of the investigation and any court proceedings.

They will also be provided, if they so request, with information from the Irish Prison Service of the release or escape from prison of an offender serving a sentence for an offence against the victim.

A victim can opt in to receive information on the reasons for a decision not to prosecute. A victim may also ask for a review of such a decision. This applies to prosecutions undertaken by An Garda Síochána on behalf of the Director of Public Prosecutions (DPP) in the District Court and prosecutions in other courts by the DPP.

The Act extends the scope for the potential use of special measures for victims and witnesses to be utilised in the presentation of evidence. This includes, for example evidence given via the use of live television link, screens or via intermediaries. The potential use of video recorded statements is also being extended under this legislation. In addition, the right to provide a victim impact statement is also being extended to all victims.

### **Criminal Law (Sexual Offences) Act 2017**

The Criminal Law (Sexual Offences) Act 2017 was enacted on 22 February 2017. A key purpose of the Act is to enhance and update laws to combat the sexual exploitation and sexual abuse of children, including new offences relating to child sexual grooming and new and strengthened offences to tackle child abuse material.

The Act introduced a statutory definition of consent. It defines situations where consent cannot be taken to have been given – including that a person does not consent to a sexual act if they allow it to take place due

to the application or threat of force. It also states a person cannot consent if they are unconscious, asleep, or intoxicated from alcohol use or another substance.

The Act also criminalises the purchase of sexual services and introduces a new offence addressing public indecency.

### **Criminal Law (Sexual Offences) Amendment Act 2019**

On 26 February 2019, the Criminal Law (Sexual Offences) (Amendment) Act 2019 was signed into law. The main purposes of the Criminal Law (Sexual Offences) (Amendment) Act are to:

- Introduce stricter penalties for repeat sexual offenders
- Equalise the maximum penalties for incest at 10 years for both male and female offenders.

The new provisions set out the arrangements for sentencing for repeat sexual offenders. Where an offender who has been convicted of a scheduled sexual offence and sentenced to at least 5 years imprisonment, is within a period of 10 years convicted of a further scheduled offence, the court is required to specify a minimum term of imprisonment to be served. Subject to a test of proportionality, the minimum must be three quarters of the maximum permissible term of imprisonment available under the law; and where the maximum term is life imprisonment, the minimum must be at least 10 years.

## **8. Operation of the Courts**

From the outset of the pandemic the Courts have prioritised hearing cases involving the most vulnerable members of society. Family law, child care and domestic violence applications in the relevant Courts continue to be prioritised.

Under Level 5 restrictions, family law services are continuing in the Circuit and District Courts for domestic violence and most urgent cases only. Between 20 and 24 High Courts are sitting remotely every day at present.

The Courts Service and the Judiciary continue to review the evolving situation with the pandemic, taking into consideration Government and public health advices, and will reassess the current position on 23 February 2021.

Budget 2021 allocated €158.8 million for the Courts Service to ensure adequate resources for the courts in order to maintain access to justice for all citizens. This included €8 million for the new Courts Modernisation Programme along with an additional provision of €5.7m for COVID measures to enable court sittings take place in a socially distanced and safe environment. A significant priority for the Department of Justice and the Courts Service in the years ahead will be to significantly invest in digital technology, to transform the experience of practitioners and of court users.

The July stimulus package had previously assigned €5m to the Courts Service, with €1.7m of the funds to be invested before end 2020, in ICT to install video technology systems to support the holding of remote courts. 2,411 remote hearings were held from the onset of the pandemic to 24 December 2020. A further programme of investment is planned this year. Remote hearing facilities are currently available in 64 courthouses around the country and plans are underway to install facilities in a further 43 courtrooms as soon as possible.

The Courts Service published its Corporate Strategic Plan 2021-2023 on 15 February 2021, after it was laid before the Houses of the Oireachtas by Minister McEntee. The Plan contains the following six strategic goals:

1. Adopt new collaborative ways of working, taking a user-centric approach, to provide improved and enhanced service delivery.
2. Work collaboratively with the Judiciary to define and provide the resources needed to effectively carry out their judicial functions.
3. Adopt a digital first approach.
4. Continue to invest in and support our people to create a high-performing organisation, delivering on the modernisation agenda and broader government priorities.
5. Provide buildings that are modern, fit-for-purpose, safe and accessible and support the new ways in which we will conduct business.
6. Put in place robust governance structures to ensure effective accountability and leadership for our modernisation and reform agenda.

The Plan covers the first phase of a ten-year vision to transform the courts and sets out the direction, challenges and priorities for the development of a modern, fit-for-purpose and cost-effective courts system. It was developed following consultation with a wide range of stakeholders and the resultant strategic goals are intended to be inclusive of the views and experiences of all court users.

A priority action for the Courts Service under Strategic Goal 1 is *'To establish User Research and Service Design function to partnering with the Judiciary and stakeholders to ensure best outcomes for all court users, with a specific focus on vulnerable users'*. Strategic Goal 4 also contains a priority action for the Courts Service to *'Implement our three-year Learning and Development strategy, including training to develop awareness of human rights, equality and supporting those who are vulnerable'*.



**Victims Alliance Submission to  
Department of Justice on  
“Victim’s testimony in cases of rape and sexual  
assault”**

**23<sup>rd</sup> February 2021**



## Introduction

*Rape cases reveal core conflicts in the space where evidence, law, and ethics intersect. Such conflicts include the tension between victim protection and the rights of the accused, the challenges lawyers face trying to negotiate the demands of sensitive and emotionally difficult cases, and the role of the law in counteracting stereotypes and bias.*

Historically, a person claiming to be a rape victim, was treated with suspicion. Any prior sexual activity on their part outside of marriage was deemed to undermine the veracity of their claim and, as a functional matter, diminished their right to control the nature of their sexual experiences. To obtain a rape conviction, the law often required corroboration (hard to find in a crime conducted mainly in secret), and evidence of physical struggle, injury, and prompt outcry. This reflected the general status of victims who have been characterized, from the time eternal as seductors and liars. The cultural trope of the victim who lies about rape is seen everywhere from the Bible to great works of literature

Traditionally, successful rape allegations involved a virtuous, ideally virginal person, who is attacked by a creepy stranger. As Professor Susan Estrich explained in *Real Rape*, the stereotype of the real rape victim involves a person who is behaving cautiously and who stays where they are supposed to be-in a good neighbourhood at a reasonable hour.

The more the facts deviate from this paradigm-if the person is sexually promiscuous, behaves incautiously or intemperately, or, perhaps, most importantly, knew their assailant, the more they are seen as "precipitating their own assault, and therefore culpable." "The more society blames the victim for their past tendencies or incautious behaviour, the less likely they are to be believed. If disbelieved, the victim will be less likely to come forward; even if they do, they will be less likely to convince the police, the prosecutor, or the jurors that their claim is true.

Although to modern ears the requirement of chastity seems obsolete, the tendency to blame victims for "asking for it" (by flirting, taking a person to their room, or drinking/drug taking), or to believe that the victim was lying to cover an indiscretion or to gain revenge, still rings true. We do not mind if a rape victim has had some reasonable sexual experience, but if they are too promiscuous, they will fall into the category of "asking for it." And if they regained interest in sex or "partying" after the attack, such conduct undermines the veracity of their report, because "real" victims do not behave that way

<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1175&context=facpub>)

**Commented [1]:** The old common law rule was that counsel could not contradict a witness' denial of having had sexual intercourse outside of marriage. (R v Cockcroft (1870) Cox C.C. 410; Healy, Irish Laws of Evidence, at [3.23]). Sexual promiscuity was considered a matter of grave ill repute, and public policy sought to avoid the airing of scandalous accusation in court. Where, however, there was evidence that the complainant in a sexual offence case had led a promiscuous lifestyle or was "notorious for want of chastity", the floodgates opened to a full-scale attack upon the complainant's truthfulness and credibility. (R v Clay (1851) 5 Cox C.C. 147; R v Holmes (1871) 1 R. 1 C.C.R. 334; Healy, laws of Evidence, at [3.23].) It was also then, and now, of concern to the courts that accusations of rape are difficult to defend. Hale once famously wrote that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent". (Hale, *Historia Placitorum Coronae* (1734) at p.635)



## 1. How testimony is currently conducted in this area

**A)** Currently when a victim presents to a Garda Station to report the crime that they are a victim of, they are subject to **Lengthy Handwritten Statements**, which are traumatising to the victim and very time consuming for the gardai who are taking the statement. The constant stop/start nature of handwritten statements don't allow for a natural flow of conversation and can cause issues for victims who are very distressed about having to recount what has happened to them.

**B)** After the statement has been taken, Gardai from the DPSU now give the victims a booklet which outlines the process and their contact details. Usually the lead Garda will keep the victim briefed of how the investigation is going, and they may be called in to give further statements. Once the book of evidence is complete, the file is sent to the DPP for a decision as to whether to prosecute or not. Depending on the size of the book of evidence and the complexity of the case, this decision can take some time. In most instances, the DPP decides not to proceed. **In this case, the victim may not understand the legal reasons given for not progressing and can feel aggrieved and traumatised by this decision.**

**C)** If the DPP takes the decision to prosecute, there can be a long waiting period before the trial date happens. Again, this can be very traumatic as the victim feels like they have this huge shadow over them while they are waiting to have their day in court. Prior to the day of the trial the victim may have a victim support person appointed to them who will show them around, to see the inside of the court while the court is not sitting. A volunteer from V-SAC will explain the layout of the court and outline the trial process. During this visit you will also be shown the separate suite of rooms which are available during the trial. These rooms are not open to the public and provide a place of privacy for the victim, family, and witnesses while the trial continues. Due to new legislation and the nature of the case, or if the defence wishes to discuss the victim's past sexual history, there may be a pre-trial hearing, where depending on a very narrow set of circumstances, the victim may be appointed their own legal counsel. Currently we have no Rape Shield legislation in Ireland, which would prevent the following:

- admission of evidence of a complainant's sexual reputation.
- use of sexual history evidence to establish the complainant as a 'type' of person who is more likely to consent to sexual activity; and
- use of a complainant's sexual history as an indicator of the complainant's truthfulness.

There is also currently no provision in law to stop questioning regarding the victims clothing, or if drugs or alcohol were taken by the victim prior to the sexual violence. Again, this line of questioning, with no legal representation for the victim to object, can be exceptionally traumatising and ultimately irrelevant.

**D)** As per the **REVIEW OF PROTECTIONS FOR VULNERABLE WITNESSES IN THE INVESTIGATION AND PROSECUTION OF SEXUAL OFFENCES 2020**, several recommendations have been made to protect Vulnerable Witnesses in the event of sexual offences and at this point in time, these recommendations are still in the process of enactment, however a point to note is that, if the victim is underage and they disclose to a person who must mandatorily report the incident to TUSLA, the victims are first subjected to giving testimony to TUSLA and then again to the gardai, which adds another layer of potential trauma.

<https://assets.gov.ie/83514/cc917997-ad32-4238-9468-29a6bccd76c1.pdf>



## 2. The effect the current process has on victims/the accused/practitioners.

- A) Victims are often subject to **traumatisation through giving a statement to the Gardai**. The stop/start nature of the handwritten statement can mean that the process takes many hours and might also mean in very complicated cases, that the victim may need to come back to complete their statement, again, prolonging the trauma of reliving bad experiences for them. It is also a poor use of Garda time. Having consulted with members of AGS previously on this issue, members of the DPSU estimated that recording statements by video or audio recording means meant that they could see many more victims and spend more time on the investigation of the crimes reported.
- B) The nature of some **decisions by the DPP's office** can sometimes be very legally based, and not easily understandable to the layperson. This can lead to frustration for the victim as they try to understand why their case is not progressing to the prosecution stage.
- C) The length of time it takes for most cases to come to court is traumatising. Add in **traumatisation by questioning in relation to irrelevant detail**, such as previous sexual history, alcohol or drugs consumed or what the victim was wearing at the time of the attack, can leave victims with low self-worth, trauma and blaming themselves, when none of this is relevant to why somebody chose to inflict sexual violence on them.
- D) Some aspects of the court process can lead to **traumatisation by being a witness for the state with no legal representation**, especially as there is a heavy focus on the accused constitutional rights during the trial process. Victims can feel very isolated and can be subjected to questioning for several days on the stand, with nobody to object to the line of questioning on their behalf or advocating for their constitutional rights.



### 3. What alternatives are there to the current process in other jurisdictions?

A) **Rape shield law** limits the ability to introduce evidence or cross-examine complainants about their past sexual behaviour. The term also refers to a law that prohibits the publication of the identity of an alleged rape victim. Rape Shield laws are currently in place in the following jurisdictions- US, Canada, New Zealand, and Australia.

#### **Source Reference to Rape Shield Law**

<https://www.alrc.gov.au/publication/uniform-evidence-law-alrc-report-102/20-matters-outside-the-uniform-evidence-acts/rape-shield-laws/>

<https://laws-lois.justice.gc.ca/eng/acts/C-46/page-65.html#docCont>

<https://www.legislation.govt.nz/act/public/2006/0069/latest/whole.html#DLM393635>

<https://www.congress.gov/bill/103rd-congress/senate-bill/11>

B) **Icelandic Burden of proof-** The following was enacted into law in Iceland, changing the onus on proving that consent was not granted on the victim, to proving that consent was obtained by the defendant. This ensures that victims are protected regarding consent and the burden of proof does not fall on them to prove that they did not consent.

#### **General Penal Code, no. 19/1940, with subsequent amendments (Sexual Offences)**

As regards the concept of consent in Article 1. of the bill, consent to participate in intercourse or other sexual intercourse must be expressed in words or other unambiguous expression. This means that consent must be given or that active participation in a particular activity must be interpreted as consent on the part of another or other participants. A participant will not be required to protest or show resistance to participating in a sexual act. Then complete inactivity cannot be interpreted as a willingness to participate. Consent to participate in intercourse or other sexual intercourse is limited to the specific case and to the sexual activity covered by the consent. As a result of sexual freedom, it is normal for a participant in a sexual activity to change his or her opinion at any time. Such an exchange of views must be expressed in words or other expressions so that one or other participants become this perception. It is not considered desirable to define too precisely the way consent should be expressed. There is a risk that legislation that sets precise conditions for how individuals should express themselves will not be in line with how human communication actually is. If consent has been expressed, it must also be considered whether it was granted voluntarily. For that reason, it is also stipulated that in certain circumstances consent will not be given, as it was not granted voluntarily, and the perpetrator could have been aware that the victim's consent did not exist. This is the case in situations where the victim has given consent because of the perpetrator's use of violence, threats, or other forms of unlawful coercion. Comparable wording can now be found in the current 1st paragraph. Article 194 which states that anyone who has intercourse or other sexual intercourse with a person by using violence, threats or other forms of unlawful coercion is guilty of rape. The provision has been clarified so that in these circumstances it is underlying that there is a lack of consent to the activities.



With Art. of the bill, however, emphasis is placed on whether or not consent for intercourse or other sexual intercourse has been obtained. It is also assumed that consent is not obtained if it is obtained by using deception or by exploiting the person's error in the situation.

**C) Unable to take civil cases while criminal cases pending in Kenya (Common Law Jurisdiction), so meaning the accused cannot take counteractive defamatory action against the victim until such time as criminal proceedings have completed**

[Act No. 13 of 1967, First Sch.]

175. Orders for compensation and expenses
- (1) A court which—
    - (a) on convicting a person of an offence, imposes a fine, or a sentence of which a fine forms part; or
    - (b) on appeal, revision or otherwise, confirms such a sentence, may, when passing judgment, order the whole or any part of the fine recovered to be applied in defraying expenses properly incurred in the prosecution of the offence.
  - (2) A court which—
    - (a) convicts a person of an offence or, on appeal, revision or otherwise, confirms the conviction; and
    - (b) finds, on the facts proven in the case, that the convicted person has, by virtue of the act constituting the offence, a civil liability to the complainant or another person (in either case referred to in this section as the “injured party”), may order the convicted person to pay to the injured party such sum as it considers could justly be recovered as damages in civil proceedings brought by the injured party against the convicted person in respect of the civil liability concerned.
  - (3) No order shall be made under subsection (2)—
    - (a) to require payment of an amount that exceeds the amount that the court making the order is authorised by law to award or confirm as damages in civil proceedings; or
    - (b) in any case where, by reason of—
      - (i) the complexity of evidentiary matters affecting the quantum of damages;
      - (ii) the insufficiency of evidence before it in relation to such damages or their quantum;
      - (iii) the provisions of the Limitation of Actions Act (Cap. 22); or
      - (iv) any other circumstances, the court considers that such an order would unduly prejudice the rights of the convicted person in respect of the civil liability.
  - (4) No order under this section shall take effect—



- (a) before the expiry of the time limited for appeal against the conviction or sentence in respect of which the order was made; or
  - (b) while any such conviction or sentence is the subject of appeal, unless and until the conviction or sentence, and the order, are confirmed by the court determining the appeal.
- (5) A court determining an appeal referred to in subsection (4) shall affirm, quash, or vary an order under this section, as justice requires.
- (6) An order under this section that has taken effect is enforceable in the same manner as a judgment in civil proceedings for the amount awarded by the order.
- (7) An award by order under this section in respect of a civil liability is, to the extent of the amount awarded, a defence in any subsequent proceedings instituted in respect of that liability.



#### 4. How could an alternative system be applied in Ireland?

**A) Constitutional rights of victims protected and full enactment of the EU Victims Directive to ensure fair treatment of victims within the legal process, as well as the enactment of the recommendations on the Working group for the review of protections for vulnerable witnesses (The O'Malley Report 2020)** - Make provision in law for the constitutional rights to the victim by appointing a Victims Commissioner to ensure the full rights of the victim while giving testimony is protected. Also ensure that all elements of the EU Victims Directive are enacted, above and beyond the minimum standards. Enact the constitutional rights of the victim regarding article Article 40.3 of the Irish Constitution which provides, in part: "1o The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen, 2o The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." This is one provision of the Constitution where the word "citizen" may confidently be interpreted as meaning "person"

**B) Legal representation in court-** Allow victims to have their own legal representation in court to advocate for the victim and to ensure that the process of giving testimony is not harmful or traumatising in any way.

**C) Recorded testimony in Garda Station** – Allow on Garda Siochana to make video or audio recordings of testimony in relation to witness statements, ensuring speed of testimony making and accurate reflection of the witness's testimony.

**D) Video Link-** Treat all victims as vulnerable witnesses and allow them to make all testimony in court via video link unless otherwise requested by them. This ensures they do not have the trauma of having to be in the same space as their attacker.

#### Conclusion:

1. **Replace Lengthy Handwritten statements with video or audio recording means**
2. **Review the process for communicating DPP decisions to make it more victim centric**
3. **Allow Victims Legal representation in court**
4. **Allow all victims to be treated as vulnerable witnesses and have video link court evidence as standard unless otherwise requested**
5. **Move to a system where burden of proof of consent has to be shown by the accused**
6. **Move to a Kenyan type system where no civil proceedings are allowed until after a criminal case has been heard and judgement given**
7. **Install Rape Shield legislation.**



### **Source Reference Materials**

[http://www.justice.ie/en/JELR/Victim Interactions with the Criminal Justice System.pdf/Files/Victim Interactions with the Criminal Justice System.pdf](http://www.justice.ie/en/JELR/Victim%20Interactions%20with%20the%20Criminal%20Justice%20System.pdf/Files/Victim%20Interactions%20with%20the%20Criminal%20Justice%20System.pdf)

<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1076&context=plr>

<https://www.dppireland.ie/app/uploads/2020/10/AR-2019-eng.pdf>

<https://www.nytimes.com/2018/11/15/world/europe/ireland-underwear-rape-case-protest.html>

<https://www.rapecrisishelp.ie/wp-content/uploads/RCNILegalInformationPackforPractitioners1.pdf>

<https://www.newstatesman.com/politics/feminism/2018/05/no-legal-system-isn-t-biased-against-men-it-allows-them-rape-near-impunity>

<https://www.amnesty.org/en/latest/news/2018/05/how-activists-got-sweden-to-recognise-that-sex-without-consent-is-rape/>

<https://www.thejournal.ie/iceland-consent-3943673-Apr2018/>

<https://www.theguardian.com/society/2017/feb/08/mp-proposes-uk-shield-law-to-protect-victims-in-court>

<https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1175&context=facpub>

<https://assets.gov.ie/83514/cc917997-ad32-4238-9468-29a6bccd76c1.pdf>



**RCNI Submission on  
Victims' Testimony in Cases of  
Rape and Sexual Assault  
to the  
Joint Oireachtas Committee on Justice**

**February 2021**

**Supported by Safe Ireland**



## **RCNI Submission on Victims' Testimony in Cases of Rape and Sexual Assault to the Joint Oireachtas Committee on Justice February 2021**

### **Introduction – Rape Crisis Network Ireland**

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

### **Introduction – This Submission**

RCNI welcomes very much the opportunity to make a submission to the Joint Oireachtas Committee on Justice on victims' testimony in cases of rape and sexual assault. Victims' testimony lies at the heart of the criminal justice process: it is very difficult to convince a jury that a person accused of rape or sexual assault is guilty beyond reasonable doubt if they do not hear directly from the victim of the crime. If no victim gave evidence, no-one could be convicted and thus be held accountable for these extremely serious acts of sexual violence.

However, it is also very difficult for victims of sexual violence to make a formal complaint to An Garda Síochána and sustain it for the many months it will take for the investigation and prosecutorial stages to be completed, and where a decision is made to prosecute, for the many more months it will take to reach court for hearing. Even where the person is convicted following a trial and goes to jail for a long time, victims may have to live with well-founded fears about what that person might do to themselves and to others, once released.

RCNI's view is that the criminal justice system can, and must, support victims of sexual violence in every way possible to give their best evidence, from the time of the offence to trial and beyond, and must ensure that their necessary participation takes place with the minimum risk of their being re-traumatised by the criminal justice process itself. This vital participation on which the whole system of criminal justice depends cannot and should not come at unbearable personal cost to the victims themselves.

RCNI would like to acknowledge the commitment of the current Government, and in particular that of the Minister for Justice and her Department, to making improvements to the protections available to vulnerable witnesses in the investigation and prosecution of sexual offences, on foot of the recommendations made in the O'Malley Report published August 2020. We look forward to continuing to work with Department officials and other agencies to help implement these recommendations.

RCNI recognises and welcomes also the many positive steps taken to improve the experience of victims of sexual offences taken by An Garda Síochána, the Office of the Director of Public Prosecutions, the legal professions, the judiciary, and others, many of

## RCNI Submission on Victims' Testimony in Cases of Rape and Sexual Assault to the Joint Oireachtas Committee on Justice February 2021

which predate and will overlap with the implementation of the O'Malley Report recommendations.

In our view, victims of sexual violence who make the difficult decision to report the crime should benefit from world class standards in the range of supports which are specially designed to facilitate them to participate as fully and as safely as possible in the criminal justice process. Each individual professional working within that system should continue the pursuit of excellence in the quality of these supports, not alone because the whole criminal justice system depends on the willing co-operation of victims of crime, but also because victims of crime themselves deserve no less than a full recognition of their own rights under the Constitution and under European law.

### **Structure and Scope of this Submission**

This submission will begin by examining the role of the victim's testimony in the criminal justice system from different perspectives and then attempt a synthesis of these perspectives which is workable within our own criminal justice framework, by describing our own analysis of the difficulties facing victims of sexual violence who are among the most vulnerable witnesses encountered in our criminal courts.

Where possible, RCNI will make recommendations for improvements, focussing mostly on those which were identified through our own research and practical experience but which were not part of the O'Malley Report. RCNI hopes that because a very wide view is being taken in the Implementation Plan, some at least of these supplementary recommendations will also be implemented through the Plan. (A summary of the recommendations made in the O'Malley Report can be found at Appendix 2).

A Checklist of all RCNI recommendations will be found at the end of the document. The Reference list under the Checklist also includes a list of previous RCNI submissions and reports on victims' testimony and web-links to each one.

This submission is not intended to be an exhaustive list of all possible protection measures and special measures available to support various groups of sexual violence victims. These are examined in some detail in other documents, for instance the RCNI Report "Hearing Every Voice" (2018)<sup>1</sup>. A full table of available special measures is also included at Appendix 3.

RCNI understands that this submission should be confined to victims' testimony in the criminal courts. Accordingly, we do not address any issues relating to victims' testimony in civil or non-judicial proceedings where sexual violence is part of the factual background.

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<sup>1</sup><https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf>

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However, we would be delighted to address these areas of victims' testimony in a separate submission if requested to do so by members of the Committee.

### **Victims' Testimony in cases of rape and sexual assault:**

#### **I Rape crisis perspective or the "trauma lens" – the criminal justice system can and does re-traumatise victims of sexual violence**

Through research, data collection and daily contacts with our clients, RCNI knows that sexual violence victims are inherently vulnerable and certain groups are even more so. We also know that not only is the experience of sexual violence a devastating trauma in and of itself but that reporting and each stage of the justice process makes demands on victims. These can be onerous and traumatic. The very necessity to speak about the sexual violence can itself trigger the re-living of that original trauma. Other factors which have the potential to re-traumatise victims who make a report to the authorities include: lack of information, advice, skilled and sympathetic support including access to specialist counselling, difficulties in contacting the investigating officers, lengthy delays throughout the process, fear of the perpetrator and of retaliation from him and/or his associates, court dates whose timing clashes with the victim's life events (family events, parenting, holidays, education etc.) as the victim does not control the scheduling of the events of the justice process but instead has to adjust their lives around the dates set for them as and when they are notified of same, fears related to privacy and anonymity, and the fear of the trial process itself, especially the fear of being cross-examined not only on intimate and traumatic events but also on one's entire character, including one's sexual character.

RCNI's view is that every victim of sexual violence who reports the offence to the police should be seen as an intrinsically **vulnerable witness** and as an **individual** whose needs are specific to their situation and their capacity. As far as possible, the criminal justice system should identify and accommodate those needs appropriately. Sexual violence victims need a range of dedicated and specialised supports to engage with criminal justice process so that risks of being re-traumatised by court process are minimised and they are facilitated to give their best evidence.

Some victims of sexual violence have **additional** vulnerabilities because of their young age and/or the nature of any temporary or permanent disability. These vulnerabilities can magnify the re-traumatising effects of taking part in criminal justice proceedings. While there are other factors that can add additional vulnerability, this submission will focus on the gaps in the provision of supports for these groups in particular.

Finally, this submission applies to victims and witnesses giving evidence in respect of **all** sexual offences, not simply rape and sexual assault offences. From the point of view of the trauma they cause and the difficulties of giving evidence for their victims, there is no

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meaningful difference between rape and sexual assault on the one hand and all other sexual offences on the other.

### II The criminal justice perspective – live oral evidence is the best evidence (or is it?)

Our largely oral-based and delay-prone criminal justice process is not designed to deliver the best possible evidence from vulnerable witnesses, or to avoid their re-traumatisation through participation in the criminal justice process itself, as far as possible.

Live oral evidence, especially in response to cross-examination, is still seen as superior to written or otherwise pre-recorded evidence, just as it was when this was written c 1900:

- “Cross-examination is the greatest legal engine ever invented for the discovery of truth” – John H. Wigmore, quoted in “Evidence in Trials at Common Law” (JH Wigmore, J H Chadbourn and WA Reiser), published by Little, Brown USA in 1974), at page 32

This reliance on oral evidence may have made some sense in times past in which more general communication was oral and in which the delay between the offence occurring and the witness having to give evidence about what happened in court was generally much less. The delay point is well illustrated by the Ruth Ellis murder case in England in 1955: the murder was committed on 10<sup>th</sup> April, admittedly in front of several witnesses. Arrested on the spot very soon afterwards, Mrs Ellis was charged in the Magistrates Court within hours. Her trial for murder began in the Central Criminal Court (the Old Bailey) on 20<sup>th</sup> June 1955. After a trial lasting two days, a verdict of guilty was returned and the mandatory death sentence was passed. She did not appeal, but a detailed letter was sent to the Home Secretary on her behalf asking him to commute the death sentence. He refused the request and Mrs Ellis was hanged on 13<sup>th</sup> July 1955, three months after the murder<sup>2</sup>. So short a gap between offence and execution of sentence after trial of so serious an offence would be unimaginable now in either the UK or Ireland.

The reality now is that the gap between offence and trial is very much longer, even in cases of “recent” rape and sexual assault: it is more likely to be measured in years than in months. With the advent of the internet and electronic communications, there is much less reliance on detailed individual memories of events and conversations because they are not needed as they were before, many gaps in recall may now be filled by looking up the internet or consulting other (mainly electronic) records. It is time to ask why our criminal justice system does not ensure that victims of serious offences, including sexual offences, can give their evidence much closer to the time that the offence(s) happened. It is also time to ask whether, at the very least, the most vulnerable of these witnesses should not be able to

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<sup>2</sup> See this online article for a full account of the case: <https://www.capitalpunishmentuk.org/ruth.html>

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avoid the ordeal of giving live evidence at trial at all but should instead have the opportunity to give all of their evidence, including evidence in response to cross-examination, much earlier in proceedings.

Modern cognitive and forensic psychology findings<sup>3</sup> underlie the conclusions of reforming judges such as Lord Carlway, Scotland's current Lord Justice-General (most senior judge), that "a person's memory does not improve over time or being put under stress" [cited in an interview with BBC dated 1<sup>st</sup> May 2018].<sup>4</sup> In short, Wigmore's view of cross-examination as an effective forensic tool honed to elicit the most accurate evidence is psychological nonsense. There is now much more understanding of the negative effects which factors such as the trauma of the offence itself and the delay between offence and trial may have on the accuracy of memory and on the ability of the witness to find the emotional strength to share their memory of what happened in court. It is time for the criminal justice system to adapt its structures and procedures to accommodate the needs of all vulnerable witnesses in line with the findings of the latest and best quality scientific research in this area.

### **III Vulnerable Witnesses – how can they give their best evidence with minimum risk of being re-traumatised by the experience and with due regard to the right to a fair trial?**

For all the reasons above, RCNI has made it a priority to look at ways of reducing both risks of re-traumatisation and delays, and to focus most on the most vulnerable witnesses, in which group we would include **all** victims of sexual violence. Inspired by learning about major reforming initiatives to help vulnerable witnesses take part in criminal justice process in Scotland, England & Wales and elsewhere, RCNI convened a small inter-agency group to examine vulnerable witnesses issue and produce a report summarising its research, findings and recommendations. This was published in March 2018 as "Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings"<sup>5</sup>. A summary of the desktop research conducted on the treatment of vulnerable witnesses in Scotland and England & Wales and reported in this Report may be found at Appendix 1 hereto for easy reference.

#### **"Hearing Every Voice" Report: Principal Conclusions**

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<sup>3</sup> There is a wealth of material on this topic. One very useful compendium of views is "Addressing Vulnerability in Justice Systems" (ed Cooper, Hunting) London (2015), published by Wildys, information is available through this webpage: <http://www.wildy.com/isbn/9780854901968>

<sup>4</sup>available through this web-link: <https://www.bbc.com/news/uk-scotland-43879455>

<sup>5</sup> See footnote 1 above and Reference list at the end of this submission for a full reference

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- Improving experience of vulnerable witnesses who are victims does not have to mean that the right of an accused person to a fair trial is compromised – it is **not a zero-sum** game;
- Understanding why a **specialised and individualised** approach to vulnerable witnesses is needed – is key – therefore the right professional training is vital;
- There is a real risk that serious **additional harm** may be caused to vulnerable witnesses by their participation in the criminal justice process, if their needs are not identified and efforts made to minimise harm;
- While our legislative framework does include many measures (some of them entirely new) which are helpful to ever more victims and other vulnerable witnesses, there are still some significant **gaps**;
- Our procedural provisions need to be overhauled so that they can facilitate use of **special measures**;
- Delays between charge and trial are still inordinately long for many especially vulnerable victims of sexual violence (especially **child victims**); and
- There is a real interest among experienced judges, lawyers and Gardaí in building on their individual areas of specialist knowledge, **to make the system better** for everyone who must use it.

### “Hearing Every Voice” Report: Principal Recommendations

Note: Recent developments are added under each Recommendation in purple type for easy reference.

- The use of **pre-recorded statements** should be increased, though not made mandatory, and pre-recorded cross-examination should be piloted;
- Vulnerable **accused** persons should be able to benefit from special measures when appropriate;
- Training of relevant professionals should include training in **how best to communicate** with vulnerable witnesses when taking Garda statements, assessing cases for prosecution and taking part in court proceedings – and should be resourced adequately. *The need for specialised training is now being addressed through an inter-agency sub-committee as part of the Implementation Plan for the relevant recommendations made in the O’Malley Review.*
- Statutory pre-trial **hearings** should be the primary means through which special measures to address vulnerable witnesses’ individual needs should be raised and

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decided upon. This is being addressed as a matter of urgency also as part of the Implementation Plan, through the Criminal Procedure Bill 2021.

- **Gaps** in the available menu of special measures should be closed, especially in relation to vulnerable witnesses who do not have a “mental disorder” but do have a communications difficulty;
- The role of **intermediaries** with regard to specific groups of vulnerable witnesses should be examined and the relevant legislation amended, to cover answers as well as questions. This is also now being examined by an inter-agency sub-committee as part of the Implementation Plan for the relevant recommendations made by the O'Malley Review;
- A **flexible, innovative and open approach** should be taken with vulnerable witnesses, including children, so that e.g. use of Court dogs might be considered to calm and reassure child victims giving evidence by video-link (a research project using EU funding is envisaged to explore Court dogs); and
- A **national inter-agency steering group** should take the lead on vulnerable witnesses to make sure that their interests get the dedicated attention which they need. This is now effectively in place as the Recommendations of the O'Malley Review are implemented. However, once the current Audit of Domestic, Sexual and Gender-Based Violence services has been completed and the new National Strategy on Domestic, Sexual and Gender-Based Violence is in place, the oversight structures are likely to take on a new shape.

### “Hearing Every Voice” Report: What Happened Next?

**September 2018:** The former Minister for Justice instituted a **Ministerial Review** of the protections for vulnerable witnesses in the investigation and prosecution of sexual offences, on foot of the public outcry after the Belfast rape trial and after publication of “Hearing Every Voice” in April 2018, to be conducted by a Working Group under the auspices of the Criminal Justice Strategic Committee, and chaired by Dr Tom O'Malley, NUIG Senior Lecturer in Law and leading authority on the law on sexual offences and on criminal law generally. Submissions were invited from NGO specialist services and other relevant professionals, with whom some separate consultations were held.

In August 2020, the O'Malley Review was published and made 55 recommendations for improvement of those protections – it goes well beyond the Garda station and the court room, taking a wide view of what is meant by a vulnerable witness. In October 2020, Government published its Implementation Plan for those recommendations, “**Supporting the Victim's Journey**” – this too takes a wide approach, encompassing multi-department and multi-agency tasks.

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### Main Points of Supporting a Victim's Journey:

- Expand existing Victims Charter website (already completed), develop and build on existing consent education initiatives at both secondary and third level as well as general awareness level (under way), map existing sexual violence victim support services across the country (under way);
- Conduct external evaluation of Garda training, ensure good geographic spread of specialist AGS interview facilities (Garda training initiatives were already either under way or completed, roll out of specialist units was already completed by 09/20)

### New legislative provisions needed:

- Priority was given to publishing and introducing legislation on pre-trial hearings to Oireachtas. It took shape as the recently introduced Criminal Procedure Bill 2021;
- Other legislative recommendations, such as those on expanding the reach of "Section 3" to include sexual assault offences, the expansion of the role of separate legal representative, extension of exclusion of the public, extension of right to legal advice, and so on, will be introduced to Oireachtas in a new Bill by end 2021;
- Disclosure: consideration will be given to whether medical and other personal records should be protected as counselling records are at present;

### Training:

- Specific action plans should be devised for each responsible agency/profession besides AGS, and including judiciary, also for counsellors and psychotherapists (many in the area are already specialised under RCNI specialist training and most are already registered with professional bodies . The work of the relevant inter-agency sub-committee on Specialist Training, set up as part of the Implementation Plan for the O'Malley Review Recommendations, has already begun.
- Intermediaries: There is a specific plan to design training for and recruit cohort of intermediaries with right skills to assist vulnerable witnesses in criminal justice process. This is being progressed through the relevant inter-agency sub-committee on Intermediaries, formed as part of the Implementation Plan for the O'Malley Review Recommendations.

### **Outstanding gaps in the protection and support of vulnerable witnesses in our criminal justice system which are not included in the O'Malley Report Recommendations:**

- It should be possible, though not mandatory, for all victims of rape, sexual assault and other sexual offences to have their formal statement pre-recorded and allowed

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to stand as their evidence in chief. At present, this right is confined to victims and some witnesses under 18 and those who are over 18 and have a “mental disorder” as defined in the legislation<sup>6</sup>. From a trauma perspective, there is much to be said for the victim having to relate what happened as few times as possible and from a best evidence perspective, the victim’s memory is likely to be fresher closer to the time of the offence and the jury will have the benefit of viewing this evidence at a time when the effects of the offence were much more likely to be obvious in the victim’s speech and demeanour. However, this is not a solution to suit every victim or witness: where electronic recording itself has been part of the offending behaviour, for instance, in a case of child sexual exploitation through the creation of child sexual abuse material, it may be very harmful to the victim’s psychological health. If the rest of the victim’s testimony is given live through video-link at court, as it must be at present, they still have to face the difficulties of live cross-examination, and of course, the attendant delay before trial. The victim or witness may find it difficult to remember the context of some of her pre-recorded evidence when cross-examined years later about it, and may appear less credible to the jury as a result. For this reason, we recommend the introduction of pre-recorded cross-examination (see further at next point below).

- **RCNI recommends** that the pre-recording of evidence in chief which can be allowed to stand at trial instead of live evidence, is made available to adults who do not have a “mental disorder” as defined in the legislation.
- RCNI’s view is that it would be best to have all the evidence of victims of sexual offences given – and pre-recorded - under the best possible controlled conditions well in advance of trial. This is why in “Hearing Every Voice”, we advocated the piloting of the pre-recording of cross-examinations, as well as examinations in chief, of victims and witnesses in sexual violence cases. Provided that certain practical issues were addressed promptly through robust case management and a statutory preliminary trial framework, such as that envisaged in the new Criminal Procedure Bill, and provided also that there is a mechanism through which any fresh evidence may be put before the court at a later stage, we see no reason in principle why trauma should not be kept to a minimum for witnesses, especially **particularly vulnerable witnesses** such as **children and people of any age with some form of intellectual or learning disability** who may have the most difficulty in recalling the detail of past events after months or years.

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<sup>6</sup> See Section 16(1)(b) Criminal Evidence Act 1992 as amended. Part III deals with special measures for victims and witnesses other than the accused. The whole consolidated statute is accessible online via this web-link: <https://revisedacts.lawreform.ie/eli/1992/act/12/front/revised/en/html>

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- **RCNI recommends** that the pre-recording of cross-examination is piloted in a small number of courts for child victims, child witnesses and victims and witnesses with some form of intellectual or learning disability, and that this pilot should also include the pre-recording of any necessary re-examination, so that all of the victim's testimony has been gathered ahead of trial.
- Such additional pre-recording of cross-examinations should take place after consideration of any special measures needed at a preliminary trial hearing, and the pre-recording itself should be overseen by the trial judge and held in conformity with any directions given at the preliminary trial hearing. Similar procedures are now operating in both England & Wales and Scotland. Please see Appendix for a summary of their respective procedures in this regard;
- **RCNI recommends** also that the current statutory regime of special measures<sup>7</sup> be redesigned and streamlined so that there is a presumption in favour of their being granted to **all victims of sexual offences**, not alone those who are under 18 or who have a "mental disorder" and so that the conditions of eligibility are not different from one measure to another; and
- **RCNI recommends** that serious consideration be given to expanding the current statutory regime of special measures to include vulnerable **accused persons**. The rationale for this recommendation is to counter the prevailing legal cultural norm that a special measure granted to a complainant or other prosecution witness is unfair to the accused person because it signals his probable guilt to the jury – and therefore, must be resisted strenuously. This makes special measures hard to obtain for anyone who is not a child or a person with a mental disorder, in practice. Our view, based on what we have heard from legal professionals in Scotland, is that once special measures become available to vulnerable accused persons also, they lose force as a bone of contention between prosecution and defence and over time, become acceptable and non-controversial and thus, simple to access for those who need them (special measures were extended to certain accused persons in 2014 in Scotland);
- **RCNI recommends** that all victims of sexual offences who must give evidence in criminal proceedings be supported by:
  - Professionalised support and advocacy services run by specialist NGOs, e.g. rape crisis centres, who would provide Garda and Court accompaniment as needed and also be available to provide tailored individual support, both practical and emotional, from first contact to the end of the case and beyond. ([Increased access to free legal advice](#))

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<sup>7</sup> See footnote 6 above for web-link to the relevant Act (consolidated version)

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for victims of sexual offences was recommended by the O'Malley Review and will be implemented).

- **RCNI recommends** that the current law on the use of intermediaries as a special measure in court be amended so that not only questions put to the witness, but also the witness's answers – may go through the intermediary; and
- **RCNI recommends** that the particular difficulties of witnesses who are of age, who do not have a “mental disorder” or mental condition which would warrant use of an intermediary, but who nevertheless have sometimes significant communications difficulties (e.g. people who have a hearing difficulty or speech impediment), are addressed in the proposed amendments to the existing special measures statutory framework; and
- **RCNI recommends** that in any legislation relating to arrangements to be made for special measures, such as the current Criminal Procedure Bill, and any substantive legislation dealing with special measures themselves, care should be taken to ensure that provisions are drafted widely enough to allow for a more open approach to facilitating witnesses with novel special measures suitable in individual cases (such as the use of court dogs).

### **Positive Signs for the future of Victims' Testimony in cases of Rape and Sexual Assault – the Implementation Plan for the O'Malley Review Recommendations:**

- Minister for Justice has repeated that the Implementation Plan for the O'Malley Review Recommendations is an **open document** and that she expects it will be revisited and revised along the way – and invited NGOs to participate (1) in construction of Implementation Plan itself and also (2) in consultation process which will be ongoing throughout the lifetime of Implementation Plan;
- Specialist NGOs have been asked to serve on the three subcommittees: mapping existing services (which feeds into the current Government Audit of Domestic, Sexual and Gender-Based Violence infrastructure), intermediaries, and specialist training, and work has started in earnest on all three.

### **Conclusion**

RCNI's view is the best evidence and analysis from other disciplines can and must inform our approach to supporting victims to give evidence in trials of sexual offences. Practitioners and policy makers alike should be trained to understand the effects of both original and secondary trauma not only on victims' psychological well-being, but also on their ability to recall and recount what has happened to them. Everything possible should be done to shorten waiting times before trial, including measures taken to pre-record the victim's

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entire evidence, where that is both fair and appropriate, and including the introduction of preliminary trial hearings. All of these initiatives should be underpinned by adequate resources, including resources to ensure that there is continuous, personal, individual, independent and professional support available to every victim of a sexual offence. The current positive initiative that is the Implementation Plan of Supporting a Victim's Journey must be resourced adequately, not only financially and through the provision of enough judges, courts, and specialist lawyers and Garda officers, but also through the development of additional perspectives drawn from the findings of the best forensic psychology research in this field. In our view, a close analysis of these additional perspectives will do much to ensure that the current measures being taken to mitigate secondary trauma to victims, reduce impunity for perpetrators and increase public confidence in the criminal justice system, are regarded as successful by victims of sexual offences themselves.

**Ref:** RCNI/LPD/

**Date:** 26 February 2021

**Rape Crisis Network Ireland clg**

**Website:** [www.rcni.ie](http://www.rcni.ie)

**This submission is supported by Safe Ireland, [www.safeireland.ie](http://www.safeireland.ie)**



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### Checklist of RCNI Recommendations:

#### I "Hearing Every Voice" Report<sup>8</sup>: Principal Recommendations

Note: Recent developments are added under each Recommendation in purple type for easy reference.

- The use of **pre-recorded statements** should be increased, though not made mandatory, and pre-recorded cross-examination should be piloted;
- Vulnerable **accused** persons should be able to benefit from special measures when appropriate;
- Training of relevant professionals should include training in **how best to communicate** with vulnerable witnesses when taking Garda statements, assessing cases for prosecution and taking part in court proceedings – and should be resourced adequately. *The need for specialised training is now being addressed through an inter-agency sub-committee as part of the Implementation Plan for the relevant recommendations made in the O'Malley Review.*
- Statutory pre-trial **hearings** should be the primary means through which special measures to address vulnerable witnesses' individual needs should be raised and decided upon. *This is being addressed as a matter of urgency also as part of the Implementation Plan, through the Criminal Procedure Bill 2021.*
- **Gaps** in the available menu of special measures should be closed, especially in relation to vulnerable witnesses who do not have a "mental disorder" but do have a communications difficulty;
- The role of **intermediaries** with regard to specific groups of vulnerable witnesses should be examined and the relevant legislation amended, to cover answers as well as questions. *This is also now being examined by an inter-agency sub-committee as part of the Implementation Plan for the relevant recommendations made by the O'Malley Review;*
- A **flexible, innovative and open approach** should be taken with vulnerable witnesses, including children, so that e.g. use of Court dogs might be considered to calm and reassure child victims giving evidence by video-link (a research project using EU funding is envisaged to explore Court dogs); and
- A **national inter-agency steering group** should take the lead on vulnerable witnesses to make sure that their interests get the dedicated attention which they need. *This*

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<sup>8</sup> See full reference and web-link at footnote 1 above and in the References section below

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is now effectively in place as the Recommendations of the O'Malley Review are implemented. However, once the current Audit of Domestic, Sexual and Gender-Based Violence infrastructure has been completed and the new National Strategy on Domestic, Sexual and Gender-Based Violence is in place, the oversight structures are likely to take on a new shape.

### II RCNI Redrafted Recommendations for this Submission

- **RCNI recommends** that the pre-recording of evidence in chief which can be allowed to stand at trial instead of live evidence, is made available to adults who do not have a “mental disorder” as defined in the legislation.
- RCNI's view is that it would be best to have all the evidence of victims of sexual offences given – and pre-recorded - under the best possible controlled conditions well in advance of trial. This is why in “Hearing Every Voice”, we advocated the piloting of the pre-recording of cross-examinations, as well as examinations in chief, of victims and witnesses in sexual violence cases. Provided that certain practical issues were addressed promptly through robust case management and a statutory preliminary trial framework, such as that envisaged in the new Criminal Procedure Bill, and provided also that there is a mechanism through which any fresh evidence may be put before the court at a later stage, we see no reason in principle why trauma should not be kept to a minimum for witnesses, especially **particularly vulnerable witnesses** such as **children and people of any age with some form of intellectual or learning disability** who may have the most difficulty in recalling the detail of past events after months or years.
- **RCNI recommends** that the pre-recording of cross-examination is piloted in a small number of courts for child victims, child witnesses and victims and witnesses with some form of intellectual or learning disability, and that this pilot should also include the pre-recording of any necessary re-examination, so that all of the victim's testimony has been gathered ahead of trial.
- Such additional pre-recording of cross-examinations should take place after consideration of any special measures needed at a preliminary trial hearing, and the pre-recording itself should be overseen by the trial judge and held in conformity with any directions given at the preliminary trial hearing. Similar procedures are now operating in both England & Wales and Scotland. Please see Appendix for a summary of their respective procedures in this regard;
- **RCNI recommends** also that the current statutory regime of special measures<sup>9</sup> be redesigned and streamlined so that there is a presumption in favour of their being

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<sup>9</sup> See footnote 6 above for web-link to the relevant Act (consolidated version)

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granted to **all victims of sexual offences**, not alone those who are under 18 or who have a “mental disorder” and so that the conditions of eligibility are not different from one measure to another; and

- **RCNI recommends** that serious consideration be given to expanding the current statutory regime of special measures to include vulnerable **accused persons**. The rationale for this recommendation is to counter the prevailing legal cultural norm that a special measure granted to a complainant or other prosecution witness is unfair to the accused person because it signals his probable guilt to the jury – and therefore, must be resisted strenuously. This makes special measures hard to obtain for anyone who is not a child or a person with a mental disorder, in practice. Our view, based on what we have heard from legal professionals in Scotland, is that once special measures become available to vulnerable accused persons also, they lose force as a bone of contention between prosecution and defence and over time, become acceptable and non-controversial and thus, simple to access for those who need them (special measures were extended to certain accused persons in 2014 in Scotland);
- **RCNI recommends** that all victims of sexual offences who must give evidence in criminal proceedings be supported by:
  - Professionalised support and advocacy services run by specialist NGOs, e.g. rape crisis centres, who would provide Garda and Court accompaniment as needed and also be available to provide tailored individual support, both practical and emotional, from first contact to the end of the case and beyond. [\(Increased access to free legal advice for victims of sexual offences was recommended by the O'Malley Review and will be implemented\).](#)
- **RCNI recommends** that the current law on the use of intermediaries as a special measure in court be amended so that not only questions put to the witness, but also the witness's answers – may go through the intermediary; and
- **RCNI recommends** that the particular difficulties of witnesses who are of age, who do not have a “mental disorder” or mental condition which would warrant use of an intermediary, but who nevertheless have sometimes significant communications difficulties (e.g. people who have a hearing difficulty or speech impediment), are addressed in the proposed amendments to the existing special measures statutory framework; and
- **RCNI recommends** that in any legislation relating to arrangements to be made for special measures, such as the current Criminal Procedure Bill, and any substantive legislation dealing with special measures themselves, care should be taken to ensure

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that provisions are drafted widely enough to allow for a more open approach to facilitating witnesses with novel special measures suitable in individual cases (such as the use of court dogs).

### Selected References on Victims' Testimony in Cases of Rape and Sexual Assault

**EU Directive 2012/29/EU of the European Parliament and of the Council** establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA: available online at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:315:FULL&from=EN>

### Principal Irish Statutes and Related Documents:

- Criminal Law (Rape) Act 1981 as amended: available online at: <http://www.irishstatutebook.ie/eli/1981/act/10/enacted/en/html>
- Criminal Evidence Act 1992 – **consolidated version** available online at: <http://revisedacts.lawreform.ie/eli/1992/act/12/revised/en/html>
- Criminal Law (Sexual Offences) Act 2017: consolidated version available online at: <http://revisedacts.lawreform.ie/eli/2017/act/2/front/revised/en/html>
- Criminal Justice (Victims of Crime) Act 2017: available online at: <http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html>
- Link to General Scheme (revised) Criminal Procedure Bill (2015) – see Head 2 on Preliminary Trial Hearings: <http://www.justice.ie/en/JELR/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf/Files/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf>

### Scotland

- Evidence and Procedure Review Report (2015) available through this web-link: <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>
- Evidence and Procedure Review - Next Steps Report (2016) available through this web-link: <http://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-report---next-steps---february-2016.pdf?sfvrsn=2>
- Series of follow-up reports and initiatives in 2017 and 2018: web-links available through this webpage: <https://www.scotcourts.gov.uk/evidence-and-procedure-review>
- 2014: Victims and Witnesses (Scotland) Act 2014, available online through this web-link: <http://www.legislation.gov.uk/asp/2014/1/contents>
- 2019: Vulnerable Witnesses (Criminal Evidence)(Scotland) Bill (as it then was) Information and all relevant documents available through this web-link: <https://www.parliament.scot/parliamentarybusiness/Bills/108702.aspx>
- Vulnerable Witnesses (Criminal Evidence)(Scotland) Act 2019: received Royal Assent June 2019, expected to commence early 2020: <http://www.legislation.gov.uk/asp/2019/8/enacted>
- Web-link to Scottish Courts Services press release about new child friendly building in which pre-recordings can be done: <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2018/10/29/new-hearings-facility-for-children-and-vulnerable-witnesses>

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### England & Wales

- The Advocates' Gateway Toolkit: Case management in criminal cases when a witness or defendant is vulnerable <https://www.theadvocatesgateway.org/images/toolkits/1a-case-management-in-criminal-cases-when-a-witness-or-a-defendant-is-vulnerable-2017.pdf> (one of a number of toolkits, sets of guidelines and checklists); and
- Criminal Procedure Rules (2015), available through this web-link: <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/criminal-procedure-rules-practice-directions-2015.pdf>
- Criminal Practice Directions (2015), available through this web-link: <https://www.judiciary.uk/wp-content/uploads/2015/09/crim-pd-2015.pdf>
- Preliminary report (2018) on the Lighthouse: [https://www.london.gov.uk/sites/default/files/childhouse\\_jan19\\_report.pdf](https://www.london.gov.uk/sites/default/files/childhouse_jan19_report.pdf);
- ppt presentation on the work of the Lighthouse, July 2020: [https://childhub.org/sites/default/files/webinars/lighthouse\\_webinar\\_for\\_childhub\\_-\\_june\\_2020.pdf](https://childhub.org/sites/default/files/webinars/lighthouse_webinar_for_childhub_-_june_2020.pdf)

### Irish Government Response to Sexual Violence starting 2018: Key Documents

- Department of Justice Press Release setting out Terms of Reference for the O'Malley Review in September 2018, available online via: [Minister Flanagan publishes Terms of Reference for review of the investigation and prosecution of sexual offences - The Department of Justice](#)
- O'Malley Review of the protections for vulnerable witnesses in the investigation and prosecution of sexual offences (August 2020), available online via: [Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences \(justice.ie\)](#)
- Department of Justice-led O'Malley Recommendations Implementation Plan, Supporting a Victim's Journey, published October 2020 and available online via: [Supporting a Victim's Journey - The Department of Justice](#)

### Selected NGO Documents:

- Guide for Lawyers to the Victims' Directive and to the Criminal Justice (Victims of Crime) Act 2017:

<https://www.iccl.ie/wp-content/uploads/2018/11/5871-EU-Victims-Day-Proof-updated-v2.pdf>;

- "Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Criminal Proceedings" – RCNI report covering special measures;

<https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf>

- RCNI Submission to the Review of Protections for Vulnerable Witnesses in the investigation and prosecution of sexual offences: <https://www.rcni.ie/wp-content/uploads/RCNI-Review-of-investigation-and-prosecution-of-sexual-offences-autumn-2018-Submission-Final.pdf>
- RCNI Submission on the Criminal Justice (Victims of Crime) (Amendment) Bill 2018: <https://www.rcni.ie/wp-content/uploads/RCNI-Legal-Advice-PMB-Submission-to-JOCJE-dated-29th-March-2019-Final.pdf>

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- RCNI Position Paper on Previous Sexual History Evidence in Criminal Trials: <https://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>
- RCNI Policy Paper on Case Management and Pre-Trial Hearings in the Criminal Courts: <https://www.rcni.ie/wp-content/uploads/RCNICaseManagementandPreTrialHearingspositionpaperMay12.pdf>

### Victim Anonymity: Recent Cases and draft Legislation:

1. Anonymity under Section 252 Children Act 2001 – text of consolidated version of Section:
  - <https://revisedacts.lawreform.ie/eli/2001/act/24/section/252/revised/en/html>
  - DPP vs EC & Media Outlets Court of Appeal judgement delivered 29/10/2020, text of lead judgement available at:
  - [https://www.courts.ie/acc/alfresco/b37ccbd-2247-4531-b5af-c2b2ce2f4657/2020 IECA 292%20\(Unapproved\).pdf/pdf](https://www.courts.ie/acc/alfresco/b37ccbd-2247-4531-b5af-c2b2ce2f4657/2020 IECA 292%20(Unapproved).pdf/pdf) - see also:
  - 11<sup>th</sup> November 2020: Hunt J made order allowing child rapist to be named in CCC (unreported)
  - IT report available here: <https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/high-court-judge-differs-with-ruling-on-naming-child-victims-of-crime-1.4406339>
2. Anonymity under Sections 7 and 8 Criminal Law (Rape) Act 1981 as amended:
  - DPP vs DH [2020] IECA (23<sup>rd</sup> November 2020), unapproved judgement available online at:
  - [https://www.courts.ie/acc/alfresco/d7b91c9d-459f-4bc3-90ef-36a2e3192768/2020 IECA 321%20\(Unapproved\).pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/d7b91c9d-459f-4bc3-90ef-36a2e3192768/2020 IECA 321%20(Unapproved).pdf/pdf#view=fitH)

### Appendix 1

#### Summary of Hearing Every Voice (RCNI 2018) findings re Scotland and England & Wales:

We found that in Scotland, there is a clear expert and sustained focus on vulnerable witnesses, including vulnerable accused, in the last few years, leading to the introduction of the Vulnerable Witnesses (Criminal Evidence)(Scotland)Act 2019, now mostly in force, which provides for witness testimony to be taken in advance of trial and often much closer to the time of the offence(s), and the establishment of a new Vulnerable Witnesses Centre opened in Glasgow in November 2019 (one of four planned).

Effective inter-agency working on vulnerable witnesses by the Scottish Courts & Tribunals Service, Faculty of Advocates, Judiciary, Procurator Fiscal, police, NGOs [etc] produced the Victims and Witnesses (Scotland) Act (2014), which recognised that accused persons could be children or otherwise vulnerable witnesses too, the Evidence and Procedure Review Report(2015), which looked in detail at special measures both during investigation and court proceedings in Scotland and in other countries, for children and other vulnerable witnesses – this Review includes a close analysis of how the **Barnahus** approach has worked elsewhere, post Norway visit; and in 2016, the Evidence and Procedure Review Next Steps

## RCNI Submission on Victims' Testimony in Cases of Rape and Sexual Assault to the Joint Oireachtas Committee on Justice February 2021

Report: looked in more detail at which solutions might work best in Scottish criminal justice system. On foot of that Report, in 2017/2018, two further studies were done on Joint Investigative Interviews and on Pre-recorded Evidence, respectively. In summary, Scottish solutions are: (1) JIIs: have standardised, high quality training, good technology, and professional transcribers – if JII is not possible, interview should be visually recorded; then (2) whichever way interview is pre-recorded, the pre-recording of cross-examination & any re-examination could & should be done by taking of evidence by Commissioner.

Use of Commissioner Hearings has expanded dramatically in last few years (from 50 applications in 2017 to 158 in 2018, following introduction of 2 x detailed Practice Notes by Lord Justice Clerk). Finally, the Vulnerable Witnesses (Criminal Evidence)(Scotland) Act 2019 most of which was commenced 20 January 2020, means that the norm is that interviews with child witnesses, initially to serious offences only, will be pre-recorded, including cross- and re-examination by Commissioner Hearing, that there will be mandatory Ground Rules Hearings before Commissioner Hearings at which duration of questioning, its time, the form of the questions, the need for an additional supporter and/or any other supportive measures, etc will be discussed by judge and advocates, and if not agreed, ruled upon by judge; and it also allows for Commissioner Hearings to take place before indictment is served on accused. In parallel with this legal development, Vulnerable Witnesses Centres are planned, four throughout Scotland, the first of which opened in Glasgow. It provides a child friendly and supportive venue for Commissioner Hearings – staff are trauma-informed – and the building is quite separate from the Court.

More training materials for advocates about the new Act's procedures are being developed, and the Lord Justice Clerk (Chief Justice) is proposing that the **Barnahus** model is adopted for the most vulnerable child witnesses.

In England and Wales, the Advocates' Gateway, originally an informal grouping of specialist lawyers and academics, produced detailed guidelines on legal, psychological and administrative aspects of facilitating vulnerable witnesses to give their best evidence in criminal proceedings. Detailed Rules of Court were introduced which incorporate and refer to TAG guidelines on various aspects of vulnerable victims' testimony and cover such matters as how to ask questions, at what time of day live evidence should be given, the use of an intermediary with a child or other vulnerable witness, and so on. See [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org), an open access website.

Also in England and Wales, we found that there had been a pilot of the use of pre-recorded cross-examination in three Crown Courts (**child witnesses under 16, other vulnerable witnesses**), and that there was a strong emphasis on professional training to help ensure that vulnerable witnesses can give their evidence with minimum risk of being re-traumatised and maximum chance of being heard and understood in Court.

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### England & Wales Investigative Stage:

There is a Pilot similar to Barnahus now running in London for 2 years from October 18, the Lighthouse in Nth London<sup>10</sup> which combines therapy, medical, social care, advocacy, police input into one service. It has been found that referrals are up compared to earlier mostly police-led service – and are from police, social care, parents, schools, and for over 13s, self-referrals. Interviews are pre-recorded and conducted by a **clinical psychologist** with police officer observing, may be attended by children and young people up to 18, and by 18-25s with learning disabilities, and their response time is weeks whereas CAMHS is much longer (due to significant cuts since 2013). It has multi-agency funding – NHS England, Home Office, Mayor's office, Dept Education, NSPCC (with help from private corporate sponsor).

Outside of this pilot, it was recommended that the ABE ("Achieving Best Evidence) recorded specialist interview process training should be repeated to maintain "open interviewing" skills, and that generally there should be more investment in ABE training issues.

### England and Wales: Court Proceedings Stage:

**Ground Rules Hearings (GRHs)** These are preliminary hearings mandated when cross-examination is being pre-recorded, and usually held when there is intermediary – however in sexual abuse cases where there was no intermediary, GRH was not held in c 50% of cases – leaving door open for more "traditional" (and often oppressive) styles of cross-examination. GRHs cover the manner, duration, timing, subject areas and nature of questioning and consider whether any special measures needed.

With regard to Section 28 Youth Justice and Criminal Evidence Act 1999, pre-recording of cross-examination: despite Government commitment made in 2017, the promised roll-out to all Crown Courts has not yet happened across England & Wales, only to 37 CCs to date – evaluation of the pilot and subsequent research on S 28 applications as compared to "regular" cross-examination, showed that suggestive, leading and "tag" questions were used much less frequently by Section 28 defence advocates when questioning children, that questions from defence advocates were simpler and more age-appropriate in Section 28 applications, that children were able to give their evidence much earlier and take much less time to do it, in Section 28 applications than for "regular" cross-examination scenarios; and finally, that children seemed to be "fresher", to give more complete evidence, and to be more confident giving it, with Section 28 applications.

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<sup>10</sup> \*see this link to a promising preliminary report (2018) on the Lighthouse:

[https://www.london.gov.uk/sites/default/files/childhouse\\_jan19\\_report.pdf](https://www.london.gov.uk/sites/default/files/childhouse_jan19_report.pdf); see also this link to a ppt presentation on the work of the Lighthouse, July 2020:

[https://childhub.org/sites/default/files/webinars/lighthouse\\_webinar\\_for\\_childhub\\_-\\_june\\_2020.pdf](https://childhub.org/sites/default/files/webinars/lighthouse_webinar_for_childhub_-_june_2020.pdf)

## RCNI Submission on Victims' Testimony in Cases of Rape and Sexual Assault to the Joint Oireachtas Committee on Justice February 2021

### Appendix 2 Principal Recommendations of O'Malley Review published August 2020 – Summarised:

- **General Recommendations – Chapter Two:**
- Increased **public awareness** of the Criminal Justice (Victims of Crime) Act 2017.
- Government-sponsored programme of public education on the **meaning and importance of consent** in the context of sexual relationships and sexual activity.
- Greater **inter-agency communication** to ensure that all state agencies, voluntary organisations (NGOs) dealing with vulnerable victims are fully aware of other services besides their own;
- **Consistent standard of all victim support services** throughout the country.
- Chapters 3 through 10 each have more detailed, specific list of recommendations. **Key** specific recommendations include:
- **Chapter 3: Investigation and prosecution of sexual offences**
- All Gardaí interacting with victims should have appropriate training, not just specialists
- All Garda training in this area should be regularly monitored by external experts;
- DPP should be resourced to establish and maintain new Sexual Offences Unit
- **Chapter 4: Anonymity, public attendance and media reporting of sexual offence trials**
- Legislation should be enacted to ensure that the public are excluded from all trials of sexual offences, not just some;
- Current victim anonymity provisions should be extended to include offences against protected and relevant persons (Sections 21 and 22 Criminal Law (Sexual Offences) Act 2017);
- Anonymity of accused to include offences under Part 2 CLSOA 2017 (child sexual exploitation) and sexual assault;
- Law should be amended to allow for verdicts and sentences to be heard in public.
- **Chapter 5: Preliminary trial hearings**

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- PTHs: statute-based and primary focus for issues relating to special measures, disclosure, "Section 3" notice being given (in relation to other sexual experience of complainant), practical matters which may affect trial, etc;
- **Chapter 6: The trial of sexual offences**
- "S.3" applications to include sexual assault, separate legal representation to include complainant cross-examination;
- Judges and lawyers must be informed about S.21 Criminal Justice (Victims of Crime) Act 2017 (restrictions on defence questioning of victims on their private life which is "unrelated to the offence").
- **Disclosure:** right to object to disclosure of counselling records should be publicised better, Gardai should have protocol on digital disclosure, and organisations/individual professionals holding counselling records should have a duty to hand them over to DPP on request.
- **Chapter 7: Information for victims**
- Dedicated Government-run website for victims with all information about all agencies, services, procedures, rights in one place, and Garda ACTIVE Mobility App to help members access all necessary information about victims' rights, services, so that they have it to hand for victims who need it;
- Victims' rights to legal advice from LAB to be extended (Section 26(3A) Civil Legal Aid Act 1995\*) to run from earliest stages through trial and beyond, and to cover sexual assault offences, new offences under CLSOA 2017;
- Court familiarisation and court accompaniment/support services to be available to all victims of sexual offences
- **Chapter 8: Intermediaries**
- - Creation of a cadre of professionally qualified and trained intermediaries to act as advisors at every stage and as interpreters in court, consideration to be given to "sharing" in NI cadre of criminal justice intermediaries;
- **Chapter 9: Reducing delay**
- Pre-trial hearing framework to aim to deal with as many issues as possible in advance of trial;
- Guidelines on discounts for guilty pleas might be prioritised by Sentencing Guidelines and Information Committee,

## RCNI Submission on Victims' Testimony in Cases of Rape and Sexual Assault to the Joint Oireachtas Committee on Justice February 2021

- research to be carried out into causes of delays at each stage of criminal justice process,
- Any proposal to appoint more judges should be preceded by assessment of impact on court "accommodation and facilities";
- **Chapter 10: Training**
- Specialist training for all criminal justice lawyers, judges and other professionals in issues relevant to vulnerable witnesses, and measures, including inspection, to ensure that "appropriate training" is provided to counsellors and other support workers

### **Appendix 3: Table of Available Special Measures in Ireland dated March 2019**

[Note: this is in Landscape format and is added to this document as a separate PDF document]



**Appendix 3: RCNI Submission on Victims’ Testimony to Joint Oireachtas Committee on Justice 02/21  
Table of Special Measures for Victims & Some Witnesses in Legal Proceedings RCNI March 2019**

Special Measures	Statutory Provision	Victims & Witnesses “other than accused” Under 18	Victims & Witnesses “other than accused” Over 18	Victims Only Under 18	Victims Only Over 18	“mental disorder” Or “mental condition”	Sexual Offences only	Relevant Offences only	All Offences	
Video-Link	S13 CEA 92	Yes, unless court “sees good reason to the contrary”	With leave of the court	Yes if S14AA applies	Yes if S14AA applies	Yes, though no specific provision	No, though they are included in definition of relevant offence	Yes, unless S14AA applies	Yes, for victims only if S14AA applies	<b>COURTS?</b> Any criminal proceedings potentially, civil proceedings under S25 DVA 18 (applicants only)
Intermediary	S14 CEA 92	Yes, if court is satisfied that “interests of justice so require having regard to age ....of witness”	Yes, if court is satisfied that interests of justice so require “having regard to ...mental condition of witness”	Yes if S14AA applies	Yes if S14AA applies	Yes, if court is satisfied that interests of justice so require “having regard to the...mental condition of witness”; S19 CEA 92 applies this to anyone with “mental disorder” as defined in CEA 92	No, though they are included in definition of relevant offence	Yes, unless S14AA applies	Yes, for victims only if S14AA applies	Any criminal proceedings potentially

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Screens	S14A CEA 92	Court may direct screen be used unless satisfied that it would be “contrary to interests of justice” to do so	No – victims only	Court may direct that screen be used for victims only if satisfied that “interests of justice so require”, subject to S14AA	Court may direct that screen be used for victims only if satisfied that “interests of justice so require”, subject to S14AA	No	No, though they are included in definition of relevant offence	Yes, unless S14AA applies	Yes, for victims only if S14AA applies	Any criminal proceedings potentially
Wigs/Gowns (restrictions on both lawyers and judges wearing them)	S14B CEA 92	Yes, for relevant offences	No, unless person has “mental disorder” within meaning of CEA 92	Yes	No, unless person has “mental disorder” within meaning of CEA 92	Yes, provided person has “mental disorder” within meaning of CEA 92 and see RIGHT	No, though they are included in definition of relevant offence	Yes, unless person is victim AND either under 18 or has “mental disorder” within meaning of CEA 92	Yes, if person is victim either under 18 or has “mental disorder” within meaning of CEA 92	Any criminal proceedings potentially
Personal cross-examination restrictions	S14C CEA 92	Yes, for relevant offences, court “shall” direct accused not to cross-examine in person,	Yes, for sexual offences only, court “may” direct accused not to cross-examine in person,	Yes, for relevant offences, court “shall” direct accused not to cross-examine in person,	Yes, for sexual offences only, court “may” direct accused not to cross-examine in person,	No specific provision relating to persons with a “mental disorder” (covered by general provisions)	Yes, if the person giving evidence is over 18	Yes, provided the person giving evidence is under 18	No - Only relevant, and sometimes, sexual offences covered	Criminal proceedings for any relevant offence potentially if witness is under 18, sexual

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		unless court's view is that interests of justice so require	unless court's view is that interests of justice so require	unless court's view is that interests of justice so require	unless court's view is that interests of justice so require					offences only if witness is over 18; Under S16 DVA 18, either applicant or respondent in DVA 18 application may apply for order, identical tests for eligibility based on age as in criminal courts
Pre-recorded evidence	S16(1)(b) CEA 92	Yes, provided that offence is sexual one specified in S16(1)(b)(ii) and person is either under 18 or has "mental disorder" as defined in CEA 92	No, unless offence is sexual one specified in S16(1)(b)(ii) and person has "mental disorder" as defined in CEA 92	Yes, if victim is under 18 or has "mental disorder" as defined in CEA 92	No, unless victim has "mental disorder" as defined in CEA 92	Yes, if person is victim with "mental disorder" as defined in CEA 92, or is witness other than accused, has "mental disorder" as above, and offence is sexual one specified in S16(1)(b)(ii)	Yes, sexual offences only if person is a witness and is either under 18 or has "mental disorder" as defined in CEA 92	Yes, relevant offences including sexual offences are all covered as long as witness is victim and is either under 18 or has "mental disorder" as	Yes, all offences are covered provided victim is either under 18 or has "mental disorder" within the meaning of CEA 92	Any criminal proceedings potentially

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								specified in CEA 92		
Counselling records (objection to their disclosure)	S19A CEA 92	Yes, provisions cover complainant in sexual offence trial and “any other person to whom the counselling record relates”, of any age	Yes, provisions cover complainant in sexual offence trial and “any other person to whom the counselling record relates”, of any age	Yes	Yes	Yes (no specific provision or exclusion)	Yes, sexual offences referred to in Schedule to SOA 2001 are covered	No, unless offences are sexual offences referred to in Schedule to SOA 2001	No, unless offences are sexual offences referred to in Schedule to SOA 2001	Criminal proceedings for any sexual offence referred to in the Schedule to SOA 2001; complainant or witness are both entitled to separate legal representation (LAB) on application for disclosure
In camera – general power to exclude public/part of it	S20 CJVCA 17	No – victims only	No – victims only	Yes, if Court is satisfied there is need to protect victim from secondary and repeat victimisation, intimidation, or retaliation and it is not contrary to	Yes, if Court is satisfied there is need to protect victim from secondary and repeat victimisation, intimidation, or retaliation and it is not contrary to	Yes, if Court is satisfied there is need to protect victim from secondary and repeat victimisation, intimidation, or retaliation and it is not contrary to the interests of justice	Yes. NB sexual offence proceedings have special additional provisions under S6 CLRA 81 (rape, agg sexual assault, defilement) and S20 CJA 1951 (any offence of	Yes, all offences are covered by S20 CJVCA 17 and sexual offences have specific additional provisions – see LEFT	Yes, all offences are covered by S20 CJVCA 17 and sexual offences have specific additional provisions – see LEFT	Any criminal Proceedings potentially; Under DVA 18 SS23 and 34 respectively, any civil proceedings and any breach proceedings “shall” be

**Appendix 3: RCNI Submission on Victims’ Testimony to Joint Oireachtas Committee on Justice 02/21  
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				the interests of justice	the interests of justice		obscene or indecent nature)			heard otherwise than in public
Anonymity for complainant – S7 applies from moment accused is charged	S7 CLRA 81	No – complainants only in certain sexual offence trials may benefit from anonymity	No – complainants only in certain sexual offence trials may benefit from anonymity	Yes – limited to complainants in certain sexual offence trials only	Yes – limited to complainants in certain sexual offence trials only	Yes – limited to complainants in certain sexual offence trials only (no separate provision for complainants with “mental disorder”)	Yes – limited to trials of following sexual offences: rape, agg sexual assault, sexual assault, defilement, incest, offences contrary to S6 CLSOA 93	No, apart from those relevant sexual offences listed LEFT	No, apart from those relevant sexual offences listed LEFT x 2	Criminal proceedings for certain sexual offences; also in S36 DVA 18 breach offence proceedings, reporting restrictions apply
Legal advice for complainant – available free of charge without means test from LAB once accused has been charged	S26 CLAA 95	No- victims of certain sexual offences only may benefit from free legal advice once accused is charged (LAB)	No- victims of certain sexual offences only may benefit from free legal advice once accused is charged (LAB)	Yes, victims of certain sexual offences only may benefit from free legal advice once accused is charged (LAB)	Yes, victims of certain sexual offences only may benefit from free legal advice once accused is charged (LAB)	Yes, victims of certain sexual offences only may benefit from free legal advice once accused is charged (LAB) – no separate provision for complainant with “mental disorder”	Yes, victims of certain sexual offences only may benefit from free legal advice once accused is charged (LAB) – these are: rape, agg sexual assault, incest, defilement, and offences	No, victims of certain sexual offences only may benefit from free legal advice once accused is charged (LAB)	No, victims of certain sexual offences only may benefit from free legal advice once accused is charged (LAB)	Available once accused is charged with one or more sexual offences listed LEFT x 2 ie out of court – is not a form of legal representation <b>NOTE</b> victims of certain

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							contrary to S6 CLSOA 1993			trafficking offences have right to legal advice under CLAA 95 also
Legal representation – becomes available once notice of S3 CLRA 81 application is received from defence free of charge and without means test – extends to application for leave only	S4A CLRA 81	No – applies to complainants in certain sexual offence trials only, namely rape, agg sexual assault, defilement, and offences contrary to S6 CLSOA 93	No – applies to complainants in certain sexual offence trials only, namely rape, agg sexual assault, defilement, and offences contrary to S6 CLSOA 93	Yes - applies to complainants in certain sexual offence trials only, namely rape, agg sexual assault, defilement, and offences contrary to S6 CLSOA 93	Yes - applies to complainants in certain sexual offence trials only, namely rape, agg sexual assault, defilement, and offences contrary to S6 CLSOA 93	Yes - applies to complainants in certain sexual offence trials only, namely rape, agg sexual assault, defilement, and offences contrary to S6 CLSOA 93 (no specific provision for complainants with “mental disorder”)	Yes - applies to complainants in certain sexual offence trials only, namely rape, agg sexual assault, defilement, and offences contrary to S6 CLSOA 93	No – applies to complainants in certain sexual offence trials only, namely rape, agg sexual assault, defilement, and offences contrary to S6 CLSOA 93	No – applies to complainants in certain sexual offence trials only, namely rape, agg sexual assault, defilement, and offences contrary to S6 CLSOA 93	Criminal proceedings for certain sexual offences only, namely rape, agg sexual assault, defilement and offences contrary to S6 CLSOA 1993 <b>NOTE</b> judge cannot hear S3 CLRA 81 applic without ensuring complainant has had notice of it and has had reasonable opportunity

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										to arrange legal rep.
Privacy “sexual experience” – defence can only adduce evidence of complainant’s “other sexual experience” with leave of Court. Leave should only be granted if: “[judge]..is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is	S3 CLRA 81	No – only applies to defence applications in respect of complainant’s other sexual experience in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93	No – only applies to defence applications in respect of complainant’s other sexual experience in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93	Yes – only applies to defence applications in respect of complainant’s other sexual experience in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93	Yes – only applies to defence applications in respect of complainant’s other sexual experience in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93	Yes – only applies to defence applications in respect of complainant’s other sexual experience in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93 (not specific to complainants with “mental disorder”)	Yes – only applies to defence applications in respect of complainant’s other sexual experience in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93	No – only applies to defence applications in respect of complainant’s other sexual experience in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93	No – only applies to defence applications in respect of complainant’s other sexual experience in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93	Defence obligation to seek leave to adduce evidence of complainant’s other sexual experience only applies in trials of certain sexual offences, namely rape, agg sexual assault, sexual assault, defilement, incest and offences contrary to S6 CLSOA 93. <b>NOTE</b> prosecution do not have to seek leave to adduce this kind of evidence.



**Appendix 3: RCNI Submission on Victims’ Testimony to Joint Oireachtas Committee on Justice 02/21  
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<p>satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied” (S3(2)(b) CLRA 81)</p>										
<p>Privacy S21 CJVCA 18 – restrictions</p>	<p>S21 CJVCA 18</p>	<p>Yes – law gives court power to</p>	<p>Yes – law gives court power to make any</p>	<p>Yes – law covers “any proceedings</p>	<p>Yes – law covers “any proceedings</p>	<p>Yes – law covers “any proceedings</p>	<p>Covers “any proceedings</p>			

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on defence cross-examination relating to private life of victim which is unrelated to the offence		make any directions it considers “just and proper regarding any evidence ....and any questions asked in cross-examination at the trial, which relates [to irrelevant aspects of victim’s private life]”	make any directions it considers “just and proper regarding any evidence ....and any questions asked in cross-examination at the trial, which relates [to irrelevant aspects of victim’s private life]”	make any directions it considers “just and proper regarding any evidence ....and any questions asked in cross-examination at the trial, which relates [to irrelevant aspects of victim’s private life]”	make any directions it considers “just and proper regarding any evidence ....and any questions asked in cross-examination at the trial, which relates [to irrelevant aspects of victim’s private life]”	directions it considers “just and proper regarding any evidence ....and any questions asked in cross-examination at the trial, which relates [to irrelevant aspects of victim’s private life]” (no exclusions where victim has “mental disorder”)	relating to an offence” - Court may make order where court is satisfied that there is a need to protect victim from secondary and repeat victimisation, intimidation or retaliation, and it would not be contrary to interests of justice in the case [to do so] <b>NOTE</b> covers sexual assault cases	relating to an offence” - Court may make order where court is satisfied that there is a need to protect victim from secondary and repeat victimisation , intimidation or retaliation, and it would not be contrary to interests of justice in the case [to do so]	relating to an offence” - Court may make order where court is satisfied that there is a need to protect victim from secondary and repeat victimisation , intimidation or retaliation, and it would not be contrary to interests of justice in the case [to do so]	relating to an offence”
Acc’ment in Court	Various: S20 CJVCA 17 refers to general right of victims to be	No – these rights apply to crime victims, and applicants in DVA 18 proceedings	No – these rights apply to crime victims, and applicants in DVA 18	Yes - these rights apply to crime victims, and applicants in DVA 18 proceedings	Yes - these rights apply to crime victims, and applicants in DVA 18	Yes - these rights apply to crime victims, in any criminal proceedings and applicants in	Yes - these rights apply to crime victims, in any criminal proceedings and applicants in DVA 18	Yes - these rights apply to crime victims, in any criminal proceedings and	Yes - these rights apply to crime victims, in any criminal proceedings and	In any criminal proceedings for any offence (1) separate right for

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	accompanied by friend or support worker in court (1) S29 CJA 17 provides for victim to be accompanied by friend or support worker in certain sexual trials (2) and S26 DVA 18 provides for applicants for DVA orders only to have CA rights (3)	only. Child victims in criminal proceedings are entitled to be accompanied by “appropriate adult” as well as by a support worker, at Garda interview as well as at Court (S18 CJVCA 17)	proceedings only.	only. Child victims in criminal proceedings are entitled to be accompanied by “appropriate adult” as well as by a support worker, at Garda interview as well as at Court (S18 CJVCA 17)	proceedings only.	DVA 18 proceedings.	proceedings. Victims of rape, agg sexual assault, sexual assault, defilement, and offences contrary to S6 CLSOA 93, have separate right to court accompaniment (See S29 CJA 17)	applicants in DVA 18 proceedings.	applicants in DVA 18 proceedings.	complainants in certain sexual offence proceedings to be accompanied by friend or support worker (2) and S26 DVA 18 right of applicants to be accompanied by friend or support worker in DVA order proceedings (3)
Video-link for adults and children in any civil proceedings, if Court is satisfied no unfairness arises and it	S26 CLMPA 08	Yes, adult parties and witnesses may avail of this protection	Yes, under and over 18s may avail of this protection, both parties and witnesses	Yes, adult parties and witnesses may avail of this protection	Yes, under and over 18s may avail of this protection, both parties and witnesses	No separate provision for parties/witnesses with any form of disability	N/A	N/A	N/A	Any civil court NOTE: DVA applications have specific separate provisions under DVA 18

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is not contrary to interests of justice										NOTE: V/L may be used inside/outside State
Video-link with the leave of the court, from inside or outside State	S21 CA 97	No, children only may benefit as well as adults whose mental disability means it is not reasonable for them to live independently	Yes, any witness under 18 may benefit as well as adults whose mental disability means it is not reasonable for them to live independently	No, children only may benefit as well as adults whose mental disability means it is not reasonable for them to live independently	Yes, any witness under 18 may benefit whose mental disability means it is not reasonable for them to live independently	Yes, any person over 18 may benefit whose mental disability means it is not reasonable for them to live independently	N/A	N/A	N/A	Any civil proceedings concerning the welfare of a child or a person whose mental disability means it is not reasonable for them to live independently
Intermediary through whom questions may be put to child/person with mental disability with leave of the court	S22 CA 97	No, children only may benefit unless person has "mental disability"	Yes, children only may benefit unless person has "mental disability"	No, children only may benefit unless person has "mental disability"	Yes, children only may benefit unless person has "mental disability"	Yes, if the person has a "mental disability" such that it is not reasonable for them to live independently	N/A	N/A	N/A	Any civil proceedings concerning the welfare of a child or of a person of full age with a mental disability



## **Appendix 3: RCNI Submission on Victims' Testimony to Joint Oireachtas Committee on Justice 02/21 Table of Special Measures for Victims & Some Witnesses in Legal Proceedings RCNI March 2019**

### **NOTES:**

#### **(1) List of Statute Abbreviations:**

CJA 51:	Criminal Justice Act 1951
CLRA 81:	Criminal Law (Rape) Act 1981
CLSOA 93:	Criminal Law (Sexual Offences) 1993
CLAA 95:	Civil Legal Aid Act 1995
CA 97:	Children Act 1997
CLMPA 08:	Civil Law (Miscellaneous Provisions) Act 2008
CLSOA 17:	Criminal Law (Sexual Offences) Act 2017
CJVA 17:	Criminal Justice (Victims of Crime) Act 2017
DVA 18:	Domestic Violence Act 2018

#### **(2) Key to other Abbreviations:**

Agg sexual assault:	Aggravated sexual assault contrary to Section 3 Criminal Law (Rape) (Amendment) Act 1990
Defilement:	Sexual act with a child, contrary to Sections 2 and 3 Criminal Law (Sexual Offences) Act 2006 (as amended)

#### **(3) Status of all Special Measures cited in this table:**

All are now in force, as at 5<sup>th</sup> March 2019.



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**(4) Any related Court Rules:** None as at 5<sup>th</sup> March 2019, but it is understood there will soon be Court Rules relating to DVA 2018.

**Dated 5<sup>th</sup> March 2019**

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**Disclaimer:** While every care has been taken to ensure that all information provided in this Table is up to date and accurate as at 26<sup>th</sup> February 2019, no responsibility is taken by RCNI clg or any of its employees, contractees and/or volunteers for any inadvertent omission or error therein or for any consequences of such omission or error whatsoever.

**Note:** This Submission is supported by Safe Ireland [www.safeireland.ie](http://www.safeireland.ie)



# LAW SOCIETY SUBMISSION

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**VICTIM'S TESTIMONY IN CASES OF RAPE AND SEXUAL ASSAULT**

**SUBMISSION TO THE JOINT OIREACTHAS COMMITTEE ON JUSTICE**

**FEBRUARY 2021**

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## ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

## **Introduction**

We appreciate the opportunity to provide our comments and recommendations to the Joint Committee. This submission has been produced with input from the Divisional Protection Services Unit (DPSU) in Dundrum, Victim Support at Court (VSAC), the Department of Health and the Office of Director of Public Prosecutions which is greatly appreciated by the Society.

For the purpose of this submission, 'victim' or 'complainant' refers to any person making a complaint in cases concerning rape, sexual assault and any sexual offences.

## **Summary of Recommendations**

The Society recommends implementation of the following:-

- i. Training of judges and other legal personnel in dealing with victims of sexual offences. Placing emphasis on a trauma-informed approach to victims in their entirety as well as their testimonies.
- ii. Separate legal representation for victims at sexual offence trials irrespective of whether questioning of previous sexual experience is to occur.
- iii. Public awareness to be raised of victim rights legislation, the victims' charter and how to access the criminal justice system by way of lodging formal complaints.
- iv. Co-operation amongst stakeholders and all agencies in the provision and exchange of information, particularly in relation to services for victims, including access to counselling records (where necessary and appropriate) and access to support services.
- v. Standardisation of services nationwide for court facilities for victims, their families and supporters.

## **Commentary**

Testimony in the area of rape and sexual offences is currently guided by juxtaposing the constitutional and legal rights of both the accused and the complainant. Article 38.1 of the Constitution provides that 'No person shall be tried on any criminal charges save in due course of law' ensuring a right to procedural fairness from the time of an accused persons arrest to completion of any trial or sentence hearing. Complainants, as members of the public, are also protected by Article 40.3 of the Constitution under Article 40.3 which provides that 'The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'.

The criminal justice system is obliged to conform with fundamental rights as set down in our constitution. This conformity extends to both complainants and defendants in criminal trials and is the cornerstone of ensuring fair procedures for both and safeguarding the right to liberty, the right to bodily integrity and the right to fair procedures. A sexual offence is undoubtedly a violation of a person's constitutional right to bodily integrity and any complainants of such an offence are therefore entitled to benefit from the State's onus to protect and assist victims of these offences, and to administer justice accordingly.

The European Court of Human Rights has also recognised that crimes relating to sexual offences are repugnant to the rights enshrined in the European Convention on Human Rights.

Courts have recognised that sexual offences are a gross violation of a person's constitutional and human right to bodily integrity and personal autonomy. Sexual offences are viewed as some of the most grievous offences, victims have referenced their bodies as crime scenes, their memories, thoughts and emotions surrounding the offence as well as the questioning and scrutiny of their testimony in the criminal justice system. Sexual offences can, of course, cause bodily harm but the act itself is also the cause of ongoing sequelae in the form of psychiatric and emotional damage to the complainant, which can be long term or lifelong. The criminal justice system, and attending court to provide evidence of their ordeal, can be re-traumatising for victims and can invoke a reoccurrence in previously assuaged physical and psychological symptoms. Sexual offences occurring in a family unit can also disrupt that family unity, the effects of a sexual offence perpetrated against a family member can result in a ripple effect of lifelong and lasting familial disharmony often spanning across generations. Court attendance to provide testimony can exacerbate and put these issues under a spotlight for each victim depending on their individual circumstances.

In terms of providing evidence in cases of sexual offences, there are currently a wide range of rights, measures and facilities provided and designed with victims at the heart of concern. These special measures are available for all vulnerable witnesses, bearing in mind that vulnerable witnesses may include witnesses who are not the direct complainant in the case. In some circumstances, defendants can also be vulnerable witnesses, who are under the auspice of a difficulty or sensitivity, such as age, ill health or incapacity.

Victims of sexual offences, unlike any other offence, enjoy and retain a right to anonymity, provided by Section 7(1) of the Criminal Law (Rape) Act 1981, for the duration of criminal proceedings, including during their testimony. Victims cannot be publicly identified and this right continues after trial, regardless of the outcome. Victims have the right, after conviction, to waive their right to anonymity and the accused can then be named. This right starts as soon as the accused is charged with a sexual offence and remains the right of the victim until the completion of the criminal proceedings. The courts take this right very seriously, any publication or broadcast found in breach of this legislation, is punishable by a term of three years imprisonment, a fine, or both.

Sexual offence trials and by consequence, victims' testimony in same, are heard 'in camera' in the absence of the public, to protect the anonymity of the victim. Section 6(1) of the Criminal Law (Rape) Act 1981, as amended by Section 11 of the Criminal Law (Rape) (Amendment) Act 1990 provides that 'the judge, the justice or the court, as the case may be, shall exclude from the court during the hearing all persons except bona fide representatives of the press and such other persons (if any) as the judge, the justice, or the court, as the case may be, may in his or its discretion permit to remain'.

Clearly, the legislation takes a firm stance on those to be present for the evidence given in a sexual offence trial, persons will be excluded, unless it detracts the interests of the case. The legislation and the judiciary in making such orders to exclude persons from the body of the court in sexual offence trials, is cognisant that public presence would add to the stress of victims and other witnesses. In an already stressful and challenging environment for the victim, the legislation is mindful of the safety of the victim in terms of re-traumatisation and their right to anonymity. To further the aim of protecting victims through their testimony and the overall trial process, Practice Direction (SC18) restricts use of electronic devices in

court, which would limit the potential for a victim's identity being exposed on social media. Notwithstanding the 'in camera' rule applied to sexual offence trials, victims are always entitled to be supported at court by a parent, partner, relative, friend or other nominated person(s). Victims are also entitled to court accompaniment organised by VSAC, One in Four and the various Rape Crisis Centres countrywide, which are a valuable resource to complainants.

The Criminal Evidence Act 1992 contains a range of invaluable measures to assist vulnerable witnesses in all trials, including sexual offence cases during the course of their testimony. One such measure is the facility for the victim giving evidence in court, to utilise a screen between themselves and the accused. This facility is ordered by the court where it is deemed appropriate on the merits of the case, unless the court considers it contrary to the interests of justice.

Section 14 of the Criminal Evidence Act 1992 provides for the use of intermediaries in giving testimony as part of the trial process. Their sole function is to assist in the communication process, similar to that of an interpreter, their role is to assist in adducing the best evidence, not to advocate or support the witness or accused in any way. Giving evidence can pose a number of difficulties for children or people with particular difficulties or disabilities and since a noteworthy portion of persons who interact with the criminal justice system satisfy the criteria for being a vulnerable person, intermediaries play a vital role in the trial and testimony process. Their involvement is based on the premise that all persons should be assisted to participate in criminal proceedings on an equal footing with others. Consequently, intermediaries are appointed to any witnesses who requires assistance, including accused persons.

The benefit of an intermediary to a victim giving testimony in a sexual offence case, is their ability to facilitate communication, using appropriate questioning for the witnesses age and level of understanding and particular requirements, to ensure that the victim's evidence to the court is as full and accurate an account as possible. This includes facilitating victims giving evidence by way of video link as well as in court.

The Criminal Justice (Victims of Crime) Act 2017 and the Children's Act of 2001, amended the Criminal Evidence Act of 1992, to provide for intermediaries for all witnesses, including victims. These amendments have the consequence of ensuring that the fullness of the issues at hand is conveyed to the court and that the victim's testimony is, to the largest extent possible, accurately presented in the round. Currently, Irish law allows for intermediaries solely at the trial stage but they have an important role at all stages of criminal procedures. There are many occasions when an interview of an accused at a Garda Station, or a specialist interview with a witness or a victim, would benefit from the presence and expertise of an intermediary.

Section 16 of the Criminal Evidence Act 1992, provides that video recording of any evidence in relation to offences, including sexual offences, through a live television link in proceedings (under Part 1a of the Criminal Procedure Act 1967) is admissible. Video recording of any statement made by any victim under 18 years of age, or those with mental disorders, is also admissible. However, in both circumstances, this evidence is only admissible at trial where the same oral evidence would be admissible and the witness is available at trial for cross examination. The court can refuse to admit this type of video link evidence if it is deemed not to be in the interests of justice of the case. This interest will be assessed on a case by case basis and the particular vulnerabilities or complexities of the victim will be borne in mind throughout the decision-making process.

Notwithstanding the ability of the court to exclude video link evidence, it remains a valuable measure to facilitate victims' testimony. Video link evidence limits the possibility of re-traumatisation of the victim by having to attend court in person thereby making the criminal trial proceeding less stressful for victim and limiting the emotional and psychological detriment they may otherwise have experienced as a result of attending court in person. That is not to say that delivering their testimony by video link will be a panacea for all victims but it may go some way to assuaging some of the anticipatory anxiety and stress associated with giving evidence at trial. Currently Irish law does not allow for recorded cross examinations.

When ascertaining if special measures are necessary, the court must be cognisant of the need to protect the victim from secondary victimisation, intimidation or retaliation. The court must take into account the nature and circumstances of each case, the nature and circumstances of each particular victim as well as any specific complexities which may be relevant to them or the case.

During the course of providing witness testimony, the issue may arise of questioning a victim regarding their previous sexual experiences. Section 3 of the Criminal Law (Rape) Act 1981 makes provision for the questioning of victims relating to previous sexual experiences and the parameters in which that may take place. The application made during trial to question a victim in this regard is made at the trial stage. There is a value in this application being made at pre-trial stage and that concept is addressed as part of the Society's recommendations.

In the event of a successful application by the defence to question a victim regarding their previous sexual history, the victim is entitled to be heard and separately legally represented under the Civil Legal Aid Act 1995. The Legal Aid Board must be immediately contacted and they are obliged to provide representation to the victim at the trial stage. All victims to whom this relates, must be given reasonable opportunity to source representation. This mechanism provides additional support for victims in understanding the legal process of a criminal trial and their rights and role within it. While the legal representative assigned will have no role to play in the victim's questioning, they can offer valuable advice before and after a victim's testimony. There is a concern that, in seeking separate legal representation, there is a possibility that the victim would receive an advisor who may be less experienced in the area of sexual offences as the accused's legal advisors. This is an area which should be reformed as reflected in our recommendations. There is also an argument to be made for victims receiving separate legal representation for the entirety of the trial process, not just in circumstances where their prior sexual experience is to be explored in cross examination, and also an argument that separate legal representation should apply in cases even where no prosecution is advanced. This is also an area for consideration for reform. However, the risk of upsetting the balance between the well-established practice around how criminal trials are conducted and the fair procedures the defence is entitled to is a concern. As always, the rights of the accused must also be considered, as required by the Constitution.

In the event of a successful application to question a victim regarding their prior sexual history, no testimony shall be advanced and no question can be asked in cross examination of the victim, other than in respect of matters to which the trial relates, except with the leave of the Judge. A Judge can allow questioning under Section 3(2)(b) of the 1981 Act, if it would be unfair to the accused to refuse to allow the evidence to be adduced or the question to be asked. It should be noted that the younger the victim is, the less appropriate questioning is as it may be extremely traumatic for a younger witness. Questioning should always be confined to what is strictly necessary in the circumstances and should never be

used as a means to embarrass or distress the victim. As with any method or line of adducing evidence, a balance must be struck between ensuring a fair trial for the accused and respecting the victim's rights to personal privacy and human dignity. Allowing questioning regarding previous sexual history does not grant defence practitioners leave to ask what they wish. Discretion remains with Judges to disallow a question, unless it is in the interests of the case to allow it. In this regard, Judges are always required to be vigilant as to how questioning is conducted.

Victim testimony can also extend beyond the trial hearing itself in the form of disclosure hearings that may take place in advance of the trial. Disclosure hearings governed by Section 19(a) of the Criminal Evidence Act 1992, while not often utilised, occurs where an issue concerning what material is relevant to the court proceedings and what material should or should not be disclosed arises. This usually occurs in relation to Counselling Records of the victim, although this is not the sole source of disclosure hearings. Such documents, being of a highly sensitive, narrative account, their relevancy, complexity and how they should be disclosed and retained, are usually the subject of disclosure hearings, if one arises, in sexual offence cases. When a disclosure hearing is taking place, all victims have the right to be heard and separately legally represented thus broadening the scope for the occasions on which a victim may find themselves addressing the court regarding the matters at hand. If the court orders disclosure where it is deemed to be in the interests of justice to do so, the court can impose any conditions necessary to protect the victim and their privacy. Victims should be aware of all their rights in this regard, not only the right to be heard at any such disclosure hearing, but also in terms of their right to legal representation and the purpose for which their records are being provided. Records are required to be disclosed to avoid the risk of an unfair trial for the accused. Various orders can be made to ensure such records are disclosed respectfully and in accordance with the victim's rights.

To assist victims of sexual offences in attending court to give their evidence, the DPP and AGS offer a victim and witness familiarisation scheme. This involves a visit to a court room, well in advance of the trial, to help the victim to familiarise themselves with surroundings and for the prosecuting Garda and solicitor to explain the various personnel and their roles. This has been of great assistance to victims in relieving some of their stress and anxiety in advance of the court date. Given the intense personal nature of sexual offence trials, there is huge value for victims in knowing the layout of the court room, where facilities are within the court house and to meet with the personnel working on the case, in advance of the trial date. Solicitors and Gardaí can obviously not engage in coaching or speaking to the victim with respect to any evidence that may be adduced. However, they can familiarise the victim with the environment and cover procedural issues in order to allay fears to some degree.

On completion of the trial, where a conviction has been secured, victims have a further opportunity to address the court via their Victim Impact Statement. This is a facility available to victims of all crimes and is well utilised in court proceedings. The introduction of Victim Impact Statements through legislation in 1993, gave recognition to victims' rights and copper-fastened a victim's right to be heard at a sentence hearing. Victims can now express the impact the offence has had on them and their lives, in a manner which perhaps had not been available to them as part of their testimony. The right to deliver this statement, either in person or submitted to the judge directly in writing, is highlighted for all victims as a means to have their viewpoint heard by the sentencing Judge. It is noted by many victims who have submitted a statement, that it was a cathartic exercise at the end of a stressful criminal procedure experience.

The effect of the current criminal process on victims and by extension practitioners has resulted in both positive and negative experiences. There is a high risk of re-victimisation and re-traumatisation for victims which is understandable given the nature of the crime and the fact that the court proceedings themselves can be traumagenic. Recounting the incident in the stressful environment of a court room, with the accused and legal personnel who are strangers present, the adversarial nature of cross examination and the sensory and emotional aspects of narrating their experience are all factors which run the risk of causing victims distress and re-traumatisation. Practitioners, and those who attend court in a court accompaniment capacity, have also noted the psychological distress encountered as a consequence of listening to victims relay their personal accounts.

Many victims noted that they felt like mere witnesses in the case and while that is objectively their role in the overall structure of the current criminal process, victims should be a key aspect of the conduct of every trial, bearing in mind the trial itself and the impact it will have beyond the final day in court. Other victims noted that they were profoundly impacted by giving evidence at trial, noting that it brought up reminders of the harm suffered and caused a setback in their psychological and emotional recovery and that the adversarial nature of proceedings made them feel as if they were the person on trial. Victims frequently note that the proximity in court to the accused and the lack of privacy in consultation with legal advisers is an urgent concern.

On the other hand, many describe a largely positive experience, associating attending trial and giving their evidence as an achievement and a re-balancing of the loss of power they may have felt during the commission of an offence. Many victims reference the Gardaí and other professionals they encounter during the process as key to that outcome. An overriding message from victims is they want to be kept apprised of developments and have the process explained to them in advance. Juxtaposed with this however is the requirement that the concept of a fair trial, enshrined in our constitution, is at the heart of every trial.

The following recommendations are made in consideration of improving the administration of justice in sexual offence cases:-

### **Recommendation I**

***Training of judges and other legal personnel in dealing with victims of sexual offences. Placing emphasis on a trauma-informed approach to victims in their entirety, as well as during their testimonies.***

Professionals dealing with victims in the area of sexual offences would benefit from specialised training to obtain a deeper and more realistic understanding of victims lived experiences. It would also assist in gaining a deeper appreciation for the anxieties that victims may have as the criminal process progresses.

An awareness is needed, by all professionals involved, for the potential of re-traumatisation of victims, through repeated discussion and disclosure of their experience with legal professionals, Gardaí as well as through their testimony itself. Judges and other professionals, must be sensitive to the trauma experienced by all victims of sexual offences, regardless of age, background, gender or their particular circumstance. It should also be borne in mind, that many victims will still be experiencing trauma when they make report to Gardaí and, in those circumstances, an appropriate approach from all professionals would be beneficial. The EU Directive on Victims' Rights has emphasised the need for avoiding the re-traumatisation of victims. Further training in this area would limit the potential for re-traumatisation of victims.

Training for professionals should include education on re-traumatisation and the emotional trauma experienced by victims of sexual offences to allow for a more trauma-informed approach. To that end, Gardaí are often a victim's first point of contact. It is vital therefore, that Gardaí have the requisite training and information to equip them to engage professionally and empathetically with any person reporting a sexual offence. This is already taking place through the formation of DPSUs countrywide. Many Gardaí already fulfil this role in an exemplary fashion. Professionals should be cognisant that victims' interaction with services will inform how, and if, future victims come forward and so, the need to provide a professional service at all times is paramount. This is true of all service providers, not just Gardaí.

Training should also create awareness, among practitioners and Gardaí, of difficulties experienced by vulnerable witnesses, including defendants. It would be desirable to equip lawyers with skills to elicit best evidence in these circumstances. By extension, this would facilitate professionals to have an all-encompassing understanding of their obligations to victims. In this vein, the prospect of attributing intermediaries at every stage of court proceedings, not just the trial, should be explored.

## **Recommendation II**

### ***Separate legal representation for victims at sexual offence trials irrespective of whether questioning of previous sexual experience is to occur.***

It would be beneficial, both to victims and to the smooth conduct of all trials, if separate legal representation were to be available to victims, regardless of whether they are to be questioned regarding their sexual history.

When questioning a victim regarding previous sexual experience, it would be preferable if there were additional provisions allowing the victim's barrister to continue to represent them while questioning is taking place - not just in an advisory capacity before and after testimony, as is currently the case.

Separate legal representation could be considered to be extended to include victims of sexual assault and to other victims even where no prosecution is being brought.

It would be in ease of both the trial process and the victims if applications to permit questioning a victim regarding prior sexual experience, could be highlighted at the pre-trial stage, rather than waiting until the trial itself. This would give greater time for the victim to receive the legal advice they are entitled to and would limit the potential for psychological detriment to the victim by bringing such an application during already traumagenic trial proceedings. The Legal Aid Board would need to be immediately informed so they can adequately represent and advise the victim. It would also be desirable if the victim could be represented by a barrister of the same level of seniority as the accused. By making this application at the pre-trial stage, more time would be available to find a suitably experienced barrister for the victim.

Section 26(3a) of the Civil Legal Aid Act 1995 would require amendment to allow representation by the Legal Aid Board of all victims of sexual offences and other victims where no prosecution is being taken.

### **Recommendation III**

#### ***Public awareness to be raised of victim rights legislation, the victims' charter and how to access the criminal justice system by way of lodging formal complaints.***

The Criminal Justice (Victims of Crime) Act 2017 confers a wide range of rights on victims of crime generally, no less so on those who have been the victim of a sexual offence. All victims should be educated and informed as to their statutory and constitutional rights and greater public awareness of the 2017 legislation would facilitate this.

Interactions with members of the public and Gardaí suggest many complainants are not aware of their rights or the services available. For example, many people are unaware of the facilities provided by Sexual Assault Treatment Units in the aftermath of a crime and how the public may access same in the event they need assistance.

Given the nature of crime, it is often only when people require the service that they seek it out, this is at a time when they are already vulnerable. If public awareness of the legislation and services available was more prominent, it might translate to a greater uptake in service participation at a crucial stage for victims in the immediate aftermath of the commission of an offence. Sexual offences can leave victims severely traumatised and the nature of the crime and sometimes the relationship with the perpetrator, victims can feel isolated and unable to contact support services or unsure of what services are available. Greater public awareness in this area would assist victims at their most vulnerable. This concept is echoed by DPSUs and VSAC who agreed that a major barrier to victims accessing services is the lack of knowledge around what is available and how to secure such access.

Feedback from victims post-trial can inform agencies as to how best to improve communications and services for future reference.

DPSUs have advised that they would like to see victims contact made with victims by support services in the aftermath of a crime, rather than leaving the onus on the victim to contact supports. Many victims can still be in contact with/living with the perpetrator which makes it more difficult to make contact with services through isolation or fear of re-victimisation from the perpetrator. If a liaison from an agency were to make contact with them, greater uptake may be seen in services available.

VSAC have advised that 80% of their referrals are through the Gardaí. They would like to see greater awareness of their service and the facilities they provide to victims attending court as many are unaware of the facilities offered until quite close to the trial date. It would be preferable that they could avail of assistance throughout the process.

### **Recommendation IV**

#### ***Co-operation amongst stakeholders and all agencies in the provision and exchange of information, particularly in relation to services for victims, including access to counselling records (where necessary and appropriate) and access to support services.***

Specialised services are available to victims, through the Gardaí, the DPP, Probation Services, Courts Services, VSAC, SATU, DRCC, One in Four and many other organisations nationwide. The perception from those working in these services is that there is little public awareness of what they offer and how they can be accessed, even by other agencies. While these agencies work successfully together on a daily basis, throughout the entire

criminal process, greater cohesion amongst service providers would be of huge benefit in ensuring that victims are adequately informed and sufficiently supported at all times. This could be done through inter-agency meetings and training on the awareness of the role each has to play.

## **Recommendation V**

### ***Standardisation of services nationwide for court facilities for victims, their families and supporters.***

The familiarisation service offered by the DPP and AGS should continue in its current format and should be applied consistently across the country with the relevant Gardaí and State Solicitors. From feedback provided, there is a clear need for victims to be kept informed at all stages of the process and the standardisation of services, and further roll out of procedures which have been successful countrywide, would be of benefit both to service users and service providers, to assist in the smooth running of criminal proceedings, thereby minimising the increased risk of delays to trials and further distress for victims.

There have been major improvements to facilities for victims across the country in recent years and continued development and standardisation of same will benefit everyone engaged in the criminal trial process.

Great strides have been made in recent years, notably through the Criminal Justice (Victims of Crime) Act 2017, to promote and support victims' rights, facilitate victim testimony within criminal trial proceedings, the training of legal personnel and the establishment of DPSUs. The establishment of the DPP's Specialised Sexual Offences Unit is another commitment to progress in this area. As the needs of victims evolve, services and professionals will need to adapt accordingly.

There is an ongoing opportunity to develop the potential for victims to engage with the criminal justice system in a more positive and considered way and in a manner that assists with the effective administration of justice and the management of criminal trials.

## **Conclusion**

We hope that the Committee finds these observations and recommendations to be helpful and will be glad to further engage on any of the matters raised.

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## Submission to the Joint Committee on Justice in relation to the “Victim’s Testimony in cases of Rape and Sexual Assault” – February 2021.

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### 1. Introduction

Men’s Aid welcomes the opportunity to make a submission to the Joint Committee on Justice in relation to the Victims Testimony in cases of rape and sexual assault.

We are Ireland’s only dedicated service for men and their families experiencing domestic violence and coercive control. Whilst our area of expertise is not sexual assault and rape, we are often the first point of contact with a victim as they start their journey of disclosure. We listen, we believe and we sign post the victims to the Dublin, Cork, Galway Rape Crisis services and Helpline depending on what part of the country the victim is calling.

We also help victims of historical rape such as the recent John McClean case and other victims who call us disclosing domestic violence which then during counselling appointments disclose further abuse experienced often from childhood or previous relationships.

We provide a range of specialised support services specific to supporting how men experience and respond to domestic violence. Our services include a national Helpline, Monday – Friday 9am – 5pm, legal clinic through our outreach, court accompaniment in Dolphin House and Dundalk courts and one to one counselling. Our services are designed to support the vulnerable man and his family through the trauma of domestic violence. Our counselling team are senior level professionals with extensive and specific experience in supporting vulnerable men with mental health, addiction, homelessness and suicidal issues.

We have been delivering our service for 24 years mainly focused on supporting vulnerable men located in the North East (Meath, Louth, Cavan and Monaghan). Over the years men have travelled from across the country to our base in Navan to avail of our specific support services.



Our CEO is active in representing the voice of vulnerable men experiencing domestic violence. Kathrina Bentley is part of the Monitoring committee for DSGBV, member of the Family Justice Consultation Group, member of the Domestic Violence Leave group, member of the Child Maintenance Review Group and a member of the 3<sup>rd</sup> National Government Strategy DSGBV group.

## 2. Academic Research

The Government led research 'COSC 2005' key findings alerted all key stakeholders involved in DSGBV that 1 in 3 victims of domestic violence is female and 1 in 7 victims are male. The alarming statistic we found from this research was the 95% of domestic violence experienced by men is not reported to Gardai. This key statistic helps explain the points I will raise further in this submission.

Whilst budget matters are not usually addressed in legislative issues, it is important to highlight here that our service, as the only national domestic violence service for men and their families, receives 1% of the national DSGBV budget of €26m. This funding represents how under resourced the whole area of violence against men is and perhaps why reporting of a sexual crime is so low. Our colleagues in the Dublin Rape Crisis Centre recently reported 1 in 10 calls to their Helpline is a man disclosing he has experienced rape. To date Irish culture and Government funding has not given men the confidence to come forward to disclose or report either domestic violence or sexual violence.



### 3. Disclosures of rape / sexual assault by service users

In our experience we have received reports from men who state they have been forced to have sexual intercourse without consent. The men report their wives/female partners have forced the male to engage in sexual intercourse. Therefore the men refer to this act as rape.

Our LGBT clients also disclose to us they experience rape from their male partners. To date, we refer our clients who disclose rape and/or sexual assault to the Dublin Rape Crisis Centre and provide the Helpline number.

We are gravely concerned about the increase in disclosures from men experiencing rape during 2020. Our clients make contact with us initially for assistance regarding domestic violence and journey through to our specialised counselling service of six block appointments. It is often in these private counselling appointments that the disclosure of rape is mentioned by the victim. A trust builds between the victim and our counsellors where by the man feels confident to disclose rape. This is a huge step for any gender to take. Our experience to date is whilst we signpost the victim to Dublin Rape Crisis Centre, they do not take that step and make contact with another organisation on their own.

**This is a gap in the victim's journey we are constantly seeing. At present, our resources does not extend to offer the wrap around services offered to women disclosing rape.**

Another concern for our organisation now in February 2021 is the increase in suicide ideation and suicidal men calls to our Helpline. Within a recent time period of 10 days, we handled five extremely serious situations and needed to involve our colleagues in An Garda Siochana and Hospital services. We would urge that the findings following the submissions on this issue move as quickly as possible given the mental health issues our communities are currently struggling with.

#### 4. Current Legislation

The Criminal Law (Rape) Act, 1981 and The Criminal Law (Rape) (Amendment) Act 1990 appear to be silent on the issue of men being raped by a female perpetrator.

We would ask that this issue be addressed in order for legislation to support male victims.

The barriers for men coming forward to report rape and sexual assault in our experience are:

- Fear of not being believed
- Fear of losing access to their children
- Shame
- Stigma
- Gender bias
- Lack of supports to report the crime
- Lack of legislation to support them through the Criminal Justice System

We would suggest a female perpetrator programme be available. Both Men's Development Network and MOVE Ireland offer excellent programmes for male perpetrators, we see a need for female perpetrators also.



## 5. Refuge

The “*Supporting a Victim’s Journey – A plan to help victims and vulnerable witnesses in sexual violence*” cases report references refuge. Currently, there are no refuge options for a man fleeing domestic or sexual abuse in Ireland. As significant increases in demand for our support continues we urge this issue to be addressed as a matter of urgency. Male victims deserve the same access to the complex range of needs required to support them.

## 6. Recommendations

Firstly, we would suggest an amendment to The Criminal Law (Rape) (Amendment) Act to be inclusive, acknowledge and recognise female on male rape.

Secondly we would suggest research similar to the standard of the COSC report 2005 or similar in order to make policy and funding decisions based on recent qualified academic work.

Thirdly, a national media campaign encouraging men to come forward so they know they will be supported and are not alone.

Any legislation going forward to be gender neutral and/or represent male and female perpetrators / victims. It is imperative we build confidence for all gender to feel comfortable, confident and supported to come forward and report the crime of sexual assault or rape.

It is time for change and reform, we must become proactive not reactive. It is time to stop using divisive, discriminatory language and to come together to build a system that recognises and protects all victims and their children, regardless of gender, ethnicity, sexuality, religion, disability or social and workplace position. We must work towards supporting all perpetrators again regardless of their gender.

Our organisation is a small team, very passionate about supporting victims through a collaborative inclusive approach. Everyone deserves to be happy and safe.

Thank you for your time reading our submission.

**ENDS.**



## **Dublin Rape Crisis Centre**

### **Submission to the Joint Committee on Justice on the topic of Victim's Testimony in Cases of Rape and Sexual Assault**

26 February 2021

#### **1. About Dublin Rape Crisis Centre**

The mission of Dublin Rape Crisis Centre (DRCC) is to prevent the harm and heal the trauma of all forms of sexual violence in Ireland. DRCC has been at the forefront of the Irish response to sexual violence for more than 40 years. That response includes:

- Running the National 24-Hour Helpline;
- Providing individual advocacy, counselling and other support;
- Accompaniment and support services for those attending the Sexual Assault Treatment Unit (SATU) and those reporting to An Garda Síochána or attending court;
- Data collection and analysis on trends and issues relating to sexual violence.

As a frontline service provider, we work with and support people who have been directly affected by sexual violence. We are also committed to eliminating its tolerance through education, awareness raising, advocacy and policy analysis. Through that work, we have gained insights into how engagement with the justice system can either assist a victim to access justice or re-traumatise them. That perspective has been included in this submission.

#### **2. About this submission**

We welcome the opportunity to contribute on the topic of Victim’s testimony in cases of rape and sexual assault.

While this submission is made by DRCC, it is also informed by the preliminary findings of empirical research conducted by Dr Susan Leahy, Senior Lecturer, University of Limerick in partnership with DRCC which involved interviews with legal professionals and court accompaniment workers.<sup>1</sup> All errors and omissions are the sole responsibility of DRCC however.

The submission should also be read in the light of the extensive “Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences”<sup>2</sup> published by the Department of Justice in 2020 and commonly called the O’Malley Report in deference to Mr. Tom O’Malley BL, Lecturer at NUI Galway, who authored the report of the Interdepartmental Group which conducted that review. DRCC welcomed the findings of that report and the implementation plan of the Department of Justice that followed it. However, we submit that there were ways in which the Report underestimated the experience and rights of victims and it was also limited by its terms of reference.

Throughout this submission we use the term victim/survivor. Those who contact us are victims of harm and potentially of crime and also have survived it. Many would regard themselves as one rather than the other. Some do not care for either term.

### 3. Context

Our submission begins from the reality that the testimony of victims is a central source of evidence in the investigation and prosecution of rape and sexual assault when the key complaint of the victim is that non-consensual sexual activity occurred. It may be that consent could not be given – for instance by a child – but in many cases, the question for both investigation and for a trial will be whether there was free and voluntary agreement to a sexual act. Section 9 of the Criminal Law (Rape) (Amendment) Act 1990, inserted by s. 48 of the Criminal Law (Sexual Offences) Act 2017, begins: “A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.”

Added to that is the reality that sexual activity is more likely to take place in a private place or to involve private intimacy. This then leads to an investigation, a prosecution and a weighing up by judge or jury where the prosecution has to prove the offence beyond all reasonable doubt often on the basis of the victim’s testimony almost alone, in the face of the defendant’s denial, often with little, if any, extraneous supporting evidence.

It is for this reason therefore, we particularly welcome the recognition in the O’Malley report that although the term ‘vulnerable witness’ is normally used in law to signify someone who is vulnerable because of disability or youth, a person may vulnerable in a sexual offence criminal trial by virtue of the circumstances in which they find themselves – that the trial itself may make them vulnerable<sup>3</sup>. This is the reality for many who are asked not just to give evidence,

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<sup>1</sup> Interviews were conducted with 16 legal professionals and 12 court accompaniment workers in the period July to September 2019. This research was conducted in partnership with Dublin Rape Crisis Centre and was funded by the Irish Research Council New Foundations Scheme. A report on this research is currently being finalised for submission to DRCC.

<sup>2</sup> [http://www.justice.ie/en/JELR/Pages/O'Malley\\_Report](http://www.justice.ie/en/JELR/Pages/O'Malley_Report)

<sup>3</sup> O’Malley Report Para.1.4

but to put their most intimate and private actions on display to strangers in a disputed way in the course of a trial. Given that most victims know and are known to the accused – and may be from their own family or community, the vulnerability of victims becomes even more acute.

While this submission concentrates primarily on trial testimony, it is also important to recognise that all available evidence indicates that there is an extremely high attrition rate from the time of reporting an offence to the time of trial and therefore issues arising in the investigation and pre-trial experience of victims which are raised in the O'Malley Report are highly significant necessary reforms.

The DRCC ran a brief survey following the publication of the O'Malley report to get a snapshot of views and opinions about it from as many people as possible who had engaged with the criminal justice system or were considering engaging with it. To paraphrase one respondent: the recommendations won't change a victim's experience which can be humiliating and re-traumatising but the O'Malley Report is an acknowledgement that much more needs to be done to support victims throughout the entire process.

The O'Malley report also notes<sup>4</sup> existing rights for victims and advances in those rights over recent decades but highlights the need for many further reforms, only some of which require legislation. This submission recognises that while the giving of evidence in chief and on cross-examination are necessary elements of due process and fair trial, there are a number of ways in which the current process can be improved for victims. In advance of highlighting reforms to current laws and procedures, we will provide some insight into the experiences of the women and men accessing our services who had interactions with the criminal justice system or have considered engaging in the process. Our recommendations are informed by Dr. Leahy's research and where appropriate, they are also informed by and linked with the O'Malley Report.

#### **4. The Victim Impact of Testifying in Rape Trials – experience of victims who have engaged with the DRCC.**

For victims of sexual crime, the process of testifying can be a particularly harrowing ordeal, given the intimate nature of the offence, the often intimate relationship between the victim and the perpetrator and the need to recount the explicit sexual details in the formal and unfamiliar setting of the courtroom, in the presence of the accused. We have heard victims describe their experiences in court as being tantamount to a 'second assault'.

- **Pre-trial**

Before a victim ever gets to give their testimony in court, they have to wait for their case to come to trial. People talk about having to put their life on hold or of not being able to move on from the crime during that period of waiting. Our therapists and court accompaniment personnel working with those who wait for court dates see and hear the stress, anxiety and inconvenience that delays have on them. Waiting is hard but waiting characterises much of

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<sup>4</sup> O'Malley Report, Ch 2

a victim's journey in the criminal justice system and their experience in court. Outside of a lengthy wait for their case to come to trial, they may also have to endure short notice that their trial has been put back. It is not uncommon for victims to be told to arrive at court in the morning only for the trial to start later in the day. There will be valid reasons for many of these delays but more often than not, the victim is the last person to be given an explanation about why it happened. That lack of information only serves to heighten a victims' feelings of marginalisation in the trial process, where many aspects of the process can be difficult to understand because to quote one of our clients, *'it's a world I know nothing about'*.

Attending court to give evidence having never been inside a court building, has been described by victims we support as terrifying, humiliating, upsetting, frustrating. The unfamiliarity of the setting, coupled with their natural anxiety over taking the stand, can make attending court a daunting experience. We always recommend a prior court familiarisation visit and many find that to be useful because it gives them some sense of the surroundings they will find themselves in for the duration of the trial.

- **The Trial**

Victims are aware that their testimony is an integral part of the trial process but many feel that they arrive in court on the day of the trial without a really clear understanding about giving evidence and the trial process as a whole. While the pre-trial meeting provides an opportunity to meet the prosecution team, some victims have told us that they felt the meeting was rushed. For others their experience of that meeting was one where they were being talked at, rather than being engaged in the conversation. Some left the meeting without ever getting a chance to ask their own questions. All of which can leave victims feeling very disempowered.

Despite have familiarised themselves with the court room in advance of the trial on the day it is only on the day that many victims realise how close they will be sitting to the accused and comment on the intimidating atmosphere in the court room which only heightens their fears of giving evidence.

- **Giving evidence/ Being heard**

Testifying in front of a court room full of strangers has left many victims we support feeling vulnerable, overwhelmed, intimidated and re-traumatised. Some have expressed frustration that the particular focus of the prosecution case inhibited how they told their story. For so many victims their testimony is their story, complete with personal, private and sensitive detail about their life. They often tell their stories in a highly emotional, sometimes contradictory and often in a fragmented manner that is consistent with the traumatic impact they have experienced but which can be criticised as undermining their credibility.

Victims have described to us how giving evidence is an extremely isolating experience where they are asked to *'go back to that time and place'* and focus on the facts of the sexual violence they suffered, without an opportunity to explain context or how this crime has impacted on their life. For some, their description is one of re-living the most horrendous day or night of their life in front of family and strangers. There is no real recognition to the trauma they experienced and that they are still going through. Victims are well aware that this is the

system that they have to engage in but too often it is the manner in which they are treated that they find intolerable and one which leaves a lasting impact. Some speak to the anger they feel towards themselves for not giving their best evidence, for getting upset, for getting tripped up by defence and those feelings don't leave them, they linger long after the case has concluded, regardless of the outcome.

- **Cross-Examination**

While victims acknowledge and understand that cross-examination is part of the trial process, it is the manner in which they were spoken about, it is how they were portrayed to the court that has a long-lasting effect on them. The distress and trauma victims endure in a sexual offence trial is exacerbated when cross examination is protracted, when their character is subject to hostile questioning and where the defence strategy is to attack their testimony by focusing on their behaviour. For many, the defence's line of questioning meant they found it hard to express themselves, to make their point and explain events in full as they recalled them.

Some have told us that no amount of preparation would have allowed them to anticipate the sheer anguish they endure. It wasn't living through it again, it was reliving every fine detail, over and over. For others, it was like every piece of their life to the date was picked apart and judged by everyone in the court room which only reinforced their feelings of shame and guilt and the feeling that they should have done something more or something different at the time.

Cross-examination has affected victims we know in many different ways. From some it was the manner in which the defence sought the use of counselling notes, medical or mental health records, phone records, and social media posts to undermine them. For others, it was how the defence deliberately critiqued their behaviour, clothing and sexual character, including some instances where an application was made for permission to introduce evidence of sexual experience. Facing into a trial not knowing or only knowing very briefly in advance if their sexual history was going to be called into question left them feeling like every part of their life was invaded and scrutinised.

The cross examination can have a long-lasting effect on victim that far outlasts the trial process. It only serves to re-traumatise the victim and play on any myths that exist for juries in relation to victims of sexual violence.

We now turn to some issues relating to victims' testimony at trial that part of the submission focuses on ways in which the experience of victims as described in the previous section could be addressed

## **5. Special measures.**

There is a presumption in our legal system that the best evidence is that given in person in court at a trial. We submit that this presumption pre-dates any understanding of the traumatic impact of crimes of intimate violence or indeed modern understanding of child development or how memory operates. In the case of these offences, the routine trial process can actually hamper the delivery of best evidence. For this reason, and recognising

that a victim of sexual offences can be vulnerable by reason of having to go through the trial process, existing measures for victim protection need to be more widely used.

Among these are the use of screens and video links to enable victims to give evidence remotely to reduce the risk of being re-traumatised. While there is existing legal provision for these special measures, the reality is that these are not widely used. Where the witness is a child, evidence can be given by video link. As matters currently stand, screens or video links for adult victims are rare.

Even if an application is made, many courthouses are not equipped to hear evidence with these special measures. Given the rapid development of technology, every courthouse, at every level should have such facilities in place.

There is an urgent need to develop capacity for child victims to give their evidence in a coherent comprehensive way at an early stage after disclosure/ report. A current model – the so called Barnahaus model – where a child’s evidence can be taken and recorded by specialist interviewers is in early stages of development in Ireland and points to a way forward which will allow a child to better manage the impact of sexual violence and will also provide better evidence and better access to justice. This should be rapidly advanced.

## 6. Tackling Rape Myths

The presence of so-called rape myths or misperceptions about the realities of sexual violence in society is at this stage generally well-accepted. Research has repeatedly demonstrated that such myths can impact negatively on juror deliberations if jurors make decisions with reference to these erroneous perceptions of what constitutes a ‘real rape’ or a ‘real victim’, as opposed to deliberating dispassionately on the facts of the case before them.

When victims are testifying in rape and sexual assault cases, the potential impact of the ‘real victim’ stereotype is clear. If they do not conform to what is expected of a ‘real victim’ (e.g. they have reported immediately, they are at all times clear and consistent and have not engaged in what may be perceived as ‘risky’ behaviour such as excessive alcohol or illegal drug consumption), then this may colour their testimony in the eyes of jurors. For this reason, it is vital that the potential impact of rape myths is tackled within the court-room.

With this in mind, we recommend that judges in these cases guide jurors on the realities of sexual violence and provide instruction on setting aside preconceived ideas of what constitutes a ‘real rape’ or a ‘real victim’.

To assist judges in achieving this, we recommend that they are provided with bench book guidance such as that which is currently available in the English *Crown Court Compendium*.<sup>5</sup> The *Compendium* contains a number of model directions which judges can use to direct jurors to be wary of drawing unwarranted assumptions because of issues such as: delayed complaint; inconsistent accounts; lack of emotion/distress when giving evidence, or; the clothing worn by the victim at the time of the incident. Such directions can be given at the

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<sup>5</sup> D Maddison et al, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial Council, 2021), available at: <https://www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf> (Last accessed: 4 February 2021).

start of the trial or when summing up for the jury and it is recommended that any proposed direction be discussed with counsel in advance.<sup>6</sup> The following extract, providing sample guidance on the avoidance of assumptions in sexual offence cases, is illustrative of the type of guidance which is available in the *Compendium*:

‘It would be understandable if some of you came to this trial with assumptions about the crime of rape. But as a juror you have taken a legal oath or affirmation to try D based only on the evidence you hear in court. This means that none of you should let any false assumptions or misleading stereotypes about rape affect your decision in this case. To help you with this I will explain what we know about rape/sexual offences from experience that has been gained in the criminal justice system. We know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other or may be related. We also know that there is no typical response to rape. People can react in many different ways to being raped. These reactions may not be what you would expect or what you think you would do in the same situation. So all of you on this jury must make sure that you do not let any false assumptions or stereotypes about rape affect your verdict. You must make your decision in this case based only on the evidence you hear from the witnesses and the law as I explain that to you.’<sup>7</sup>

Participants in Dr. Leahy’s research study were provided with an extract from the *Compendium* and asked for their views on whether such guidance would be beneficial in an Irish context. The majority of legal professionals and all of the court accompaniment workers interviewed agreed that the introduction of a bench book similar to the *Compendium* would be useful in Ireland.

Participants were also asked when such guidance should be given in a trial: at the beginning; at the end, or; at both the beginning and the end. There were differing views on this. Six of the 15 legal professionals who felt that guidance similar to the *Compendium* would be useful in Ireland were of the view that such guidance should be given at the end of the trial. Concerns were raised that the provision of such guidance at the start may potentially be prejudicial or encroach upon the rights of the accused. However, 4 legal professionals recommended that such guidance be given at the beginning of the trial, with a further 3 suggesting that such guidance be given at both the beginning and the end.<sup>8</sup> The majority of the accompaniment workers (8) felt that guidance should be given at the beginning and the end of the trial.

Based on the findings above and the evidence from available research, it is our recommendation that guidance similar to that provided in the *Compendium* should be introduced in Ireland and that it should be recommended that trial judges provide this guidance at both the beginning and the end of the trial. Providing guidance only at the end arguably comes too late as jurors will already have viewed the evidence according to their own pre-existing beliefs. However, it is important to revisit such guidance at the end of the trial to remind jurors of this advice prior to their deliberations. Concerns about the potential

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<sup>6</sup> Ibid, 20-2, para 5.

<sup>7</sup> Ibid, 20-5.

<sup>8</sup> Two of the legal professionals in favour of the adoption of guidance similar to the *Compendium* did not provide an opinion on when the direction should be given.

prejudicial effect of the provision of such guidance at the beginning of the trial may be offset by the judge engaging with both prosecution and defence counsel regarding the wording of the proposed directions.

## **7. Legal Support for Victims.**

In our legal system, victims are not legally represented. While many – including victims – view the DPP or prosecuting lawyers as their lawyers, the role of the DPP and prosecution is to represent the State. In most crimes, the absence of representation for the victim does not impede justice. The role of the victim is to give their evidence of the crime and for the most part, their credibility, their reputation is not at stake. For the most part too, the only link between the accused and the victim will be the criminal offence. This is not the case in sexual offence trials. For the most part, the victim and the accused are known and may have an existing familial, intimate or community relationship. And, as stated previously, the main evidence in the trial will be the evidence of the victim which, if disputed, will be vigorously and thoroughly cross-examined and dissected by the accused’s expert legal team. The victim, without legal representation, without legal preparation for the evidence they will give is therefore uniquely disadvantaged in such a case.

Further, in such trials, the defendant’s legal team may make a number of applications to admit evidence which they assert is relevant to the defendant’s right to a fair trial. These applications typically relate to the victim’s sexual experience or counselling records. Quite apart from the fact that this form of additional corroboration is questionable on the basis that it is not needed for trials of offences other than sexual offences, victims are often rightly apprehensive that its main purpose is to intimidate the victim or to damage their credibility or reputation. In addition, the defence may use the doctrine of ‘hue and cry’ to question a victim’s credibility if they failed to disclose the crime at the first available opportunity – despite the reality that there can be many reasons why a victim might delay disclosure. The presence of legal representation to limit such applications/ questioning to legitimate limits would greatly enhance the capacity of victims to give their best evidence but is not currently available.

As Tom O’Malley has put it, our court system operates in a ‘binary’ way, that is recognising a trial as involving two parties: the prosecution and the accused. We argue that this fails to recognise the rights of victims. These rights are emerging through developments in human rights and also through EU and national legislation, principally the EU Directive on Victims’ Rights and the Victims of Crime Act 2017 and will undoubtedly gain greater recognition in our court systems over time.

The time taken will mean however that many victims of sexual offences will be placed in an unacceptable position where a trial which depends largely on whether a jury believes their account of an event beyond reasonable doubt or believes that of the accused is held with one of those parties represented by expert, experienced legal representatives and the other is not represented at all and has had no legal preparation for that trial. Despite significant opposition from the legal profession, and a failure of the O’Malley report to endorse this suggestion, we submit that there is not only capacity to provide legal representation for

victims of sexual offences, but that there is a real need for that, to vindicate the rights of victims.

Nonetheless, the O'Malley Report does make valuable recommendations to increase access to legal advice for victims to build their understanding of the criminal justice process. In particular, it recommends extending advice, through the Legal Aid Board at the early stages of the process to ensure that victims can make informed decisions as they proceed with their complaint.

If legal representation for victims from the time charges are laid is not to be available, we recommend at a minimum, victims be allowed to avail of accessible, timely legal advice to victims of any sexual offence and which is not contingent upon a prosecution being instigated.

## **8. Sexual History Evidence**

A significant concern for victims in sexual offence trials is that they will be questioned about their previous sexual history during the trial. Such questioning is obviously very traumatic and intrusive for victims. In Irish law, such evidence cannot be adduced without the leave of the trial judge.<sup>9</sup> Such applications are adjudicated in a private hearing and the victim is entitled to separate legal representation (via the civil Legal Aid Board) for the purposes of this application.

The O'Malley Report has highlighted a number of shortcomings with the current procedure for dealing with applications for the admission of sexual history evidence which need to be rectified if victims are to be properly protected in this process. The findings of the Report are also supported by Dr. Leahy's empirical research in this area. First, the Report has highlighted a gap in the legislation whereby victims in sexual assault trials (as distinct from rape/aggravated sexual assault) are not afforded separate legal representation for the purposes of an application to adduce sexual history evidence. It accordingly recommends that the relevant legislative provisions be amended to provide 'separate legal representation (and the associated right to legal aid) to all trials for sexual assault offences'.<sup>10</sup> This recommendation should be acted on as a matter of priority to ensure equal protection for all victims in sexual offence cases as all such victims are affected equally by the prospect of such evidence being adduced at trial.

A further issue highlighted by the Report and by Dr. Leahy's research study are practical challenges with securing legal representation for victims for these applications. One issue which was highlighted in Leahy's study is the problems caused in relation to late applications to adduce such evidence, particularly where they arise on the day the trial commences or during the trial. This can cause delays and is obviously also very upsetting for the victim to deal with. This will hopefully be substantially improved, if not entirely eliminated by the proposal for Preliminary Hearings proposed in the Criminal Procedure Bill 2021. We submit that there are improvements possible to the Bill as initiated but the intention of the Bill, if it covers all sexual offences, is a valuable step forward.

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<sup>9</sup> Section 3 of the Criminal Law (Rape) Act 1981 (as amended).

<sup>10</sup> Para 6.10.

To maximise protection for victims in this area, the O'Malley Report has recommended that where an application to admit sexual history evidence is successful, the victim's legal representative should continue to represent the victim while the questioning is taking place.<sup>11</sup> This is an important added protection for victims which would ensure that any questioning on sexual history evidence goes no further than is necessary and is in accordance with the leave provided by the trial judge. While the trial judge will be overseeing such questioning carefully, having the support of separate legal representation will provide added support and confidence to the victim during this particularly challenging and traumatic form of questioning.

Finally, on this topic, the O'Malley report also recommends, in relation to representation for the application to hear and the questioning on sexual experience that 'the Legal Aid Board...should endeavour to ensure that the victim is represented by a counsel of a level of seniority similar to that of counsel representing the prosecution and the defence'.<sup>12</sup> While this may not always be possible, we recommend that at the very least any counsel who is briefed in relation to such an application should have received appropriate certified training on best practice in representing victims in these cases.

## 9. Counselling Records

Issues surrounding the disclosure of victims' counselling records is now a feature of most rape trials in Ireland. In the Criminal Law (Sexual Offences) Act 2017<sup>13</sup>, a regime to regulate disclosure of counselling records was introduced for the first time in Ireland. For the purposes of this process, a 'counselling record' is defined as:

'...any record, or part of a record, made by any means, by a competent person<sup>14</sup> in connection with the provision of counselling<sup>15</sup> to a person in respect of whom a sexual offence is alleged to have been committed ('the victim'), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy.'<sup>16</sup>

The regime provides for an application process similar to that which applies for the introduction of sexual history evidence (including the provision of legal representation for victims). Counselling records may only be introduced at trial where the judge grants leave for this to occur. However, a victim may waive the application of this scheme and permit disclosure of their counselling records without going through this process.<sup>17</sup> Many do. This waiver provision has significantly undermined the potential of the new regime for disclosure

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<sup>11</sup> P 84.

<sup>12</sup> p. 84

<sup>13</sup> Section 39 of the 2017 Act inserted this new regime into section 19A of the Criminal Evidence Act 1992.

<sup>14</sup> A 'competent person' is defined as 'a person who has undertaken training or study or has experience relevant to the process of counselling': section 19A(1) of the Criminal Evidence Act (as amended).

<sup>15</sup> 'Counselling' means listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration)': section 19A(1) of the Criminal Evidence Act 1992 (as amended).

<sup>16</sup> Section 19A(1) of the Criminal Evidence Act 1992 (as amended).

<sup>17</sup> Section 19A(17) of the Criminal Evidence Act 1992 (as amended).

of counselling records to protect victims from being questioned about the contents of their counselling notes.

Legal professionals participating in Dr. Leahy's research study reported little impact of the new disclosure regime, even though it has been in operation for a year at the time of the research study. Similarly, the O'Malley Reports notes that the regime is 'seldom used'.<sup>18</sup> This supports the contention that, in general, victims consent to disclosure of their counselling records early in the investigation process, either to the investigating Garda or to the DPP, thus obviating the application of the disclosure scheme. Five of the legal professionals who participated in Leahy's study made specific reference to the fact that the majority of victim's consent to the disclosure of their counselling records, often in the very initial stages of the investigation process. The O'Malley Report also notes that '[i]t seems to remain the norm for victims and other witnesses to waive their right to a court hearing and to consent to the disclosure of their counselling records'.<sup>19</sup>

While victims are, of course, entitled to waive the operation of the regime and consent to disclosure of their records, it must be questioned whether they are making such decisions on a fully informed basis. For example, they may not be aware at the early stage of an investigation that their records may provide the basis for cross-examination by the defence at trial. Further, they may not fully understand that they have a choice whether to disclose and that they have the option of letting a judge adjudicate on this. We know for certain that many victims believe that non-disclosure would result in their case not proceeding to trial. We note and welcome the commitment in *Supporting a Victim's Journey: A Plan to help victims and vulnerable witnesses in sexual violence cases*, that victim's information on section 19A (i.e. the disclosure regime) will be available for release by An Garda Síochána in Q1 2021.<sup>20</sup> However, this does not go far enough to protect victims. Thus, we recommend that a robust informed consent process be introduced to ensure that victims do not consent to the disclosure of their counselling records without full knowledge of their entitlement to object to this and to let the judge decide on what, if any, disclosure should be made. This informed consent process should be supported by the entitlement to legal advice, discussed above.

A further important reform to consider is the extension of this regime beyond counselling records. O'Malley suggested that consideration should be given to whether the disclosure of medical records should be made subject to a statutory disclosure regime because they give rise to a similar expectation of privacy.<sup>21</sup> We would go further and recommend that the disclosure regime be extended to apply to all 'personal records', as defined by section 278 of the Canadian Criminal Code, on which the Irish regime on counselling records is closely modelled. For the purposes of Canadian regime, a 'record' is defined as:

'...any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a

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<sup>18</sup> Para 6.39

<sup>19</sup> Para 6.39.

<sup>20</sup> Recommendation 5.6.

<sup>21</sup> Para 6.41

provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.<sup>22</sup>

We recommend that the current disclosure regime for counselling records in Ireland be extended to include all personal records, as defined above. This will maximise protection for victims' privacy rights and minimise the potential for intrusive questioning on evidence which is not directly relevant to the case.

## 10. Electronic or Communications Data

A significant challenge in sexual offence trials which has yet to be dealt with effectively is the disclosure of electronic or communications data (e.g. content from a Victim's mobile phone). Naturally, the accessing of such sensitive and private information and the potential questioning about such data while giving testimony is very upsetting for victims. Further, the challenges surrounding the management of effective disclosure of such data has the potential to contribute to delays in trials. That said, there may be evidence there which is of relevance to the defence and thus must be disclosed in order to protect the defendant's right to a fair trial. Given the complexities of this area, it is necessary to devise a suitable regime to manage disclosure of such data, which while appropriately respecting defendants' rights, ensures that victims are not subjected to fishing exercises or unnecessarily invasive questioning about potentially irrelevant information. The development of such a scheme has been recommended by the *O'Malley Report* which proposed that '[a] formal code of practice should be established to govern the collection and disclosure of a victim's digital material and electronic data such as text messages, social media and internet usage'.<sup>23</sup> Significantly, it is also recommended that '[t]here should be periodic evaluation of the process and, as part of that, feedback should be sought from victims as to their experience of this aspect of the criminal investigation'.<sup>24</sup>

## 11. Consistency of Practice

There have been considerable improvements in the treatment of victims in sexual offence trials in recent years and this should be acknowledged. However, it is important that all victims of sexual offences receive the same level of respect and fair treatment when giving testimony. Trials for rape take place in the Central Criminal Court where the professionals involved have a certain level of experience in dealing with these cases and where facilities are likely to be better.

Significant numbers of sexual offence cases also take place in other courts. Thus there are a lot of different court premises and different professionals involved in these cases, which obviously creates challenges for ensuring a consistent approach to victim testimony across the system. It is important to ensure that wherever a trial is held, and whatever the charge, a victim is appropriately protected when giving evidence and receives equal access to

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<sup>22</sup> Section 278.1.

<sup>23</sup> p 85.

<sup>24</sup> p 85.

protective and supportive measures such as video link, court accompaniment, special waiting areas and appropriate legal advice.

## **12. Training for Judges and Legal Professionals**

The trial judges who preside over sexual offence trials and the legal professionals who prosecute and defend these cases play a vital role in ensuring fair treatment of victims while they give their testimony. Thus, it is vital that any judge or legal professional working within these trials have received appropriate training on best practice in the treatment of victims. This aligns with the recommendations of the O'Malley Report which propose that '[a]t a minimum...all practising lawyers dealing with sexual offence cases should undergo a foundational course of training and that all should have completed it by a date to be agreed with the two professional bodies- the Law Society and the Bar Council'.<sup>25</sup> They propose that the completion date for this training should 'not be later than the beginning of the legal year 2021-22, but preferably sooner'.<sup>26</sup> We also welcome the request by the Report that the Judicial Studies Committee be asked to give high priority to training on 'dealing with persons in respect of whom it is alleged an offence has been committed', and with a special emphasis on sexual offences.<sup>27</sup> Training for all judges who preside over sexual offence trials is vital to ensure consistent practice and that the regulation of examination and cross-examination of victims in these trials is always appropriately trauma-informed and sensitive to the specific vulnerabilities of these witnesses.

## **13. Sentencing**

One of the things that victims want to know when they engage in the criminal process is what the outcome is likely to be. The process is onerous and difficult for most victims and if they are to engage on that lengthy, tough process, they want some indication of what the consequences will be. They will of course know that the defendant may be acquitted or convicted. In the absence of sentencing guidelines and a sentencing database, it is hard for them to know the consequences of a conviction. The O'Malley Report has suggested that the Judicial Council's Committee on Sentencing Information and Guidelines might address sexual offence guidelines. That indeed would be welcome. But a sentencing database is also necessary, where information is stored on a national basis on sentences handed down for various offences. Such a database was commenced some years ago and then abandoned. The project should be taken up again. It would not tell a victim with certainty of the outcome of a conviction but it would give some guidance and consistency.

## **14. After-care**

The process of giving testimony is an arduous one for victims. It is important to ensure that they have appropriate follow-up and aftercare when the trial is completed. While court accompaniment provides invaluable support during the trial, accompaniment workers' relationships with victims will normally end when the trial is over.

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<sup>25</sup> Para 10.15

<sup>26</sup> Para 10.15.

<sup>27</sup> Para 10.10

While many victims may also be linked with therapeutic support services who can assist with any distress a victim may experience after giving evidence, it is important that there is a formal mechanism whereby they have access to appropriate support services after the trial to ensure that any adverse effects of engaging in the trial and giving evidence can be dealt with effectively.

Again, linked to the recommendations about legal advice/ representation above, it is also important that victims have somewhere to direct any outstanding queries they have about the trial process, such as why certain evidence was included or excluded or how a sentence was structured. Such follow-up after-care would ensure that victims have the advice and support they need after the trial and would acknowledge the service they have provided by giving their testimony in these cases. As noted by Dame Vera Baird (Northumbria Police and Crime Commissioner) in her response to her Gillen Review in Northern Ireland, *'victims in sexual violence cases give evidence as a public duty in the interests of the community, exactly like victims in every other kind of case'*.<sup>28</sup> An appropriate recognition of this is to ensure that they are provided with any supports they require after the trial has completed and are not forgotten once they have provided their evidence.

## Conclusion

Every victim is different, and each one will have a differing capacity to process their trauma. Taking a victim-centred approach to how the criminal justice system processes a sexual assault case means treating victim with care, respect and recognising the particular difficulties and needs facing those who have experienced this unique crime and the social stigma surrounding it. A failure to understand the nature and impact of sexual violence will impede those within the criminal justice system from investigating and prosecuting these crimes adequately, will permit perpetrators to continue to offend with a high degree of impunity and will definitely discourage victims from reporting what is already a massively under-reported set of crimes. By recognising the rights of victims of sexual offences to be heard and to access justice, in all their individual capacities, in spite of their trauma, we truly advance the highest professional standards and respect for human rights.

We hope that the content of the submission is helpful. For any further information or discussion, please contact:

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<sup>28</sup> *Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1*, p 181.

February 2021

# Victim's Testimony in Cases of Rape and Sexual Assault



National Women's Council

## Summary of Key Recommendations

- We recommend that a statutory definition - based on S.10 of the Victims and Witnesses of Crime (Scotland) Act - be inserted into the Criminal Law (Victims of Crime) Act 2017.
- The automatic rights afforded to children (presumption of protection needs) under the Criminal Law (Victims of Crime) Act 2017 should be extended to all victims of sexual offences. This would honour, in statute, the expanded understanding of what constitutes a 'vulnerable witness'. This would reflect both Status and Situational vulnerability.
- Frontline services should be resourced to both provide and engage the supports for victim-survivors. Increased and expedited multi-annual funding to frontline specialist support services to ensure they can offer victim-survivors support services.
- Ensure that victim-survivors of all sexual offences receive the same level and standard of support and accommodations irrespective of jurisdiction or the location of the court.
- Comprehensive, victim-led supports services that provide victim-survivors with the choice of a range of supports including, legal, psychological, financial and care. Including but not limited to court familiarisation and accompaniment services.
- Dedicated interview suites should be available for use for interviewing all victim-survivors of all sexual offences. Such suites should be located across the country and accessible to all.
- Legislation should be amended to provide for pre-recorded interviews to be considered as evidence-in-chief in all rape and sexual assault cases. An Garda Síochána should be resourced to ensure that they have the capacity to train sufficient numbers of Gardai to undertake such specialist interviews.
- Legislate and adequately resource provision for pre-recorded cross- and re-examination of victim-witnesses in all rape and sexual assault cases.
- Greater protections are needed to safeguard the privacy rights of victim-witnesses in rape and sexual assault trials especially in relation to counselling and medical records. A review of how S.16A is operating is urgently needed. Medical records should all be included in S.19A also so as to better protect the privacy rights of victim-witnesses.

## 1.1 Introduction

Established in 1973, the National Women’s Council of Ireland (NWCI) is the leading national women’s membership organisation in Ireland. NWCI seeks full equality between men and women and we draw our mandate from a membership of over 180 groups and organisations across a diversity of backgrounds, sectors and locations. We also have a growing, committed individual membership.

We strive to show leadership in bringing women together to build a consensus on the kind of society we want to be a part of, and on the key values, that we believe, should be at the heart of that society. Our feminist values of equality, inclusion, respect for diversity, empowerment and meaningful participation by women in society, are shared by Irish trades union and civil rights movements.

Our Strategic Plan 2020-2024 ‘No Woman Left Behind’ aims to build on the progress that NWCI has helped to bring about for women in Ireland to date and sets out our vision for the future to progress key human rights and equality issues for women.

## 1.2 Submission Structure

NWC welcomes the opportunity to input into the Justice Committees consideration of a ‘victim’s testimony in cases of rape and sexual assault’. NWC’s comments reflect the lived experiences of the women that we have worked with and that have contacted us in huge numbers over many years.

Rape and sexual assaults are forms of gender-based violence<sup>1</sup>. While women, men and children can be victims of rape and sexual assault, the perpetrators are predominantly men

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<sup>1</sup> The Council of Europe Convention on Violence Against Women (Istanbul Convention<sup>4</sup> 2011) emphasises the gender perspective on violence and states that violence against women cannot be addressed without looking at gender equality issues see Istanbul Convention [http://www.coe.int/t/dghl/standard setting/convention-violence/](http://www.coe.int/t/dghl/standard_setting/convention-violence/)

and women are disproportionately the victims<sup>2</sup>. One in five women in Ireland have been raped in their lifetime, this compares with one in ten men<sup>3</sup>. Younger women are at an even greater risk of rape and sexual assault. The NUIG Sexual Experiences Survey (2020) found that nearly one in three female students had experienced rape while at college<sup>4</sup>. There are clear differences in female and male vulnerability to sexual violence. Where male vulnerability to sexual violence decreases as they age, female vulnerability does not decrease to the same extent.<sup>5</sup> One in five women and one in ten men have experienced sexual assault in adulthood<sup>6</sup>.

In drafting this submission, we were cognisant of the significant reform that is currently underway in the form of the implementation of the O'Malley Review through the Department of Justice's strategy 'Supporting a Victim's Journey'. NWC and its members are engaging with and assisting the Department, to ensure these substantial reforms are driven from the perspective of the victims and survivors.

In accordance with the remit prescribed by the Justice Committee our submission focuses on two core areas: contextualising a victim's testimony and special measures to improve a victim's testimony. The submission concludes with a broader recommendation on the needed reforms of trial rules and processes that impact significantly on a victim-survivors experience of the trial process.

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<sup>2</sup> The SAVI Report - Sexual Abuse and Violence in Ireland. A national study of Irish experiences, beliefs and attitudes concerning sexual violence. Dublin: Liffey Press, 2002. <http://www.drcc.ie/wp-content/uploads/2011/03/savi.pdf>

<sup>3</sup> see <https://www.maynoothuniversity.ie/news-events/mu-and-trinity-study-finds-one-five-women-have-been-raped-their-lifetime>

<sup>4</sup> See, <https://www.nuigalway.ie/media/smartconsent/Sexual-Experiences-Survey-2020.pdf>

<sup>5</sup> Dublin Rape Crisis Centre and RCNI – National Rape Crisis Statistics 2011, p. 27. [www.rcni.ie/wp-content/uploads/RCNIARNationalStatistics2011.pdf](http://www.rcni.ie/wp-content/uploads/RCNIARNationalStatistics2011.pdf)

<sup>6</sup>The SAVI Report –Sexual Abuse in Ireland, Executive Summary. E-publications at RCSI. <http://epubs.rcsi.ie/cgi/viewcontent.cgi?article=1014&context=psycholrep>

## 2.0 Contextualising a Victim's Testimony

It must never be forgotten that all sexual offences are grossly underreported. This trend sadly persists, with younger victims and older victims of domestic abuse being the least likely to report such crimes<sup>7</sup>. Compounding this reality is the fact that in 2008 only 8% of reports of rape resulted in conviction<sup>8</sup>, this has only marginally increased to 11% in 2018.<sup>9</sup> The barriers to sexual offence reporting coupled with the high attrition rate is the backdrop to which all sexual offences need to be considered as there is no other category of crime that suffer the same perils as that of sexual offences.

The reasons for the exceedingly low reporting rates and unacceptably high attrition rates have been well documented and do not warrant repeating here in detail. That being said, the root causes of underreporting of sexually violent crime lies in the long history of oppression of women, their sexuality and their autonomy. The question is not whether, but instead, *how* do these oppressions continue to shape and influence the justice system generally, and how does this impact on a victim's testimony, specifically.

A victim's testimony is but one phase, albeit an incredibly important phase, of a victim's journey<sup>10</sup>. Events that precede, and indeed those that proceed it, will invariably impact upon this testimony. Whilst recognising this fact, for the purposes of this submission analysis will be confined to how a victim's testimony should be reformed so as to better protect the fundamental rights of victim/survivors of sexual offences which have for centuries now been

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<sup>7</sup> Rape Crisis Network Ireland, 2019 Statistics available at <<https://www.rcni.ie/wp-content/uploads/RCNI-Statistics-2019.pdf>>

<sup>8</sup> Corr, M-L., O'Mahony, P., Lovett, J., & Kelly, L. (2009). Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries: Country Briefing: Ireland. <https://cwasu.org/wp-content/uploads/2016/07/Ireland.pdf>

<sup>9</sup> CSO, Recorded Crime Detection 2018 available at <<https://www.cso.ie/en/releasesandpublications/ep/p-rcd/recordedcrimedetection2018/>>

<sup>10</sup> The victim/survivor's journey includes , but is not limited to: the victim/survivors lived experience of the crime; the victim/survivor disclosing of the crime; the victim/survivor reporting the crime; when the crime is being investigated; when/if charges are brought; when/if preparing for a trial; when/if going through a trial; when/if the perpetrator is sentenced; when/if the perpetrator is released

denied, neglected, misunderstood, misinformed and damaging not only to victim/survivors but to society as a whole.

As noted above, there is significant reform afoot within both the Department of Justice and across the criminal justice system. It is perhaps the publication of the O'Malley Review that has been most significant in this regard. Using the O'Malley Review as a jumping off point, this submission will focus particularly on significant aspects of a trial that impact upon a victim's testimony in rape and sexual assault cases.

While much of this submission draws on the O'Malley Review it is important to note at this point that there are a number of shortcomings in that Review. Largely absent from the Review is the recognition that there are very different contexts for a victim-survivors and these different contexts can, and do, profoundly impact on victim-witnesses. Some may experience rape and sexual assault in the context of: domestic violence; in prostitution; in trafficking. Compounding this, victim-survivors may experience multiple layers of discrimination: as women; as disabled woman; as minority ethnic women; as Traveller woman. There is simply no one type of victim.

We welcome and recognise that the Department of Justice has taken a much broader approach in regard to the implementation of the Review and so we are recommending that the Committee take this broader and more inclusive approach when considering the victim's testimony in rape and sexual Assault cases.

## **2.1 Defining Vulnerability**

The expanded understanding of what constitutes a 'vulnerable witness' is crucial in developing a truly trauma-informed and responsive criminal justice system. The shift away from recognising purely Status Vulnerability - based on the individual characteristics (whether that is age or capacity) - to Situational Vulnerability, which recognises the impact of the nature of the offence, goes beyond the mere provision of protections and special measures but,

instead, reflects a profound conceptual leap in understanding of the impact and seriousness of sexual offences<sup>11</sup>.

The O'Malley Review makes clear in adopting a broad understanding of vulnerability that 'a person who has a well-founded fear or is likely to experience distress in connection with the giving of evidence' is to be considered a vulnerable witness and thus should be afforded all the requisite protections and special measures. The question is, to what degree is this understanding reflected in law and, most especially, in practice.

This reform is essential in truly recognising the gravity and impact of all sex-based crimes. In many respects, this recognition acts as a gateway to the array of protections and special measures that are so crucial in safeguarding witness' rights during their testimony.

Therefore, the incorporation of this important shift in understanding both, substantively (in statute and guidelines) and conceptually (through education, training and other measures), is fundamental and necessary to ensure that victims and vulnerable witnesses are afforded the protections they need to support them throughout the trial process, and, most especially during their testimony. This is necessary in order to ensure that victims and witnesses are facilitated to give their best evidence and to lessen, as far as is possible, the re-traumatisation of victims and witnesses through the criminal justice process.

## Recommendation

- The automatic rights afforded to children (presumption of protection needs<sup>12</sup>) under the Criminal Law (Victims of Crime) Act 2017 should also be extended to all victims of sexual offences. This would honour, in statute, the expanded understanding of what constitutes a 'vulnerable witness'. This would reflect both Status and Situational vulnerability.

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<sup>11</sup> It is noted that the Review Group cautions against equating a "vulnerable witness" with a "vulnerable complainant", but instead recognises that all witnesses may be "vulnerable" by virtue of their youth, disability or some other factor.

<sup>12</sup> Most especially, Criminal Law (Victims of Crime) Act 2017 "S. (7) For the purposes of an assessment, where a victim is a child—  
(a) the child shall be presumed to have protection needs, and..."

- To fully meet this objective, we recommend that a statutory definition, based on S.10 of the Victims and Witnesses of Crime (Scotland) Act, be inserted into the Criminal Law (Victims of Crime) Act 2017

### 3.0 Supports for Victim-Survivors

It has long been recognised that Ireland lags significantly behind when it comes to protections and special measures for victims of crime. Especially so for victims of sex-based crimes. The prevailing negative view around such measures – that they amount to a disadvantage for the accused – must be challenged and reformed.

From consultation with member organisations of NWC, we know that in spite of legislative provisions providing for special measures (Victims of Crime Act 2017) they are still not commonplace within the Irish justice system. More serious than this – there is currently an *ad hoc* approach to the provision of supports which relies on volunteers and under resourced frontline services providing victim supports including court accompaniment, NWC is thus calling for a comprehensive, victim-led supports service that provides victims with the choice of a range of supports including, legal, psychological, financial and care.

Although there are notable amendments needed in legislation, it is perhaps more apt to conclude that the substantial reforms are needed in the application and implementation of such provisions, with the need to prioritise specialist training, infrastructure and technological advancements.

Whilst this submission is confined to considerations of the victim's testimony in rape and sexual assault cases the 'ingredients' that lead to that point must be considered. As such, this section will set out the key measures that must be taken to limit, as far as possible, re-victimisation of victim-witnesses and to support them to give their best possible evidence at trial.

#### Recommendation

- There needs to be comprehensive, victim-led supports services that provide victim-survivors with the choice of a range of supports including, legal, psychological, financial and care.

### 3.1 Pre-Trial and Trial Supports

The O'Malley Review and others have highlighted the importance of the provision of information, access to legal advice and specialist supports for victim-witnesses in preparing them for trial<sup>13</sup>. Indeed, the provision of such supports should be recognised as the fundamental rights of all victims of crime, which of course, includes that of rape and sexual offences. This is so, irrespective of whether or not: a victim-survivor formally reports the incident; the case is prosecuted; the case goes to trial, and/or; the accused pleads guilty.

We support the O'Malley Review's emphasis on the necessity for: the provision of information, access to legal advice, intermediaries, and psychological and other specialist support services. However, the question remains, who will deliver those supports to victims? And how will victim-survivors access legal advice and representation? The ideal situation is that supports are victim centred and accessible. Whilst the O'Malley Review sets out an array of services and supports needed for victim-survivors none of these avoid necessitating a victim go to range of services to seek supports. This diffused system of supports and services is not workable for victim-survivors. To access legal supports, they must go to one service, to access psychological supports they must go to another. We recommend that frontline services should be resourced to both provide and engage the supports for victims.

For present purposes we will focus on two particular services that impact directly and considerably on a victim's testimony. First, the familiarisation services offered by the DPP, in partnership with *An Garda Siochana* is particularly important for victim-witnesses in preparing them for the trial process and, in particular, for their testimony. This service offers an opportunity for victim-witnesses to familiarise themselves with the court and the trial

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<sup>13</sup> "The research found that specialist sexual violence services play particularly crucial roles through the use of approaches that can be characterised as flexible, enabling, holding and mending." See Marianne Hester, Sarah-Jane Lilley, More than support to court: Rape victims and specialist sexual violence services, *International Review of Victimology* (2018) 24(3), p. 313-328. doi:10.1177/0269758017742717; "Finding highlight the importance of advocacy that is independent of statutory and criminal justice agencies" see Oona Brooks, Michele Burman, Reporting rape: Victim perspectives on advocacy support in the criminal justice process, *Criminology & Criminal Justice* (2017) 17(2), p. 209-225.

process. This service has been described by the Rape Crisis Network Ireland as having “a profound effect on victims and has been very helpful in alleviating fear of unknown surroundings and procedures”<sup>14</sup>. Whilst this support appears to be extremely effective in Courts of Criminal Justice in Dublin, it has been noted that some inconsistencies in the quality of the meetings were reported in other parts of the country.<sup>15</sup> As recommended in the O’Malley report:

it is vitally important that this service should be available to all victims of sexual crime in advance of trial, irrespective of the court or locality in which the trial is being held.<sup>16</sup>

The related, yet distinct service of court accompaniment is provided by a number of NGOs. However, in several court venues and throughout the country there is no such services available. The Victim Support at Court Service (V-SAC) is the only service whose sole function is to provide court accompaniment for all victims of crime, regardless of the type of crime. In addition to this, court accompaniment services are also provided by other NGOs as part of a suite of services they provide to victims of specific crimes. A large number of Rape Crisis Centres around the country provide court accompaniment services to victim-survivors of sexual offences. Although, as stated above this service is not available in every part of the country and is thus not available to every victim-witness who may need/want to avail of this support. The importance of the provision of this essential service for victim-survivors is recognised. Despite this, court accompaniment is still not adequately funded and, in large part, is only sustained by the extraordinary goodwill of volunteers, without whom the services would not exist.

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<sup>14</sup> Irish Council for Civil Liberties, *A Better Deal: The Human Rights of Victims in the Criminal Justice System* (Irish Council for Civil Liberties 2008) 18.

<sup>15</sup> Romyana Grozdanova and Fiona de Londras, *Protecting Victims' Rights in the EU: The Theory and Practice of Diversity of Treatment During the Criminal Trial*, National Report: Ireland (Institute of Advanced Legal Studies 2

<sup>16</sup> O’Malley Report (2020), P. 95

In line with the general understanding - as set out in the O'Malley Review - that all victim-survivors of all sexual offences need increased supports,<sup>17</sup> we recommend that there is a commitment to ensuring the availability of these services to support all victim-survivors of all sexual offences.

## Recommendation

- Increase and expedite multi-annual funding to frontline specialist support services to ensure that they can offer victim-survivors court accompaniment services.
- Frontline services should be resourced to both provide and engage the supports for victim-survivors.
- Ensure that victim-survivors of all sexual offences receive the same level and standard of support and accommodation irrespective of jurisdiction<sup>18</sup> or the location of the court. Including but not limited to court familiarisation and accompaniment services.

## 3.2 Preliminary Trial Hearings

The O'Malley Review is expressly clear in need for preliminary trial hearings. This is not novel, but, instead, echoes earlier recommendations to introduce such.<sup>19</sup> In fact, Ireland is an outlier in not having statutory provision for preliminary trial hearings and their introduction is long overdue.

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<sup>17</sup> "The right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experience) should be extended to include trials for sexual assault" at P. 84; "...the range and quality of support and services for victims should not depend on the court or locality in which a trial is held", at p. 32; "Some sexual offences are also dealt with in the District Court... When a sexual assault charge is contested in the District Court, the victim will be required to attend and give evidence as in a trial in one of the higher criminal courts. It is therefore essential that adequate support and accommodation should be available for victims in the District Court" at P. 32 O'Malley Report (2020),

<sup>18</sup> This includes the District Court, Circuit Court and Central Criminal Court. The latter of these courts is recognised as having particularly good facilities and services to support victim-witnesses, but these are to be contrasted with the limited or lacking facilities and supports that are available in the District and, to a lesser degree, the Circuit Court.

<sup>19</sup> Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* Pn 237 (Dublin: The Stationery Office, 2003), at 746 to 781; Expert Group on Article 13 of the European Convention on Human Rights.

There are of course a number of benefits to preliminary trial hearings. Chief amongst these from the perspective of victim-survivors of rape and sexual assault is the: potential for reduction in delays in the trial; reduced risk of unintended disclosures at the trial phase; the provision of special measures, and; decisions on the admissibility of evidence and disclosure.

## 4.0 Special Measures

The question of which victim-witnesses qualify for special measures is of course crucially important. Other considerations include who decides what special measures are available to vulnerable witnesses. And, importantly, whether there is capacity to provide for such measures.

At present those who come within the definition of vulnerable is limited in the Irish context. It is accepted that victim-witnesses who are young and/or have an intellectual disability are vulnerable and therefore have access to a number of special measures. As stated above, it is our view that such measures should be extended to include *all* victim-survivors of *all* sexual offences.

### 4.1 Interview Suites

Dedicated interview suites are primarily used to interview victims who are under 18, or those who have an intellectual disability. Additionally, there is nothing to preclude their use in interviewing other vulnerable witnesses. Each suit is equipped to record witness statements. The pre-recorded statements can then be admitted at trial<sup>20</sup>. In relation to whether such evidence is considered to be evidence-in-chief the O'Malley Review finds that it is likely that in practice it is treated as such<sup>21</sup>. It is recognised that the use of pre-recorded statements may enhance the ability of witnesses to give their best evidence which 'is essential for the overall fairness of any eventual trial'.<sup>22</sup> This recognition and understanding supports the above

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<sup>20</sup> S.16 (as amended) Criminal Evidence Act 1992

<sup>21</sup> O'Malley, p. 72

<sup>22</sup> O'Malley, p. 38

assertion that such measures should be made available, as part of a suite of options available to all vulnerable witness – broadly defined so as to include victim-survivors of sexual offences.

## Recommendation

- Dedicated interview suites should be available for use for interviewing all victim-survivors of all sexual offences.
- Legislation should be amended to provide for pre-recorded interviews to be considered as evidence-in-chief in all rape and sexual assault cases.
- An Garda Síochána should be resources to ensure that they have the capacity to train sufficient numbers of Gardai to undertake such interviews.
- Such suites should be located across the country and accessible to all.

## 4.2 Screens in Court

A court may issue a direction that a screen be positioned so as to prevent the witness from seeing the accused when a victim of any offence is giving evidence, even if the victim is 18 years or older, if satisfied that the interests of justice so require<sup>23</sup>. Whilst these measures are available, they remain underused. There are considerable deficiencies in the infrastructure of and resourcing of such measure. Although some courts have extremely well-developed trauma-informed facilities, such as separate entrances and waiting areas, this is not the case in every court that hears sexual offence cases (most notably District Courts). Thus, in the absence of other trauma-informed facilities the use of screens in safeguarding the rights of victim-witnesses may be limited as best, and somewhat futile at worst.

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<sup>23</sup> Criminal Evidence Act 1992, S. 14A

## Recommendation

- Expand and resource provision for screens in court for all victim-witnesses in all sexual offence cases. Irrespective of location or jurisdiction of the court.
- Ensure that all court facilities are victim-witness centred and trauma-informed. This includes but is not limited to: separate entrances for victim-witnesses; separate waiting areas for victim-witnesses; quiet, private spaces for victim-witnesses; access to supports at courts. These should be provided throughout the country irrespective of location or jurisdiction of the court.

### 4.3 Video-linked Evidence

The Criminal Evidence Act 1992<sup>24</sup> provides that a video recording of any evidence in relation to a sexual offence (or certain other offences) through a live television link in proceedings under Part 1A of the Criminal Procedure Act 1967 shall be admissible at trial as evidence of any fact stated therein of which direct oral evidence would be admissible. However, for those over 18 years leave of the court must be granted for victim-witnesses to be able to give evidence via video link. In brief, it can be summarised that there are some special measures that *must* be provided to some victim-witnesses (those who are under 18 years and/or have an intellectual disability) and there are some special measures that *may* be provided to other victim-witnesses. In line with earlier reasoning, it is submitted that special measures must be provided to all victim-witnesses of sexual offences. We believe that this approach honours both the letter and the spirit of Criminal Law (Victims of Crime) Act 2017 S. 15.

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<sup>24</sup> S.16

## Recommendation

- Legislate for the expansion of provision for video-linked evidence for all victim-witnesses of all sexual offences. Irrespective of location or jurisdiction of the court.
- Ensure that such facilities are adequately funded and are of high quality. Pre-recorded Cross- and Re-Examination.

### 4.4 Pre-recorded Cross- and Re- Examination

Another example of a special measure that can greatly reduce the risk of re-victimisation of a victim-witness of a sexual offence is the use of pre-recorded cross-examination and re-examination. As with recorded evidence-in-chief and video-linked evidence detailed above, pre-recorded cross examination and re-examination have also been shown to be both possible and beneficial to victim-witnesses in giving them an opportunity to give their best evidence. The concerns around pre-recorded cross-examination (and re-examination) rest largely on issues of disclosure. While of course these are legitimate concerns, they are not, in fact, directed at the practice of pre-recorded cross and re-examination. But, are instead separate issues that require separate and distinct reform.

Evidence from pilot studies and from other jurisdictions where pre-recorded cross- and re-examinations operate has shown that much of the concerns raised around the introduction of such a measure are not in fact well founded<sup>25</sup>.

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<sup>25</sup> E. Davis and K. Hanna, 'Pre-Recording Testimony in New Zealand: Lawyer's and Victim Advisors' Experiences in Nine Cases' (2013) 46(2) *Australian and New Zealand Journal of Criminology* 294 and 297; Scottish Government, THE IMPACT OF THE USE OF PRE-RECORDED EVIDENCE ON JUROR DECISION-MAKING: An Evidence Review (2018) at <https://www.gov.scot/Resource/0053/00532556.pdf> last accessed 23 August 2018; Oslo Metropolitan University, Findings from the first evaluation of the Norwegian equivalent to childrens advocacy centers: Statens barnehus at [https://www.hioa.no/eng/About-HiOA/Centre-for-Welfare-and-Labour-Research/NOV\\_A/Publikasjonar/Rapporter/2012/Findings-from-the-first-evaluation-of-the-Norwegian-equivalent-to-childrens-advocacy-centers-Statens-barnehus](https://www.hioa.no/eng/About-HiOA/Centre-for-Welfare-and-Labour-Research/NOV_A/Publikasjonar/Rapporter/2012/Findings-from-the-first-evaluation-of-the-Norwegian-equivalent-to-childrens-advocacy-centers-Statens-barnehus) last accessed 23 August 2018; *R v Dinc (Zafer)* [2017] EWCA Crim 1026 (CA (Crim Div)); The most commonly cited concerns are: the rights of the accused; the possible issues with technology; a potential reduction in

From the available evidence it is clear that defendants can still have their right to a fair trial protected while balancing the rights of victim-survivors of sexual offences. On the issue of the defendant's rights to a fair trial – an often-raised concern - it was held in *Dinc*<sup>26</sup> that the measures implementing pre-recorded cross-examination did not undermine the defendants' right to a fair trial, and stated that:

There is nothing inherently unfair in restricting the scope, structure and nature of cross examination and or in requiring questions to be submitted in advance... it is the judge's duty to control questioning of any witness and to ensure it is fair both to the witness and the defendant<sup>27</sup>.

In fact, there is evidence to suggest that the introduction of pre-recorded cross and re-examination may in fact benefit the defendant as there that a “combination of admissions and focussed cross-examination could produce a powerful defence case; more powerful than a defence advocate putting to a witness a whole series of propositions only to be met with the answers: "No", "I don't understand" or "I don't remember.”<sup>28</sup>

Drawing on the reasoning in *Dinc*, NWC would argue that far from amounting to an unfairness for the defendant the *status quo* amounts to a gross unfairness for the victim-witness. The absence of sufficient protective and special measure reflects a serious violation of the victim-survivor's right to be treated with dignity, respect and not be re-victimised through the trial process. We would also like to raise the significant issues surrounding questions and evidence that is put to a victim-witness during their cross-examination. In spite of statutory protections to guard against such, all too often, the defence rely on discredited myths and stereotypes about victims to reinforce aspects of the case that are consistent with rape myths<sup>29</sup>. Where

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the jury's ability to “read” a witness's body language; whether video testimony might create emotional distance between the witness and the jury, and; possibly lack the immediacy and persuasiveness of live testimony.

<sup>26</sup> *R v Dinc (Zafer)* [2017] EWCA Crim 1026 (CA (Crim Div))

<sup>27</sup> *Ibid*, at 263

<sup>28</sup> *Ibid*, at 264

<sup>29</sup> J. Temkin, J. Gray and J. Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation' (2018) 13(2) *Feminist Criminology* 205-226, at p 205

pre-recorded cross- and re-examination is provided for at a preliminary trial hearing a judge can carefully screen and consider questions and evidence and, where necessary, can edit these out of the final version that is used at trial. To realise this end, we would recommend that mandatory Ground Rule Hearings also be introduced at the preliminary trial.

### Recommendation

- Legislate and adequately resource provision for pre-recorded cross- and re-examination of victim-witnesses in all rape and sexual assault cases.
- Ensure that such facilities are available throughout the country.

## 5.0 Privacy Rights of Victim-Survivors of Rape and Sexual Assault

Disclosure of personal and deeply private information, such as medical records and/or counselling notes have deeply chilling effect on victim-survivors of all cases, especially so for victims of sexual offences given the nature of these offences. As noted in the O'Malley Review, the provisions that are designed to safeguard the victim-survivors right to privacy are seldom, if ever, used<sup>30</sup>. NWC would like to reiterate the concern expressed in the Review about the lack of application S.19A<sup>31</sup> and call for this to be urgently reviewed.

If a victim-witness is unaware or not supported in understanding S.19A this raises serious concern about how the law is operating *de fact*. The sole purpose of S.19A is to safeguard the privacy of the victim-witness. A victim-witness is entitled, not only to be heard, but to be legally represented at the disclosure hearing. The reality that this right is most often waived is deeply concerning. Clearly the 'balance' that S.19A seeks to strike, as between the accused right to a fair trial and the victim-witnesses right to privacy, in reality results in a clear unbalanced in favour of the accused to the detriment of the victim-witness. Whilst we acknowledge and welcome the strict conditions that are imposed in respect of counselling notes by the DPP this does not, in our opinion, sufficiently uphold the privacy rights of victim-

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<sup>30</sup> O'Malley, at p. 78

<sup>31</sup> Criminal Evidence Act 1992 (as amended)

survivors. Similarly, in respect of medical records NWC calls for them to be included in S.19A also so as to better protect the privacy rights of victim-witnesses.

Given the deeply personal nature of counselling notes, and the evident lack of meaningful protections provided to victim-survivors we would serious question the appropriateness of the necessity to disclose counselling notes or medical records. Similar to protections pertaining to evidence on previous sexual experience (S.3 of the Criminal Law (Rape) Act 1981) we would recommend that a similarly restrictive approach be adopted in respect of counselling notes and medical records. In that, 'where a form of questioning is allowed, it should be confined only to what is *strictly necessary* and should never be utilised as a form of character assassination of a complainant [emphasis added]'<sup>32</sup>.

The question of whether counselling notes are ever considered 'strictly necessary' would of course rest with the presiding judge. However, given the deeply personal nature of counselling notes and their inherent subjectivity it is hard to imagine situations where they would/could be deemed to be 'strictly necessary', but for in the most exceptional cases. This, coupled with the clear lack of *de facto* protection available to victim-witnesses would strongly suggest that they should not form part of rape and sexual assault trials, except in exceptional circumstances. As such, we would call for a reversal of the current trend of counselling notes almost never being excluded to a position where they are almost never *included* in trials.

## Recommendation

- A review of how S.19A is operating is urgently needed.
- Greater protections are needed to safeguard the privacy rights of victim-witnesses in rape and sexual assault trials especially in relation to counselling and medical records.
- Medical records should be included in S.19A also so as to better protect the privacy rights of victim-witnesses.

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<sup>32</sup> DPP v GK [2007] 2 I.R 92 at 103-104

## 6.0 Conclusion

This submission has outlined some of the reforms that are necessary to ensure that a victim's testimony is the best evidence that it can be at trial. Furthermore, we have called for the expansion of the availability of special measures to victim-survivors of rape and sexual assault to reduce, as far as possible, the re-traumatisation and re-victimisation of survivors that is caused by the trial process itself.

There is a great deal of reform being undertaken to improve the justice system for victim-survivors of sexual offences and we commend all those that are working so hard to bring about this change. Despite being somewhat behind some of our common law neighbours, this has afforded us the opportunity to learn from others experiences and to 'leap-frog' over practices that have not been effective. As such, we are calling on you to go from limited 'Pigot'<sup>33</sup> to 'Full Pigot'<sup>34</sup> in order to better protect the rights of survivors that have, for too long, been so poorly served by the justice system.

Although arguably beyond the scope of this submission we would also call on you to examine further the trial rules and procedures as they relate to other aspects of the criminal trial process. In particular, the myth-based narratives that continue to plague rape and sexual assault trials. In most cases, the judge's direction or charge to the jury comes too late to disrupt these as juries process information as it is presented. They rarely, if ever, consider all of the information at together in deliberations. Given the importance of ensuring that trials are fair and impartial processes, we feel that this needs to be examined separately and in greater detail. The myth-based narratives remain particularly pervasive in relation to myths around female alcohol consumption, female sexual activity, the 'unreliability' of women<sup>35</sup>.

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<sup>33</sup> Some facilitates for pre-recorded evidence-in-chief

<sup>34</sup> Pre-recorded evidence-in-chief and pre-recorded cross- and re- examination

<sup>35</sup> See further, Emma Henderson, Kirsty Duncanson, A LITTLE JUDICIAL DIRECTION: CAN THE USE OF JURY DIRECTIONS CHALLENGE TRADITIONAL CONSENT NARRATIVES IN RAPE TRIALS? (2016), Law Journal Volume 39(2), p. 260

Judicial charges and directions to the jury should be based on Judicial Guidelines that are drafted and regularly reviewed by the Judicial Council. These are essential in challenging and displacing 'rape myths' and misunderstandings that permeate rape and sexual assault trials. In particular, guidelines should include directions on consent, reasonable belief, and corroboration warning.