

Review of the investigation and prosecution of sexual offences

A. INTRODUCTION:

The Dublin Rape Crisis Centre (DRCC) is a non-governmental organisation which aims to prevent the harm and heal the trauma of rape and sexual abuse in Ireland. Located on Leeson Street with outreach services in Coolock, Tallaght and in the Dóchas Women's Prison, we are the largest of the 16 Rape Crisis Centres in the country. We work predominately in the area of counselling and therapy as well as education, policy, and in the training and supervision of our cohort of approximately 80 volunteers. We run the National 24-Hour Helpline which takes over 1,000 calls a month from victim/survivors of sexual violence and their supporters. We provide therapy for over 500 people a year. We provide training for about 2,000 people, including those working on the frontline with victims of sexual violence and those working with children and young people. We accompany victim/survivors to the Rotunda Sexual Assault Treatment Unit (SATU), to Garda Stations and to court. We advocate on behalf of victim/survivors and carry out public awareness campaigns to prevent sexual violence.

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. In some cases, we also use the term complainant.

To practically inform our submission we consulted both survivors and a number of legal practitioners, to obtain their expert insights. We are grateful to them for allowing us to add their thoughts to our observations. In addition, we wish to acknowledge the work done by Professor Ivana Bacik, Trinity College Dublin and her team and the later research of Kate Mulkerrins in relation to separate legal representation. We also wish to acknowledge the assistance received from the office of the DPP which made available statistical data in relation to a sample of sexual offences tried in the Central Criminal Court. And we also acknowledge the helpful review of this submission by Dr. Susan Leahy, University of Limerick.

B. Context:

We believe that the current treatment of rape and other sexual abuse complaints in the criminal justice system is hostile to the interests and rights of victims of sexual crime and is also harmful to society. Ever before the Belfast rape trial, we have been concerned about how complainants are treated in court.

From our experience over the years, through research and analysis, through accompanying complainants to court, through hearing people on the National 24-Hour Helpline and through working with them in therapy, it does not surprise us at all that people are reluctant to report, and to follow through to giving evidence in court.

C. For consideration throughout sexual offences investigations and trials:

- A. With the advent of the EU Victims Directive and the Criminal Justice (Victims of Crime) Act 2017, the protection of victims, establishing minimum standards on their rights and supports, is now an important part of the criminal justice system. Victims now have a legal entitlement to information, protection and support throughout their passage through the criminal justice system which must be ensured by effective service delivery from all stakeholders throughout the victims' journey.
- B. A recognition that victims of sexual violence (as in other intimate violence) differ from victims of other crime. The crime is to their dignity and psyche as well as their body and is usually committed by someone they trust – in their family or otherwise. It is a crime of true abuse where the abuser may retain power over the victim for many years. Further, if they report it, the criminal justice process depends on them 'holding on' to the trauma and detail of the crime in order to ensure that the evidence is complete which can seriously impede their ability to heal and move on with their lives. This is their lived reality.
- C. Delay and case management which follows from the previous bullet point. Where there is unnecessary delay, this, as described by one experienced lawyer is unfair to the complainant, unfair to the accused and can be an act of cruelty against the complainant. Delay also contributes to the attrition of sexual crimes from the criminal justice system, a point made by one victim contributor in stating that *'delay will deter people from seeing the process through'*. These cases should be prioritised for hearing, and trials should proceed in accordance with an agreed prompt schedule. The lack of close case management is particularly difficult for complainants. They are not given adequate notice of adjournments or late-occurring delays when they have built themselves up to give evidence, to give a victim impact statement or to hear a judge pronounce sentence or a verdict.
- D. The sexual offences legislation is much amended and nigh on impossible to read. Consolidation is necessary to provide one clear unambiguous legislative text. While the reforms which were implemented via the Criminal Law (Sexual Offences) Act 2017 were welcome, a more thorough root and branch review of the current legislation is required to provide a more streamlined, accessible and thoroughly modern body of law.
- E. Further research and data is needed as it is impossible to chart or comprehend the progress of sexual offence complaints through the justice system. As a result, the State does not have the evidence it needs to chart attrition and to better reform processes. In order to get a picture of the extent of sexual violence, the State must collect essential data on prevalence and trends, and must do so more quickly than the period of five

years which the government has recently said it would take. In addition, State agencies – An Garda Síochána, Túsla, Health Service Executive (HSE), Court Services – urgently need to agree on definitions and methods of data collection in line with best international standards, synchronise data collected and share the data and subsequent analysis.

- F. The Legal Aid Board has a research mandate. It should be resourced to provide evidence-based research centred on its contact with victims throughout the investigation and trial.
- G. The need for training and awareness raising both general and specific for all practitioners and professionals who come in contact with victims of sexual crime is of paramount importance. This should include specific training in interviewing, investigating, forensics and prosecution. Together with a recognition of the rights of victims not to be re-traumatised by the justice system and of the impact of serious trauma.
- H. The complainant is not the only person affected by the trial. Making the justice system a better one for complainants will be of value to their families and supporters as well. Further, it is important to remember that the treatment of a complainant in any given trial impacts upon the general public's (including other victims') perceptions of the fairness of the trial process and the criminal justice system. If improvements result in more victims of rape and sexual abuse coming forward, we all benefit as a society.
- I. Consideration should be given to a research and reporting project similar to that undertaken by the Child Care Law Reporting Project (CCLRP) to examine and report on rape proceedings. In so doing, it could provide a better understanding of how these cases proceed, the issues and the complexities in prosecuting and indeed defending such cases. Without fully knowing what the challenges are, we cannot tackle them effectively.

D. Garda investigation:

The first stage is an adequate investigation to ensure that victims are not re-victimised and to ensure that evidence is correctly and expertly gathered for a prosecution.

- A. Specially trained Gardaí are essential. This will mean that those interviewing will have the skill to deal with sexual offences investigations and will be able to provide a consistent service, wherever the victim reports. They must be:
 - Competent and skilled in investigation and interviewing victims who are traumatised;
 - Competent to assess what evidence must be gathered at the first stage of any report, including reports of historic rape and sexual abuse;
 - Competent to conduct adequate initial assessments in accordance with the Criminal Justice (Victims of Crime) Act 2017;
 - Competent to conduct an adequate assessment as the case goes to the Office of the Director of Public Prosecutions (DPP).

- B. Accompaniment:
 - In order to vindicate the right of a victim to be accompanied by a person of their choice during an interview, adequate protocols must be developed for all Gardaí and investigators;
 - Gardaí should be particularly alert to ensuring that vulnerable victims understand the nature of the support services available e.g. Helpline, rape crisis centres and the like.
- C. Information is a cornerstone right for victims. Lack of adequate information is a major source of victim dissatisfaction within the criminal justice process. Information and attention to the victim, needs to be more consistently professional, comprehensible and empathetic throughout the investigation.
- D. As required by law, Gardaí must determine whether complainants have 'special protection needs' which warrant the use of special measures during the investigation or trial. Gardaí must be fully trained for this assessment process according to best practice protocols, for identifying a complainants' needs in line with their own views and the input of support workers such as rape crisis centre support personnel.
- E. Victims should be alerted at all stages to potential requests made for disclosure that affect them.
- F. Currently, we have concerns about the lack of prioritisation particularly of childhood sexual abuse reported by an adult. While there is some excellent practice; some Gardaí either treat this work as too difficult, not urgent because it is 'historic' abuse or they do not understand the kind of investigation it demands, in particular the identification of factual evidence which may support the victim's account. It should be treated with the same gravity as recent abuse.
- G. A new approach to historic case indictments where a person could be charged on just one charge/ offence committed over a number of years of sexual abuse. This would focus attention on the substance of the allegations themselves rather than on the often fruitless or frustrating task of identifying precise timings for offences committed on a child many years previously.

E. SATU:

There should be a permanently open and available Sexual Assault Treatment Unit (SATU) service in Dublin - 24-hour a day, 7 days a week. This is essential in the country's capital city. The unit at the Rotunda Hospital, Dublin is frequently closed because of a lack of personnel for a full forensic examination team which means victims of sexual violence may have to travel to one of the other 5 SATUs in the country for the forensic examination and essential aftercare.

- The review to which this submission is made should link in with a review of SATUs being undertaken by the Policy Unit of the Department of Health, due to conclude at end 2018.

F. Office of the Director of Public Prosecution:

- A. Information on how decisions are made within the Office of the DPP about charges needs to be clearer:
 - i. We need Irish research in this area to
 - Increase knowledge
 - Ensure no unconscious bias
 - ii. Victims should be entitled to legal assistance at the time that a review of a DPP decision is under consideration so that they are aware of constraints on DPP reasons, but equally can make relevant enquiries of the DPP's office.

G. Trial:

- A. Bail
 - There is a need for greater knowledge by legal practitioners and Gardaí of capacity to hear the victim's voice (particularly given delays in trial).
- B. Case Management
 - To deal with delay and to fix a full schedule.
 - Applications for the introduction of sexual experience evidence, notes, medical records, should all be made in pre-trial applications at least one month before trial, with rulings which are then binding on the Trial Judge, in the absence of a change of circumstances which would make a subsequent trial unfair. Rules of Court should be amended to provide strict time limits for these applications.
 - Victims should be entitled to adequate legal representation both in advance of and after such applications and such representation should be provided in a timely manner to allow for the giving of instructions and appropriate advice.
 - Disclosure should be dealt with pre-trial by way of written application which is time-bound as to the period of disclosure requested. In addition to the scheduling of disclosure applications, victims (and Gardaí) say that defence disclosure applications are getting wider and more extensive all the time. This raises two issues: one is the need for guidance on what is and is not relevant for disclosure so that time and money are not wasted in fishing exercises. The other is that if disclosure is to be given, then the costs of disclosure must be factored in. Both the cost to the complainant in providing it, and the costs of both sides in considering it.¹
- C. Complainant
 - Given that a victim of crime is entitled to make informed decisions about taking cases forward, there are a number of points at which there is no legal support to inform those decisions.

¹ In this regard, we received a copy of representations made by Mr. Luigi Rea BL, which we note was also sent to Mr. O'Malley and the Minister for Justice & Equality, in relation to the costs of thorough disclosure.

Instances include, provision of counselling or medical notes, applications for disclosure, applications for anonymity. There is no provision for legal advice from the Legal Aid Board to enable complainants or other potential witnesses to give informed consent (it would mean prioritising these cases and thus skipping waiting lists of the Legal Aid Board). Given that a complainant's consent will allow a victim to waive certain protections, it is vital that a mandatory, robust and fully functioning informed consent regime is devised so that anyone whose records are requested has an opportunity to discuss this fully with their counsellor/health care provider and a legal professional. This will help to ensure that they fully understand the ramifications of consenting to disclosure and not availing of a judicial assessment of the relevance of such evidence for the trial.

- Separate legal representation (SLR) for the complainant would permit the representative to participate in the court process, in the absence of the jury. Expanding the SLR procedure to allow for continuity of representation would provide greater supports for complainants in the following ways:
 - A. Pre-trial and case-management hearing advice.
 - B. Having assigned SLR counsel to the complainant for the section 3 application, counsel should remain in court for the duration of the cross-examination of the complainant.
 - C. Complainants should have access to SLR (at least a solicitor, if not also counsel) at the pre-trial and post-trial stages. Given the provisions of the 1995 Civil Legal Aid Act which permits access to legal advice pre-trial, complainants should be made more aware of this and have timely access to it.
 - D. At post-trial stage, complainants should have access to legal advice concerning issues around adjournment of sentencing or lifting of the anonymity rule/protective orders. In particular, it would be important for complainants to have access to legal advice on anonymity; and be told that they can ask to waive the defendant's anonymity post-conviction subject, at the moment, to judicial discretion whether or not to grant that request.
 - E. Complainants should have an entitlement to SLR in respect of other sex offences, in particular in cases of sexual assault. Although the section 3 procedure for introduction of evidence as to prior sexual history applies to all sex offences, the entitlement to SLR is only provided for in respect of the most serious sex offences, not including sexual assault simpliciter. Yet it is arguably even more important that complainants have access to SLR when section 3 applications are made at District/Circuit court level as these are more local courts; these are the courts where cases of sexual assault are tried.
 - F. The complainant's SLR counsel should also be engaged for preparation of the victim impact statement post-conviction.

- Provision (as exists right now but which should be better funded) for victim support – psychological support – by trained supporters, such as that provided by rape crisis centres.
- Intermediaries – communication experts to assist vulnerable victims and witnesses such as children, young people and those with intellectual disabilities – should be provided to allow them to give their best evidence at police interview and trial as is the case in Northern Ireland and England & Wales. In addition, there is a significant flaw in the current legislation which only allows intermediaries to interpret questions, but not answers.
- Special measures:
 - Live links and screens in every court where sexual offences are tried.
 - While the provisions of s.39 of the Criminal Law (Sexual Offences) Act 2017 remain largely untried, this review would be a good opportunity to review and better understand the current balance between the rights of the accused and the victim in the trial including the definition of records, privacy rights of the victim, to name but two aspects.
 - The prohibition on personal cross-examination by the defendant should to be extended to all complainants as a right.
 - While recognising that there are evidential difficulties with it, many victims identify significant value in moving cross-examination entirely away from the main trial with the recorded outcome available to the jury. This should be the subject of further consideration.
- All sexual offences, including relevant bail applications, to be heard *in camera* – currently they are only held in private in the higher courts.
- The consent threshold should be revised from subjective ‘honest belief’ standard to ‘reasonable belief’. This is already before the Law Reform Commission and we have made separate submissions to the Commission relating to it.

D. Culture

- Through expert evidence and thorough research as appropriate, judges, legal practitioners and jury members need to have a thorough understanding of:
 - Myths and stereotypes leading to conscious or unconscious bias;
 - Understanding of trauma and how it affects the delivery of evidence.

- Review charge to jury to include judicial directions such as *Crown Court Compendium*² in England and Wales which could be through the Judicial Council or court rules, if that results in earlier directions. While such directions are typically given in judges' final directions to the jury; consideration should be given to whether instruction on, for example, the definition of consent, might be appropriate at the beginning of a trial so that the jury can judge the evidence in light of this definition.
- There is a need for stronger media guidelines for accredited journalists and new guidelines for social media (such as those now being adopted in the courts at the request of Chief Justice).

E. Sentencing.

One of the factors that victims have to take into account when they are facing a trial, is what the outcome is likely to be. In cases where the accused may be convicted, they will need to understand what sentence may be imposed. There is little advice or information available on this. Further, many victims do not understand the wide variations that they perceive in sentences which they suggest does not make sense. A number of victim contributors complained about what they feel is '*a lack of consistency in sentencing*'.

- A Sentencing Database, as commenced by the project known as the Irish Sentencing Information System (ISIS) some years ago, should be reinstated and maintained for reference by judges, practitioners, accused, victims and the public.
- When a database exists, review penalties for sexual offences to ensure that they are consistent and commensurate with gravity of offence(s).
- Sentencing guidelines. Legislation should contain sentencing principles which could then be developed by Judicial Council in line with draft Judicial Council Bill or, if that is delayed, to be developed by a working group.
- The weight given to a victim impact statement needs to be better identified.
- The right of adult complainants to waive anonymity should be absolute. However, it is recommended that the right to waive anonymity should be associated with a fully informed consent procedure, to ensure that victims are fully aware of the potential negative effects which waiving anonymity might have.

² Judicial College, *The Crown Court Compendium: Part I- Jury and Trial Management and Summing Up*, (2018), chapter 20. Available at: <https://www.judiciary.uk/wp-content/uploads/2018/06/crown-court-compdium-pt1-jury-and-trial-management-and-summing-up-june-2018-1.pdf>

- Judges must be aware of the reality of offences of intimate violence and how abusive behaviour is connected so that, for example, rape in intimate relationships is often only one aspect of domestic violence where that aspect cannot be separated out from the overall abusive behaviour.

H. Post-trial:

Given the traumatic nature of trials for victims, the State should ensure adequate practical aftercare packages for people whose lives now have to be reconstructed whatever the outcome. This could require support in relation to housing, ongoing health care requirements, assistance with employment disrupted by the crime etc. While not strictly a matter for the justice professionals, they should have the knowledge and skills to make referrals to the appropriate supports.

I. Compensation:

While recognising that it would be a significant adjustment, and requires further study, consideration should be given to permitting a victim to include a civil compensation claim in the criminal proceedings as in the case in certain civil law jurisdictions. This would mean that the complainant would not have to repeat the entire exercise in public at a much later stage thus further delaying recovery.

J. CONCLUSION:

It is in everyone's interest that victims of sexual crime are not discouraged from reporting, that they engage with the criminal justice system so that these crimes are reduced and that those who commit them are held to account. Manifestly the system as it stands does not encourage this. Every possible support should be afforded to victims of rape and sexual abuse during their journey through the criminal justice process, to ensure that not only their rights as a victim of crime are upheld but so too are their human rights. Reform which takes account of a victims' rights is most likely to advance justice and the rule of law to the benefit of society.