



Mr Justice John Quirke,  
President, Law Reform Commission,  
Styne House,  
5th Floor,  
Hatch Street Upper,  
Dublin 2,  
D02 DY27

Dear Mr Justice Quirke,

The Dublin Rape Crisis Centre (DRCC) welcomes the opportunity to make submissions to the Law Reform Commission in respect of the Commission's forthcoming new Programme of Law Reform.

Should you have any questions or queries in relation to our submission, please do not hesitate to contact me.

Yours sincerely,

Noeline Blackwell  
CEO

## **Dublin Rape Crisis Centre (DRCC) Submission on the Law Reform Commission Proposed New Programme of Law Reform**

### **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. We have provided crisis counselling and long-term therapy services to adult women and men who have experienced rape, sexual assault and childhood sexual abuse and have provided our expertise and experience for policy and advocacy purposes for almost 40 years. Our services include a national 24-hour Helpline, one-to-one counselling and support and accompaniment services for those reporting to An Garda Síochána or attending court. We deliver training to those working with victims of sexual violence. We make policy interventions and carry out public awareness campaigns to prevent sexual violence.

This submission is informed by our expertise and experience and by the experiences of the women and men accessing our services who are victims of sexual violence and either had interactions with the criminal justice system or have considered engaging in the process. We have structured our reply to you in the form of answers to the questions we noted on your response form.

### **What do you suggest as a suitable project for law reform?**

As a crime that by its very nature is almost inevitably hidden; the evidence, participation and co-operation that the victims of sexual crime give to the criminal justice system is essential to the prosecution of the guilty and the proper administration of justice. Without them, it is often not possible to determine the facts of the case because there may be no external evidence. Often, the entire case will revolve around their credibility. Therefore, their participation is essential to the better implementation of the rule of law and is a significant public good. However, almost universally, their experience is not a good one. Our submission is that the normal system of investigation, prosecution and sentencing of these crime is inadequate for fulfilling the purposes of the criminal justice system and vindicating the rights of the victim. It needs reform.

The current system provides substantial barriers to would-be witnesses, thus reducing the likelihood that perpetrators of sexual violence will be brought to justice. As it stands, the current system does re-traumatise many victims and runs that risk in the vast majority of cases. Victims also feel that a lack of transparency around sentencing, parole and release fails to vindicate their rights.

We believe that a suitable project of law reform would be to examine why so few victims of sexual crime make and/or complete their journey through the criminal justice process, and whether the process is one that supports the rights of this group of people.

- What difficulties do victims of sexual crime encounter?
- What setbacks arise that impede reporting or terminate their engagement with the process?
- Is the reluctance for victims of sexual crimes to report due to their perception of the criminal justice system?
- Do they believe that justice will not be achieved?

The question then is how the criminal justice system can tackle these concerns, which go to the heart of why many of those who contact us refuse to engage in this process, without unfairly restricting the rights of the accused. With the advent of the EU Victims Directive, the protection of victims, establishing minimum standards on their rights and supports, is now an important part of the criminal justice system. Quite apart from that Directive, people have family and privacy rights in Irish and international human rights law that seem poorly articulated by complainants of sexual crime.

By conducting an audit of the existing system, identifying the difficulties that victims encounter on their journey through the criminal justice system, and what changes are needed in law to remedy those difficulties; the Law Reform Commission could establish a modern framework for the investigation, prosecution and sentencing of sexual crime in a better way to protect the rights of all those involved.

### **What issues have arisen in relation to this area that have caused you concern?**

The small numbers reporting into the criminal justice system in Ireland gives rise to concern, given the evidence of the widespread prevalence of sexual violence in Ireland. We are

hampered in understanding the level of sexual crime in Ireland by a dearth of reliable data and therefore, certain assumptions must be made on the basis of the limited data available.

The last comprehensive study in this area, the Sexual Abuse and Violence in Ireland (SAVI) Report, was published in 2002.<sup>1</sup> That found that 42% of women had experienced some form of sexual abuse in their lifetime and that only 10% of sexual offences were reported<sup>2</sup>. A 2014 survey undertaken by the European Union Agency for Fundamental Rights (FRA) revealed the extent of abuse suffered by women at home; work, in public and online. The FRA findings confirmed that violence against women and girls is pervasive and extensive across the EU including Ireland, with 8% of Irish women saying they had experienced sexual violence since the age of 15 as against the European average of 11%.<sup>3</sup> The most recently published census figures found that there were 2,407,437 women in Ireland<sup>4</sup>. Using those figures and the FRA findings for Ireland, we could extrapolate that approximately 192,500 women are likely to have been victims of sexual violence, which would make this one of the most endemic crimes in Ireland, albeit one which is largely hidden and under-discussed.

We need to tackle this pervasive crime to reduce its incidence. Yet, in 2016, the CSO figures record only 2,549 sexual offences (covering the entirety of all sexual offences) – the highest number recorded for 10 years<sup>5</sup>. The Courts Services Annual Report 2016<sup>6</sup> recounts that in 2016, there were 59 trials in the Central Criminal Court covering rape only, rape and attempted rape, rape and indecent/sexual assault and rape and other offences. These figures bear out what we know from those who contact our services: Reporting rape or other sexual offences is a difficult option that many victims will not take.

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<sup>1</sup> The SAVI Report (2002) *Sexual Abuse and Violence in Ireland* Hannah McGee, Rebecca Garavan, Mairéad de Barra, Joanne Byrne and Ronán Conroy. <http://www.drcc.ie/wp-content/uploads/2011/03/savi.pdf> At the time of this submission, the Government has commissioned a Working Group to scope the terms for an updated survey <https://www.irishtimes.com/news/social-affairs/state-research-on-sexual-abuse-to-be-updated-1.3296286> (Irish Times Nov 17, 2017)

<sup>2</sup> SAVI Executive Summary <https://epubs.rcsi.ie/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1014&context=psycholrep> (From SAVI Survey - 5% of participants disclosed to a doctor, 7% disclosed to Gardaí and 12% disclosed to a counsellor pg.149)

<sup>3</sup> Violence against women: an EU-wide Survey (2014) [https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-apr14\\_en.pdf](https://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-at-a-glance-apr14_en.pdf)

<sup>4</sup> CSO Women and Men in Ireland 2016 <http://www.cso.ie/en/releasesandpublications/ep/p-wamii/womenandmeninireland2016/society/#d.en.139028>

<sup>5</sup> <http://www.cso.ie/multiquicktables/quickTables.aspx?id=cja01>

<sup>6</sup> [http://www.courts.ie/Courts.ie/library3.nsf/\(WebFiles\)/300A3D2A10D824E88025816800370ED2/\\$FILE/Courts%20Service%20Annual%20Report%202016.pdf](http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/300A3D2A10D824E88025816800370ED2/$FILE/Courts%20Service%20Annual%20Report%202016.pdf)

Yet we need victims to report in order to hold perpetrators accountable and to protect our society. Our criminal justice system needs to be open and sensitive to such reporting.

Victims who come forward to report their sexual crime must be provided with an efficient and streamlined process that protects their rights, assures their safety, minimises indignity and abuse of the victim and the attendant stresses involved wherever possible.<sup>7</sup>

Among the issues that we have identified are: -

### Reporting & Investigation Stage

The operational investigation by An Garda Síochána is crucial as the first and possibly the most important point of contact for victims of sexual violence who choose to report their crime. While there is a 2013 Garda policy<sup>8</sup> on investigations into Sexual Crime, Crime Against Children and Child Welfare, and while Protective Services Units are being developed in some areas, the implementation of this policy is inconsistent and many of those who carry out investigations do not take into account the vulnerabilities of someone traumatised following a rape or other sexual assault. This is even before taking other particular vulnerabilities such as age into account. Even when investigations are conducted with the victim in a sensitive way, the reality is that the An Garda Síochána has to produce evidence in line with normal procedures to meet the normal evidential requirements of the DPP if the case is to go forward. Little attention has been paid to whether the criteria or guidelines for evidence in such cases or how it is presented for prosecution needs to be adjusted to take account of the special nature of these offences.

Other jurisdictions have advanced the way in which they investigate such crimes, to reduce the risk of further traumatisation at the time of reporting and potentially, to reduce the necessity for a traumatised person to ‘hold on to’ their trauma for months or even years, to ensure a successful prosecution later.<sup>9 10</sup>

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<sup>7</sup> See Opinion piece of former England & Wales DPP Keir Stamer:

<https://www.theguardian.com/commentisfree/2014/apr/06/victims-law-criminal-justice-labour-plan>

<sup>8</sup> <https://www.garda.ie/en/About-Us/Publications/Policy-Documents/Policy-on-the-investigation-of-sexual-crime-crimes-against-children-and-child-welfare-.pdf>

<sup>9</sup> Evidence and Procedure Review Report (2015), published by Scottish Courts Service to identify how best to capture complete, reliable and accurate evidence as soon as possible after an incident is reported

- <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>

<sup>10</sup> What is Barnahus and how it Works <https://childhub.org/en/promising-child-protection-practices/what-barnahus-and-how-it-works>

### Review of Attrition Rates Pre-trial

As mentioned above, the prosecution of serious cases of sexual violence remains very low in Ireland. There is also a high attrition rate in rape cases. In 2009, Ireland was among 11 countries that took part in the EU Daphne II project entitled - *Different systems-similar outcomes? Tracking attrition in reported rape cases across Europe*.<sup>11</sup> The final research report found that in Ireland the reporting of rape had increased by over 500% between 1977 and 2007, but that the conviction rate had fallen. Between 1998 and 2000 the conviction rate was 16%, but at the time of the report in 2009 that figure had dropped to 8%.<sup>12</sup> This is the most up to date information that we have available to us.

Delay contributes to the attrition of sexual crimes from the criminal justice system. The current trial system in Ireland results in long delays for victims. There are delays in the investigation of the crime, including gathering evidence; in the examination of the file by the DPP; in getting a date for hearing and in a trial going ahead.

In many ways, this is no different to the trial system for other types of crime. However, there are particular difficulties in cases of sexual crime. In most crimes, the victim can deal with the trauma of the crime and work on getting healing at the same time as the crime is being investigated, as decisions are made for prosecution and evidence is given. Without in any way seeking to under estimate the trauma that other crimes can induce, there is a particular difficulty for the victim of sexual offences where the criminal process depends on the victim 'holding on' to the trauma and detail of the crime in order to ensure that the evidence is complete. This can seriously impede a victims' ability to heal and move on with their lives. We believe that there is a need to examine the systemic causes for attrition rates and to identify, if possible, a methodology for streamlining the conduct of prosecutions of sexual offences to minimise harm to the victim. The Commission is well placed to examine this phenomenon, which would get to the heart of the problem of lack of accountability for sexual crimes in Ireland.

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<sup>11</sup> Different systems-similar outcomes <http://kunskapsbanken.nck.uu.se/nckkb/nck/publik/fil/visa/197/different>

<sup>12</sup> Gartland, Fiona 'Just 8% of reported rapes result in conviction' Irish Times April 30, 2009 <http://www.irishtimes.com/news/just-8-of-reported-rapes-result-in-convictions-1.756237>

## Trial Stage

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. Indeed, we have had clients describe their experiences in court as being tantamount to a ‘second assault’. The trauma of the trial is exacerbated especially if their testimony and character were subjected to hostile questioning. Cross-examination can be a particularly distressing experience for victims of sexual crimes, in particular if the defence strategy is to attack the victim/witness's behaviour by focusing on their behaviour. Being questioned in such a manner leaves victims feeling under attack. Jennifer Temkin<sup>13</sup> in her research on prosecuting and defending rape cases noted that the approach of defence counsel in a rape case in particular is robust to the point of ruthlessness. Discrediting the victim involves deliberately maligning her behaviour, clothing and sexual character. Temkin also found that among the defence barristers she interviewed, most applied for permission to cross-examine the victim about her sexual experience.

In 2009<sup>14</sup>, Senator Ivana Bacik undertook research on behalf of the DRCC, which was based on an analysis of 40 rape cases tried in the Central Criminal Court between 2003 and 2009. The study showed that judges granted defence application to introduce evidence about the sexual history of rape victims experience pursuant to Section 3 of the Criminal Law (Rape) Act 1981<sup>15</sup> very frequently, despite the highly prejudicial nature of the reasons being offered by the defence. One commonly used defence argument was that the victim was promiscuous. This sort of argument unfortunately strengthens myths about rape and has the potential to undermine the victim's evidence in court. Such unnecessarily aggressive cross-examination and the inappropriate introduction of evidence of victim's sexual history, results in an unduly traumatic court experience for victims. In addition, victims will often face a trial not knowing or only knowing very briefly in advance if their sexual history is going to be called into question.<sup>16</sup>

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<sup>13</sup> Temkin, J. (2000), *Prosecuting and Defending Rape: Perspectives from the Bar*, Journal of Law and Society, 27(2): 219–48. <http://www.broadcaster.org.uk/section1/tempkin.pdf>

<sup>14</sup> Bacik et al (2010) *Separate Legal Representation in Rape Trials* DRCC Conference

<sup>15</sup> <http://www.irishstatutebook.ie/eli/1981/act/10/section/3/enacted/en/html>

<sup>16</sup> Gallagher, Conor ‘Many rape victims still face court questioning on sexual history’ Irish Times March 27<sup>th</sup> 2017 <https://www.irishtimes.com/news/crime-and-law/many-rape-victims-still-face-court-questioning-on-sexual-history-1.3025289>

There is a question as to the merit of this kind of evidence at all. If it is essential to the rights of the accused, then the Commission might identify whether the current latitude given to the accused needs to be restrained. Further, if it is to be allowed, then it could be considered how an application to introduce this line of questioning would have to be made as a pre-trial one, except in exceptional circumstances, so as to at least clarify for the victim/witness what they likely to face.

Although the complainant is often the main or perhaps only witness in the prosecution case in a rape trial, they are only entitled to the most limited of separate legal support - while sexual history is being examined. Like the point previously made, victims of sexual crime are not like the victims of other crime, because of the level of violation of a person's intimate dignity and the trauma that follows. They deserve and need greater protection in law and we would welcome the Commission's views on whether victims of sexual crime who are complainants in prosecution should be entitled to separate legal representation throughout the trial.

We would also welcome the Commission's view on the distinction whereby the public is excluded from some sexual offences trials, but not others. Given that all sexual offences involve highly personal evidence, impacting the dignity of the person at its most intimate level and that the label of the offence does not necessarily mean that the offence is any less invasive than another, the current distinction seems unnecessarily arbitrary.

The defence whereby an accused person can avail of the assertion of 'honest belief' that a victim consented, no matter how unreasonable that belief, is in need of reform<sup>17</sup>. It is highly subjective. Furthermore, it is dangerous to the public as it gives a total acquittal to an accused who is then entirely at liberty and risks engaging in the same behaviours again. Noting that the Law Reform Commission has already been asked to look at the issue, we submit that there is a need for those accused of rape to demonstrate an element of reasonableness in relying on that defence. We look forward to the Commission providing much needed clarity on the matter.

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<sup>17</sup>*When Honest is not Good Enough: The Need for Reform of the Honest Belief Defence in the Irish Rape Law.* Dr Susan Leahy. Irish Criminal Law Journal 2013, 23(1), 2-10

Further practices such as the continued reliance on ‘hue and cry’ by a complainant should also end. They are entirely at variance with what we know in this day and age about how victims behave and rely on a myth that all rape victims will be able to speak immediately in the aftermath of a crime.

### Post-Trial Stage

There is little public awareness of how judges decide on a sentence. According to one analyst,<sup>18</sup> the sources of the inconsistency are an individualised sentencing system, multiple sentencing aims and judicial variability. While the Supreme Court have set down general guidelines, our individualised system of sentencing in which judges exercise a relatively broad sentencing discretion can give rise to concerns about inconsistency in the sentences imposed on those convicted of rape and other sexual offences.

This lack of information about sentences in general, and concerns around inconsistency are a significant barrier to reporting. Victims question whether the undoubted effort that they will have to make to report and to engage with the justice system will be worth the effort in the long run. They will know of cases where sentences did not seem to match the seriousness of the crimes. No one can point them to objective information on what to expect in sentencing. Further, the public and indeed perpetrators are not aware of how these crimes are punished.

One project which was commenced by the judiciary and the Courts Services, the ISIS project<sup>19</sup> was abandoned. Had it been continued, there would at least have been information available across the range of offences tried. In the UK, there are sentencing guidelines developed by a range of stakeholders including victims which give greater clarity still.<sup>20</sup> The absence of reliable data or sentencing guidelines and the fact that rape cases are heard in private results in an information vacuum for victims of sexual crimes which gives rise to uncertainty and additional trauma for them as well as a risk of inadequate sentencing for offenders.

In addition, many current sentencing practices speak to the need to mitigate or aggravate sentence by reference to factors relevant to the convicted person.

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<sup>18</sup> *Consistency in Sentencing*. Dr. Niamh Maguire. Judicial Studies Institute Journal 2010

<sup>19</sup> <http://www.irishsentencing.ie>

<sup>20</sup> <https://www.sentencingcouncil.org.uk/about-sentencing/about-guidelines>

The victim impact statement is a way in which the rights of the victim could be better recognised in sentencing and provide a necessary counterweight to the focus on the perpetrator.

The other aspect of sentencing relates to whether a conviction and sentence alone is a just outcome. It may serve to prevent a perpetrator from further offences, but it may do little to address the victim's pain and suffering because of these most serious assaults. It may be entirely impractical to expect a victim to return to the civil courts to bring a claim against the abuser in open court. The Criminal Injuries Compensation Scheme does not provide compensation for pain and suffering. However, this criminal hearing could provide an opportunity for a court to assess what compensation should be paid.

### Post-Sentence

There is a concern about the small number of convicted sex offenders who engage in rehabilitation programmes while in prison. The Irish Prison Service (IPS) confirmed in 2015 that only 22 of the 136 sex offenders to be released from Irish jails had completed its dedicated sex offender treatment programme Building Better Lives.<sup>21</sup> There may be a variety of reasons for this including lack of opportunity, lack of interest and lack of motivation. While such programmes are no panacea, it is important for the many victims that we meet that they know that perpetrators will learn to understand the harm that they have done while in prison. Most perpetrators know their victims and our statistics regularly point to anything in the region of 20% of victims suffering sexual violence at the hands of intimate partners.<sup>22</sup> Many will have children in common. They may want their perpetrator to engage in rehabilitation programmes in order to better influence desistance from future offending.

Allied to the need for rehabilitation and working on programmes in prison is the need to explore restorative justice. This includes the need to build into sentencing the need for victims to get answers and closure as part of the outcome of engaging with the justice system.

Similarly, victims should have a formal role in the parole system. While the Parole Bill 2016 has proposed some role, there is value in the Law Reform Commission identifying the rights of the victim including the right to be properly represented and advised in parole hearings.

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<sup>21</sup> Deegan, Gordon 'Just 16% of sex offenders released from Irish prisons go through treatment programmes' Irish Examiner November 20<sup>th</sup> 2015

<sup>22</sup> <http://www.drcc.ie/wp-content/uploads/2016/08/Updated-DRCC2016-Statistics.pdf>

The law relating to the management of sex-offenders post release remains in need of modernisation. Amendments to the Sex Offenders Act 2001 has not progressed thus providing inadequate supervision for medium to high risk sex offenders in the community.<sup>23</sup> Initiatives to manage these such as those undertaken by PACE's Circles of Support & Accountability<sup>24</sup> are useful but can only engage a limited number of offenders.

#### Access to Information as part of Access to Justice

One of the problems that people face is the complexity of our sexual offences legislation if they are seeking information on what constitutes an offence, or what are its consequences. The legislation stretches from the nineteenth century to 2017. The pieces are interlinked, amend each other and constitute a thoroughly confusing set of legislation which create difficulties for all those in the law-enforcement system as well as for those supporting victims. It would therefore be timely to look at consolidating the sexual offences legislation, providing one clear unambiguous piece of legislation.

#### **What problems does this give rise to in practice?**

Sexual violence can happen anywhere, regardless of gender, social background, age or any other attribute. It can happen at home, at work, at school, in the street or online. From the evidence available, it is one of the most prevalent crimes in Ireland. It is among the most serious and personally devastating crimes imaginable, impacting not only the individual but society as a whole. It is also a hidden crime for the most part. This makes it exceptional in the criminal justice system.

Prosecution often depends entirely on the evidence of a victim who has suffered great harm. Sentencing is complex. It cannot be treated in the same way as any other crime. Unless it is recognised, prosecuted and convictions take place, the prevalence and lack of recognition of these crimes will continue. Making a system which is more cognisant of a victim's rights not only benefits the person involved, but all of society.

The big problem is lack of confidence in reporting and attrition in continuing within the process.

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<sup>23</sup> Bray, Allison, 'Electronic tagging for sex offenders among new law' Irish Independent May 4<sup>th</sup> 2017

<sup>24</sup> <http://circlesireland.ie/>

Research such as that undertaken by Lovett and Kelly (2009)<sup>25</sup> highlighted how in Ireland, attrition was found to be a very serious problem in relation to sexual violence, with a large number of sexual offences failing to lead to prosecution and conviction. The bulk of attrition occurred because victims did not report the offence. However, a great deal also occurs at various points on the victim's journey through the criminal justice process as has been highlighted in addressing question two.

The under-reporting of sexual crime undermines efforts to combat and prevent these crimes which also makes it very difficult to establish the true incidence rates of sexual violence in Ireland. Victims who go through the criminal justice system are often delayed in their own healing from the trauma of the offence and the investigation and trial process often causes further serious harm through re-traumatisation.

#### **What would be the potential benefits of reform of this area?**

- The available research continues to demonstrate that prosecution and conviction rates for sexual crimes are not increasing. The benefit to research into the current system is to identify areas that could be improved upon which have the potential to impact on outcome statistics and in so doing increase reporting rates and reduce attrition.
- Increasing the conviction rates for perpetrators of sexual crimes reduces the impunity of rapists, sending out a message that rape and sexual abuse are serious crimes that will not be condoned by society.
- Victims of sexual crime should be afforded every possible support 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 the remainder of their human rights.
- Giving victims of sexual crime the chance to have their voice heard would not mean a dilution of due process, rather a demonstration of respect for the human rights of all those taking part in the trial.
- Currently, the lack of systemised data – including sentencing data and consolidation of the Sexual Offences Legislation – is restricting access to justice.

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<sup>25</sup> Different systems-similar outcomes <http://kunskapsbanken.nck.uu.se/nckkb/nck/publik/fil/visa/197/different>

- Ultimately, it is in everyone's interest that victims of sexual crime engage with the criminal justice system so that these heinous crimes that are so prevalent are reduced and that those who commit them are held to account. Manifestly the system as it stands does not encourage this. Reforms which took account of victims' rights are most likely to advance justice and the rule of law to the benefit of our entire society.