

THE LEGAL PROCESS  
AND VICTIMS OF RAPE



With the support of the European Union (Grotius Programme)

The Dublin Rape Crisis Centre  
The School of Law, Trinity College Dublin

# The Legal Process and Victims of Rape

A comparative analysis of the laws and legal procedures relating to rape, and their impact upon victims of rape, in the fifteen member states of the European Union

September 1998

# **Dedication**

To all victims of rape and sexual violence.

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by

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## Foreword

This Report marks the culmination of twelve months intensive research. The stated objective was ambitious: to review the laws and procedures on rape throughout the 15 member states of the European Union. In addition, it sought to assess the impact of the different laws in each member state, upon the victims of rape themselves.

Thus, perhaps the compelling feature of this study is the insight it provides into the experiences of those women who had been raped and had been through the legal process as a result. In Part II of this Report, those women are given a voice, and a means of expressing their views on the laws and procedures of which they have had direct experience. Their personal testimonies make harrowing reading, when set against the detailed account of the laws and procedures outlined in Part I of the Report.

This Report then, is the product of an unusual collaboration. It combines both legal and psychological research, and the researchers have sought to present the research in a unified manner, while seeking to ensure that both Part I (presenting the legal findings) and, Part II (presenting the findings from the interviews with those women who have experienced the legal system as victims of rape), remain accessible to a reader versed in either discipline.

The findings presented in both Parts complement each other. While the researchers admit to a common law bias and explain that the emphasis on formal rules of evidence in the legal questionnaire, for example, displays this bias, it is still noteworthy how many themes arising in the trial of rape are common to both adversarial and inquisitorial systems:

the role of the police; the crucial nature of the forensic medical examination; the differential treatment of minors, both as witnesses and as defenders; the lack of training for lawyers and judges dealing with rape trials; the absence of sentencing guidelines; the existence of mechanisms for obtaining compensation.

At the same time, it is important to note the extent of the difference between the adversarial and inquisitorial systems as demonstrated by this Report. This difference perhaps comes across most strongly in the sections on the rules of evidence in chapters 2 to 7. In both England and Ireland, formal rules as to the need for a corroboration warning, and the admissibility of the complainant's prior sexual history as evidence, in rape trials, have formed the basis for some of the strongest criticisms of rape law by feminist scholars in both jurisdictions. Elsewhere however, these issues do not appear to be regarded as problematic, because, for the most part, under the inquisitorial trial process, no formal rules of evidence apply and the guiding principle for the trial court is that of 'free evaluation of all the evidence'.

The other glaring difference between the two types of jurisdiction is the existence of legal representation for the victims of crime. This is available to victims of crime in all of the member states studied, except England and Ireland. The issue of the role of victims' lawyers was central to the purpose of this project, and the findings presented in Part II are particularly interesting in this regard. Nine out of the sample of twenty women interviewed had been represented by a lawyer at trial, and a highly significant relationship was found to exist between representation by a lawyer and overall satisfaction with the trial process. Those women who were legally represented were found to be much more confident in giving evidence and much less hostile to defence counsel.

These findings must give cause for thought to those accustomed to a common law, adversarial legal system. Given the differences which exist between adversarial and inquisitorial systems, it might be difficult to introduce as comprehensive a right to representation for victims of crime as exists in some of the member states, but it is surely worth considering the introduction of some form of representation for victims. Indeed, the rights accorded to the legal representative differ greatly even

between the inquisitorial systems. In some states, they have full rights of audience before the courts; in others, they may only address the court as to the level of compensation for the victim.

Many other differences in the criminal process are found to exist between the member states, even among those with inquisitorial methods of trial. In some states, a jury is used to try rape; in others, it is always tried before three professional judges without any jurors. Even in the meaning of 'jury' the rules differ: in some states, a new jury is selected for each criminal trial, in others, lay magistrates are elected to serve for four-year terms at a stretch.

Throughout this Report, the reader is provided with an insight, not just into the different rules around the trial of rape, but also into the many differences and similarities that exist in the criminal justice systems of the member states of the European Union. For this too, this Report serves a valuable purpose. The increased pace of harmonisation of laws between the member states in recent years has, to date, left the criminal law well behind. Criminal systems have long been regarded as the exclusive preserve of the individual member state.

This report shows what is to be gained from a comparative review of criminal justice systems, conducted with a view to achieving some sort of harmonisation, based on what the researchers describe as a 'best practice model' drawn from the experiences of all the member states. The Report also provides a much needed gendered analysis of the comparative criminal law. Again, discourse on the harmonisation of laws within the EU has tended to ignore issues of gender in the past. The impact upon women of the changes brought about by harmonisation, in many areas of law, is rarely considered or analysed.

The EU Commission's Grotius programme, which provided most of the funding for this research study, is to be complimented on its foresight in encouraging projects such as this. Other future studies should take up the challenge of examining laws within the EU, from both a comparative and a gendered perspective.

The Dublin Rape Crisis Centre is to be congratulated for initiating and undertaking this study. The Law School, Trinity College Dublin, their partner in the project, has done groundbreaking research and written a report that is thought provoking and will, it is hoped, lead to greater harmonisation of laws within the EU and to very necessary law reform in Ireland.

Mary Robinson  
U.N. High Commissioner for Human Rights  
August 1998

# Acknowledgements of the Project Supervisory Board

The Project Supervisory Board is honoured that Her Excellency, Mary McAleese, President of Ireland, agreed to launch the report. We owe special thanks to Mary Robinson, UN High Commissioner for Human Rights, who wrote the foreword.

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Special thanks are also due to the other researchers who contributed at various stages to this project. In particular, we are indebted to Marianne McCarthy and Elisabeth Mayer, both of the Law School, Trinity College Dublin, for their invaluable expertise. We would also like to thank Clifford Stevenson, Cassandra Byrne and Anne Corr for their additional research work. Finally, we would like to acknowledge the assistance of several others who contributed to the work in progress: Dr. Annie Rogers, Lisa Cullen, Catherine Finnegan, Cepta Hopkins, Catherine Power Hernandez, Theodore Karellas, Dr. Michael O'Connell, Dr. Howard Smith, Head of the Department of Psychology, T.C.D.; and Professor William Binchy, Head of the Law School, T.C.D.

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# Introduction

This project is a comparative research study into the legal procedures which provide assistance, representation or support for the victims of rape and sexual abuse. It was conducted by the authors for the Dublin Rape Crisis Centre and the School of Law at Trinity College Dublin, with funding provided by the European Commission under the Grotius Programme. The aim of the project was to gather information on the laws and procedures on rape existing in different European Union (EU) member states, particularly those which provide for some form of assistance or separate legal representation for rape victims within the legal system; and to provide some analysis as to how those laws and procedures impact on victims, through the use of empirical research in different jurisdictions. Both legal literature and practical experience from each jurisdiction was drawn upon, in order to build an accurate picture of the existing legal procedures which apply in rape trials throughout the member states of the EU. Particular attention was focused on the provision of legal representation for the victims of rape, and how such provision affected the experience of victims.

It was aimed to conduct an in-depth study on the laws and procedures on rape in five EU member states: Belgium, Denmark, France, Germany and Ireland, and on the impact of the legal process on the victims of rape in those states. Each state was selected for a specific reason. Belgium was chosen because substantial change to the law on sexual offences is underway there at present. Denmark was included because it possesses a particular model of legal representation for rape victims within an adversarial trial system, while France and Germany were selected as two larger states with an established tradition of legal representation for victims of crime. Finally, the researchers' own state, Ireland, was selected as the only common law/adversarial system in the study.

The research was conducted on a number of levels. In order to ascertain the impact of rape upon victims within these five states, interviews were carried out with twenty victims of rape, all of whom had some experience of the legal process. The interviews were conducted on the basis of a psychological interview schedule, containing questions designed to assess how the laws and procedures on rape in each of the five states

had impacted upon the interviewees. The findings drawn from those interviews appear in chapters three and four.

In order to gain information on the legal process in the five states, a questionnaire on rape law was completed in each of the five states, during interviews with a legal academic and a representative of the Ministry of Justice. Additional interviews were conducted with legal practitioners, police, prosecutors and those working with rape victims, and their impressions of the system were also recorded, in order to build up an overall picture of the relevant law, and the role of the victim, in each jurisdiction. The results of this study may be found in chapters six to ten, which deal with each of the five states in turn. Some methodological issues relating to this part of the study are dealt with in chapter five.

It was also hoped to gain an overview of the laws and procedures relating to rape in each of the other (10) member states of the EU. For this purpose, legal questionnaires were sent to a legal academic and to a designated official in the Ministry of Justice in each of the other ten states. Sufficient responses were obtained to enable the authors to compile a summary of the relevant laws and procedures across the EU. The data gathered from this part of the study are presented in chapter 11.

Finally, a review was conducted of the relevant literature on rape, both legal and psychological, taken from European and international perspectives, and this review may be found in chapter two.

A number of methodological issues and points about terminology deserve mention. Perhaps most importantly, readers may query the use throughout this study of the word 'victim' to describe a woman who has been raped. The authors acknowledge that the use of this term is problematic, in that it constructs the woman who has been raped in a particular way. It is not intended to present a falsely universalised view of women's experience of rape, since it is recognised that different women may experience rape in different ways, and that for some women, the term 'survivor' may be more appropriate to describe their response to the rape. However, it was thought necessary for the sake of consistency within the study to use one word to describe women who have been raped. The term 'victim' was chosen, and has been used throughout the study. The use of this term was justified in the Council of Europe Report on violence against women (EG-S-VL 97), on the

basis that it implies recognition of the violation of rights and bodily integrity which occurs when violence is used.

A number of other factors further justify the use of this term. While the word 'complainant' is more appropriate to describe those women who have reported a rape to the legal authorities, the term 'victim' was seen as more inclusive, since it extends to those women who have been raped but have not reported their experience to the police. The term 'victim' was considered to be more descriptive of the experience of many women complainants within the legal process (which has often been described as a 'secondary victimisation').

The use of this term was also thought to confer a greater validity upon the experience of women who have been raped. It must be emphasised, however, that the word is not intended to convey an assumption of guilt on the part of the accused. Indeed, care was also taken in choosing how to refer to the accused person. Depending on the relevant stage of the legal process, the different terms of 'suspect', 'accused' or 'defendant' are used to describe the person alleged to have committed rape. The term 'offender' is only used where a person has been convicted of rape.

The victim is referred to as 'she' throughout the study, while the defendant is referred to in the masculine. Again, it is not intended to imply that all victims of rape are female, nor that all perpetrators are necessarily male. However, the scope of this study is confined to an assessment of the experiences of female victims of rape who have been injured by male perpetrators. It was considered to be appropriate to limit the study in this way, given that rape is, historically, the archetypal gendered crime. Not only are the victims of rape predominantly female, but the perpetrators are overwhelmingly male (Brereton, 1997; Elman, 1996).

The women interviewed for this study should not be regarded as representative of all victims of rape. It was a necessary condition that those interviewed should have had some experience, as rape victims, of the legal process. However, the literature available on the reporting of rape indicates that the majority of women who are raped do not report the rape to the authorities. It is beyond the scope of this study to question women as to why they did not report a rape, but the accounts provided by the interviewees of their experience of the legal system may provide

an insight into the reluctance of many women to involve the legal authorities.

Readers will notice that the format of the legal questionnaire displays a common law bias, with its emphasis on particular features of the adversarial trial system, for example the strict rules as to the admissibility of certain evidence; but as far as possible, the questionnaire was designed so as to elicit accurate responses from different legal systems. The range of responses received clearly shows the divergence between types of legal system, and even among legal systems of the same broad type.

This divergence is perhaps one of the most challenging aspects of comparative study, and makes the gathering of information on diverse systems a difficult task. Language differences also affect this type of comparative study. Some words or phrases do not have any direct translation into English, and so are italicised in the text, with an approximate explanation of their meaning provided.

Given the difficulties with comparative study of this kind, some inaccuracies may exist, particularly in the description of different legal procedures. While every attempt was made to ensure that the information published in this Report, and received by way of questionnaire and interview, is accurate, the authors of course accept responsibility for any such errors or inaccuracies contained herein.

It has long been argued that analysis of EU social policy is generally conducted on a gender-blind basis; that the major impact upon women of the changes which are being brought about through the policy of harmonisation across the EU has barely been considered (as pointed out by, for example, Garcia-Ramon and Monk, 1996). It is to be hoped that this study will provide some insight into women's experiences of particular laws throughout the EU, and perhaps provide some guidance as to how law and policy on rape may best be developed in future within the EU.

# Chapter One

## Summary of Findings and Recommendations

### Introduction

In this Chapter a set of recommendations is presented, based upon the findings of the study as a whole. These recommendations are intended to form the basis for a best practice model for the trial of rape. Since the study was conducted within an EU framework, the recommendations are intended to have a broad application, and are not specifically directed at any individual jurisdiction. In some jurisdictions, many of these recommendations may already be implemented. The findings and recommendations are presented in a systematic manner, following the order of the legal questionnaire and interview schedule. Particular emphasis is placed on the potential role which legal representation for the victim could play at each stage of the legal process.

### 1. The law on rape

#### Definition of rape

The significance of the definition of rape within the legal process has increasingly been recognised by legislators in recent years. Indeed, in all the countries studied, except Denmark and Greece, the definition of rape has been changed since 1989.

In eight of the countries studied, the offence of rape is defined as sexual penetration of another by force or compulsion, or otherwise without their consent. However, in the other six countries the law provides for a graduated spectrum of offences of 'sexual coercion' (Germany) or 'infringement of sexual freedom' (Spain), again by force or compulsion; penetration is regarded in these systems as one of a number of aggravating factors which will warrant an increased penalty. In Germany, this change has occurred very recently and is the subject of much criticism.

Previously, rape and sexual assault were two separate offences in German law, as they are in English and Irish law.

Sexual offences are defined in a gender-neutral way in every country. Penetration is defined in different ways, depending on individual jurisdictions, but is not restricted to penile-vaginal penetration in any country.

The legal definition of rape clearly has an impact upon victims in every legal system, in the following ways:

- (1) if the definition is not sufficiently broad, her experience may not be regarded legally as constituting rape, even though she defines it as rape.
- (2) if the definition is based on the need for the prosecution to prove lack of consent, then the legal process is focused on her behaviour and reaction to the sexual violence.
- (3) if the definition provides for a subjective test for the defendant's *mens rea*, then even if she did not consent, he will be acquitted if he honestly, however unreasonably, believed that she was consenting.

### **Consent**

Although the prosecution must prove the absence of consent as an essential element of the offence of rape in each country, this is done in very different ways. In England and Ireland, there is no definition of consent in law, but the jury must determine whether the prosecution has proved an absence of consent. By contrast, the criminal codes of the inquisitorial jurisdictions provide for a range of circumstances in which the sexual act is deemed to be committed through force or compulsion, or in which the consent of the victim is deemed to be absent.

There is no requirement in any jurisdiction for the prosecution to show physical force by the defendant, or physical resistance by the victim, in order to prove rape. In practice, however, difficulties are experienced with proving lack of consent where the victim did not resist physically; 12 out of 15 of the sample of women interviewed who had to testify at trial were questioned about the degree of resistance they had offered.

***Mens rea* (mental element of offence)**

In England and Ireland, it must be proved according to strict rules of evidence that the defendant was *aware* of the victim's lack of consent; that is, a subjective test for *mens rea*. The same strict rules of evidence do not apply in the other 12 countries, but, as far as can be determined, a subjective test is also used to determine the liability of the defendant in nine of them. Only in Finland, the Netherlands and Spain is an objective test applied in determining *mens rea*. In those countries, the defendant's belief in consent must be reasonable in order to afford him a defence.

In England and Ireland, regard may be had to the presence or absence of reasonable grounds in assessing the genuine nature of the defendant's belief in consent, but the test for *mens rea* remains subjective; the defendant must at least have been aware of the possibility that the victim did not consent. In Denmark, the application of a similar subjective test for *mens rea* has led campaign groups to demand the introduction of an alternative offence of 'negligent rape', that is, to apply to situations where the defendant was not aware that the victim did not consent, but should *reasonably* have known that she was not consenting.

**Use of a code**

In all of the countries except England and Ireland, the definition of rape is provided in a Criminal Code which specifies the circumstances in which consent is deemed to be absent or force present, for example where threats are used, or where there is abuse of authority or undue influence over the victim. The Code also provides a list of the aggravating factors and the relevant penalties for different levels of sexual offence.

The lists provided in the Code may not be sufficiently extensive in some countries; two of the women interviewed for this study had been raped while they were not conscious, and had criticisms of the particular definition of circumstances in their country, since the prosecution had to prove the presence of some form of 'coercion'. Thus, rape of an unconscious person was not included within the definition.

## Marital Rape

Rape within marriage is now recognised as an offence in almost all member states, although some procedural distinctions are still retained (for example, in Ireland the consent of the Director of Public Prosecutions must be obtained before a prosecution can proceed). A recent proposal to retain special procedures where rape has been committed within marriage has been strongly criticised in Germany.

## Time limits

There is much divergence between different member states as to the time limit within which prosecutions for rape must be commenced. This ranges from six months in Portugal and Italy to an indefinite time (no limit) in England and Ireland. Time limits have represented a particular problem in Belgium; where a charge of rape is reduced to one of sexual assault, then a shorter time limit applies. Extended time limits for the prosecution of crimes of sexual violence committed against children have been provided in most jurisdictions (these run from the child's 18th birthday rather than from the date of occurrence of the offence).

### 1. Recommendations: The law on rape

- 1.1. A separate offence of 'rape' or 'sexual penetration' should be maintained, but should be made as broad as possible to encompass all forms of penetration.
- 1.2. Consideration should be given to alternative definitions of rape, which are not so reliant on the need to prove lack of consent. The merits of providing a codified definition of consent should also be given consideration.
- 1.3. The introduction of a separate offence of 'negligent rape,' using an objective standard of *mens rea*, and carrying a lesser penalty, should be seriously considered in those jurisdictions in which a subjective test is used.
- 1.4. It should be made clear in every legal system that failure to offer resistance is not the same as consent.

- 1.5. There should be no special procedural or other rules relating to the trial of marital rape.
- 1.6. There should be no time limit within which the prosecution of offences of rape or sexual violence must be commenced.

## **2. Pre-trial**

### **Reporting of rape**

Studies conducted in many different jurisdictions show that rape is consistently under-reported. Although all the women interviewed in this study reported to the police (this was one of the criteria for participation in the study), almost two-thirds (65%) of them had doubts about reporting, mainly due to the fear of being disbelieved by the police.

### **Police response to rape**

Police methods are assumed to have improved in every jurisdiction, and there is now much more emphasis placed on the need to provide police training. However, the interviews conducted with victims showed that there was no difference in police response at different times or over different years; nor did the gender of the police officers significantly affect the women's satisfaction rating with the police, although the women stated a preference for female police officers. The degree to which the police interviewer was viewed as sympathetic had the greatest effect on the participants' satisfaction with their overall experience of contact with the police. A higher satisfaction rating was recorded with the police in Ireland than in any other jurisdiction.

In some of those jurisdictions in which legal representation is available for the victim pre-trial, the victim may have her lawyer present when she makes her statement to the police or examining magistrate. Victims' lawyers in Denmark submitted that this was an important function, since it gave the victim greater confidence in reporting and ensured that the interview was conducted sensitively.

### **Information and representation pre-trial**

In general, there is a distinct lack of information available to victims about the progress of the investigation, and about the pre-trial procedures. The difficulty in accessing information is a significant cause of stress for victims, and was commented upon in strong terms by the participants in this study.

Of the participants, 11 out of the total sample of 20 experienced difficulties getting information about the progress of the case generally, and would have liked to have received information about the workings of the legal process, the role of different legal personnel and about the conduct of the trial.

In particular, great dissatisfaction was found among the participants over the lack of follow-up information from police after they had made the initial report of rape. Some women were not contacted for a number of months after reporting the rape. The problem is that in many jurisdictions, nobody is given responsibility for informing the victim. While the police may do so in practice (particularly in Ireland), no formal duty is imposed upon them to provide information, and so the level of information received by the victim may vary depending on the individual police officer.

In those jurisdictions where the victim is entitled to legal representation, her lawyer assumes the role of keeping her informed about the progress of the investigation and the conduct of the trial. The victim's lawyer passes information from the police and prosecution to the victim, so that a single channel of communication with the authorities is created for the victim.

However, even where the victim is entitled to pre-trial legal representation, victims often remain unaware of their entitlement, since in many jurisdictions the police are not obliged to inform them of the availability of legal representation. In Denmark, by contrast, police must inform the victim of her right to a lawyer at the initial report stage, and before they take her statement.

## Medical examination

Specialist medical facilities for the examination of rape victims have been established in six countries. A specialist medical unit for victims of sexual assault is well established in Ireland, although in France similar facilities are available only on a pilot basis. Where such facilities are not available, some countries provide for the issue of a standard rape kit to all doctors (such as the *set* in Belgium).

The level of dissatisfaction recorded with the medical examination was very high, and the examining doctor came second highest in the hostility rating for interviewees (after the defence lawyer). The gender of the examining doctor was not an issue; the level of sensitivity was more important.

In Portugal, the victim can report the rape directly to a medical unit, thereby cutting out the need to go to the police separately.

## Support services

Voluntary groups providing support to victims of rape are established in most jurisdictions. Of the sample of interviewees, 35% received information about relevant support services from the police. Interviewees suggested that the police should have a counsellor 'on call' when a rape is reported.

## Role of Prosecutor

Spain is the only member state in which the decision to prosecute is made by the police; in every other state, it is made either by the state prosecution service, or by the examining magistrate (eg in Italy). Special prosecutors are not formally assigned to rape cases in any jurisdiction, although in some states (Italy, Luxembourg) this may occur on an informal basis. In some states, special prosecutors may be assigned in cities but not in rural areas. The level of discretion accorded to the prosecution (in discontinuing a prosecution against the victim's wishes, for example) differed widely among member states.

Those interviewees who had a lawyer did not regard the state prosecutor as representing their interests. However, those who were not legally represented had high expectations of the prosecutor, and were

accordingly disappointed when they felt that the prosecutor was not representing them adequately. All of the Irish interviewees felt that the prosecutor did not adequately represent their interests.

The desirability of meeting with the prosecutor before the trial was expressed by all participants. At present, even in those states in which such a meeting is arranged, it is generally done on an informal basis.

### **Reduction of charges**

The reduction or downgrading of charges (e.g. from rape to sexual assault) had a number of implications. It can be distressing for the victim; two of the interviewees in the study had their charges downgraded, and recorded a negative reaction to this. In Belgium and France, the reduction of charges has a particular implication, since it reduces the time period within which the rape must be prosecuted. In every jurisdiction, the level of court in which rape is tried also depends on the status of the offence. Offences which are reduced are heard in lower courts with reduced sentencing powers; but in some jurisdictions the use of the lower court was regarded as preferable for the victim, since there was less delay and the procedures were less intimidating.

### **Withdrawal of complaint**

In the inquisitorial jurisdictions, the victim's withdrawal of her complaint does not affect the continued investigation of the offence, since the police are obliged to investigate whenever a complaint is made; in some countries, an investigation may be commenced even if a complaint has not been made.

In Germany, as soon as the report of rape has been made, it is possible for a victim to give evidence immediately before the investigating judge or examining magistrate, so that if she is intimidated later into withdrawing her charge, the statement may still be used in evidence. There has been much debate in Germany over a proposal to allow married women to withdraw complaints of rape made against their husbands.

### **Bail/pre-trial detention of the accused**

Bail is regarded differently in the inquisitorial and adversarial systems. In inquisitorial systems, the word is understood to mean only the monetary

conditions which may attach to a release from custody pre-trial. In this study, it is used to mean the pre-trial release itself. Although the accused is entitled to be released pre-trial in every jurisdiction, in inquisitorial systems accused persons are more likely to be detained in custody. Where this occurs, the trial is usually more expeditious.

Where the accused is released pre-trial, conditions of non-contact or non-intimidation of witnesses are often imposed upon his release in order to protect victims. However, victims have no formal role in the bail process in any jurisdiction, and this may explain why only four interviewees were officially notified that the accused had been granted bail (out of a total of eight cases in which bail was granted).

## **2. Recommendations: Pre-trial**

- 2.1. It is strongly recommended that victims should be entitled to legal representation at the pre-trial stage.
- 2.2. The police should be obliged to tell victims of the existence of this right at the reporting stage, before taking the victim's statement.
- 2.3. The victim's lawyer should be present when the victim makes her statement to the police, if the victim so wishes.
- 2.4. Special interview locations should be provided for victims' interviews with the police, and consideration should be given to the video-taping of the police interview for adult victims as well as for children.
- 2.5. Ongoing training for police officers should be provided, to enable them to deal with the particularly sensitive questions which may have to be put to victims of rape and sexual violence.
- 2.6. Special police units for dealing with rape and child sexual abuse should be introduced, with support provided for those police officers who specialise in this area.
- 2.7. The victim's lawyer should have responsibility for providing information to the victim about the progress of the investigation, and should act as a channel of communication between the victim and the authorities. In particular, the victim's lawyer should ensure that the victim is

informed whether the accused has made a statement, whether he has pleaded guilty or not guilty, and whether it has been decided to proceed with the prosecution or not. The victim should also have access through her lawyer to the contents of the dossier or pre-trial book of evidence.

- 2.8. Specialist medical units should be provided for the examination of rape victims in every country.
- 2.9. Where such facilities are not available in particular areas, doctors should be provided with a standard rape kit to enable them to carry out such examinations.
- 2.10. Special training should be provided for doctors in the conduct of the forensic medical examination, and in giving expert testimony at rape trials.
- 2.11. The victim should be given the choice of a male or female doctor.
- 2.12. Co-ordination between police and medical personnel should be ensured, so that the police know where to bring a victim after she has reported a rape, and a list of designated doctors should be provided in every police station for this purpose.
- 2.13. Formal communication links should be established between the specialist medical unit, the designated doctors and the police. The victim should be able to report rape directly to the specialist medical unit, without having to go to the police station.
- 2.14. The police should provide information about voluntary support services to the victim at the reporting stage through the issue of leaflets and the provision of contact numbers.
- 2.15. A counsellor should be available on call to those victims who report a rape.
- 2.16. Because of the voluntary nature of many victim support groups, there is a need to ensure that adequate training and support is provided to their members.

- 2.17. Support services should be monitored, and sufficient funding provided to enable them to provide high quality services to victims.
- 2.18. Access to psychological counselling for victims of rape on a state-funded basis should be provided. This counselling should be available to the victim both before and after the trial.
- 2.19. Where a reduction of charges, for example from rape to sexual assault, is contemplated, then it should only be done with the fully informed consent of the victim. She should be informed of the consequences of the reduction of the charge; particularly whether the trial will be heard before a lower level of court, or whether a reduced sentence will be imposed.
- 2.20. Victims should be given a say in the type of conditions which may be imposed on bail, via the police, and should be formally notified of the outcome of the bail decision through their legal representative.

### **3. Trial**

#### **Delay**

Delay in the legal process is found to be a major cause of dissatisfaction, which had a particularly negative impact upon the Irish interviewees. It may be concluded that delay will impact more on those victims who are not kept informed of the progress of the investigation. Among the interviewees for the study, the average time length between report and trial was found to be 19 months. In every jurisdiction, the process is more likely to be expedited if the accused is detained in custody.

#### **Court facilities**

In no jurisdiction studied were separate court facilities for victims provided as a matter of course. Only two out of the 15 participants in this study whose cases proceeded to a full trial were allocated separate waiting rooms during the trial, but they still encountered the accused or members of his family on leaving the room. This enforced proximity to the defendant was a major cause of distress for victims.

### **Anonymity and media reporting**

A great divergence exists between different member states in respect of the rules on anonymity. In a surprising number of states, including Finland and Sweden, the victim is not entitled to anonymity (except in very limited circumstances). This may deter women from reporting rape, since they know they will be identified publicly at trial.

Similarly, rape trials are held in public in a surprising number of jurisdictions, although the judge generally has discretion to restrict media reporting or to exclude the public for some part of the trial, usually the victim's testimony. However, where restrictions exist on the reporting of the victim's evidence, or where the public are excluded only during her testimony, some concern was expressed that this might be detrimental to the victim's interests, since the defendant's side of the story would be told publicly, but hers would not. In Denmark, the victim's lawyer makes the application for the trial, or part of it, to be heard *in camera*.

The presence of the public in the courtroom is often a matter of concern for victims. Indeed, five of the interviewees said that there were more than 40 persons present in the courtroom during parts of their trial. Despite this, a minority of the interviewees wanted the trial to be held in public.

### **Special procedures**

In some countries, such as Austria, Denmark and Sweden, the victim may request to give evidence in the absence of the defendant (this happened with one interviewee). The defendant will listen to her evidence from an adjoining room, connected by audio-link to the courtroom. Where the victim is legally represented, her lawyer will make the application to have the defendant removed from the court. There was some disagreement over the value of this procedure for the victim; although many victims were intimidated by the presence of the defendant in the courtroom, a minority wanted to confront him with their evidence.

Victims who are minors are entitled to some special procedures at trial in every member state. Video link evidence for minors is now used in most states, and there is now widespread provision for video recording

of the minor's initial interview with the police when the offence has been reported.

An interesting, and apparently unique, procedure applies to the trial of rape in Austria; a gender quota is applied to the selection of jurors.

### **Victims' testimony in court**

The examination of witnesses in court is perhaps the area where there is greatest difference between the adversarial and inquisitorial systems. Cross-examination of the victim during rape trials has long been a focus for reformers in the adversarial system, since it is typically conducted in a hostile fashion; the credibility and character of the victim are frequently undermined by defence counsel tactics.

By contrast, the examination of witnesses in the inquisitorial system is often conducted through the judge, so that the lawyers do not ask the witnesses questions directly. Thus, the method of questioning tends to be less hostile. Moreover, in inquisitorial systems such as France and Belgium, where the victim is legally represented as a party in the case (a *partie civile*), she is no longer a witness and does not give evidence at trial. Instead, her pre-trial statement to the investigating judge, which is contained in the *dossier* (book of evidence), is relied upon by the prosecution at trial.

Finally, in many inquisitorial systems, the defendant is *obliged* to be legally represented at the trial. Thus, he may not cross-examine the victim himself. By contrast, lengthy and intimidating cross-examination of the victim by the defendant in person has caused concern in English rape trials, since it has added to the trauma for victims giving testimony at court.

Of the participants to the study, 15 gave evidence, 12 of these from the witness stand. Negative feelings predominated. Those negative reactions the participants experienced included feelings of loneliness, stress, humiliation or detachment.

In Ireland, all the victims felt less confident, were less articulate and experienced more stress about testifying in court than the interviewees in any other country. This may be attributed to the adversarial mode

of trial, and in particular the style of cross-examination used in adversarial courts.

The strategies used by defence lawyers in cross-examination caused much distress to the victims. These strategies included misinterpreting or manipulating the words of the victim, and minimising the effects of the rape upon the victim. Ten out of 15 interviewees said that the defence raised the issue that the victim had provoked the rape. Instead of defending the defendant, the defence lawyer would seek to undermine the victim; victims felt that they were on trial.

Because the defence lawyer's questions are put through the trial judge in the inquisitorial system, victims in those systems rated the judge as hostile. Specialist judges are not generally used for rape trials, although in some jurisdictions specialisation of judges, particularly in the area of child sex abuse, is being encouraged (e.g. in Belgium).

In contrast, the trial judge was regarded with significantly less hostility by victims in Ireland whereas, unsurprisingly, the defence lawyer was regarded with somewhat more hostility in Ireland than in the other states.

### **Evidence**

In adversarial legal systems, strict rules exist as to the admissibility of evidence at trial, whereas in inquisitorial systems two key principles apply. First is the principle of '*intime conviction*', which means that the judge and/or jury must be convinced of the truth before they reach a verdict. The second principle of 'free evaluation of evidence' means that the judge and/or jury may consider all relevant evidence in coming to their decision. The inquisitorial trial is seen as a search for the truth, while the adversarial trial may be represented as a contest between two opposing sides. This distinction is reflected in the approaches taken in different jurisdictions towards issues such as corroborative evidence and evidence of the victim's prior sexual experience.

### **Corroboration**

In most inquisitorial systems (10 out of the 12 studied) the defendant may be convicted on the victim's evidence alone; there is no requirement that her evidence be corroborated, nor do any special rules apply

to its use at trial. In England and Ireland, however, at common law the trial judge was required to warn the jury of the danger of convicting on the uncorroborated evidence of the victim (the corroboration warning). While this warning is no longer mandatory in either jurisdiction, in practice judges frequently exercise their discretion in favour of giving the warning, where the prosecution case is based on the victim's evidence alone.

### **Victim's prior sexual experience**

Although evidence of the victim's sexual past is admissible in all inquisitorial jurisdictions, its use is restricted. For example, in Spain the court is obliged to ensure that the victim's right to privacy is not unduly infringed by such evidence. In Austria, the victim is not bound to answer questions concerning her sexual past. In Finland and Sweden, the judge may exclude such evidence if it is deemed irrelevant. In the adversarial systems of England and Ireland, such evidence cannot be admitted without the leave of the trial judge.

Seven of the interviewees said that they had been asked about prior sexual experiences; four of these participants were questioned about their sexual history with persons other than the accused. This type of questioning caused them great distress. Indeed, the admission of such evidence has been strongly criticised by commentators, particularly in adversarial systems; in the US and elsewhere, attempts have been made to restrict the admissibility of such evidence through legislation.

### **3. Recommendations: Trial**

- 3.1. Unnecessary delay between the reporting of rape and the trial date should be avoided, and attempts should be made to 'fast-track' cases of sexual violence, even where the accused is not detained in custody.
- 3.2. Separate facilities should be provided for the victim at court, to minimise her contact with the defendant. In particular, a separate waiting-room should be provided so that the victim does not have to wait beside the defendant or his family and friends.

- 3.3. The victim should be given the option of anonymity at trial, and should also be given the choice of holding the trial wholly or partly in public or in camera.
- 3.4. The introduction of a provision allowing the removal of the defendant from the courtroom during the victim's testimony should be considered, in those jurisdictions where it is not already in place.
- 3.5. The issue of media reporting of rape trials should be given further consideration, in order to ensure that fair coverage is accorded both to the victim and to the defendant.
- 3.6. Special procedures permitting child victims to give evidence on video-link should be provided in all jurisdictions. Consideration should also be given to extending these procedures to adult victims of sexual violence.
- 3.7. The introduction of a gender quota in jury selection for rape trials should be considered.
- 3.8. Measures should be adopted in adversarial systems to discourage the use of unduly hostile or aggressive cross-examination of victims of rape. In particular, defendants should be prohibited from conducting personal cross-examination of victims.
- 3.9. The appointment of specialist judges to deal with rape trials should be considered.
- 3.10. The presumption should exist that evidence of the victim's prior sexual experience is inadmissible at trial.
- 3.11. The discretionary 'corroboration warning' provision should be abolished in England and Ireland, and no such warning should be given.
- 3.12. A clear role may be seen for a victim's lawyer at trial in the following areas: in making the application for the trial to be heard in camera, or for the defendant to be excluded from the courtroom; in restraining the use of unduly hostile cross-examination; and in preventing the admissibility of evidence as to the victim's prior sexual experience.

## 4. Separate Legal Representation

Victims have a right to some form of legal representation in all of the jurisdictions studied, except for England and Ireland. In 11 jurisdictions, this right is well-established and applies to all victims of crime. In Denmark, the right to legal representation was originally introduced just for rape victims, but has since been extended to victims of crime generally.

However, the nature of the right varies; in some jurisdictions, the victim is entitled to legal representation as a party to the proceedings (the *partie civile* in Belgium and France), in order to make the civil claim for compensation which is part of the criminal trial process. In some jurisdictions it is state-funded, but not in others.

Differences also exist in the rights accorded to victims' lawyers in different countries, e.g. whether they have access to the pre-trial file or *dossier*; whether they have full rights of audience; whether they may call witnesses; address the court as to verdict or sentence; or whether they may take an appeal on behalf of the victim. Their role may be limited to addressing the court as to compensation for the victim, and to applying for procedures for the protection of the victim (in Denmark the role of the victim's lawyer is limited in this way).

Nine participants in the study had their own lawyers. A highly significant relationship was found to exist between having a lawyer, and overall satisfaction with the trial process. The presence of a victim's lawyer also had a highly significant effect on victims' level of confidence when giving evidence, and meant that the hostility rating for the defence lawyer was much lower.

Participants also found it easier to obtain information on the investigation and trial process when they had a lawyer, but were less satisfied with the state prosecutor, perhaps because they had higher expectations of the prosecutor as a result of their positive experience with their own lawyer. Overall, the impact of the legal process on the family of the victim was also lessened where the victim was legally represented.

Where participants had a victim's lawyer, their lawyer was the main source of information concerning bail, trial process etc. Some problems

were experienced in relation to state-funding of lawyers, since in some countries the qualification threshold for the means test is very high.

Finally, the victim's lawyer was the legal officer with the highest satisfaction rating among the sample, by far, and also had the lowest hostility and highest sympathy ratings.

#### **4. Recommendations: Separate legal representation**

- 4.1. These findings clearly confirm the positive effect of legal representation for the victims of rape. Such representation is already the norm in inquisitorial systems, and has even worked so effectively within the Danish (semi-adversarial) system that it has now been extended to apply to all victims of crime.
- 4.2. The introduction of a right to legal representation for victims of rape in adversarial systems is therefore strongly recommended. Such a right should extend from the reporting stage, through the trial stage. Thus, victims will be kept informed of the progress of the investigation and pre-trial procedures. The role for the victim's lawyer at trial can be delineated so that s/he does not act as a second prosecutor, but may still intervene on behalf of the victim, for example to request that certain protective measures be adopted, and to prevent unduly hostile questioning of the victim and to assist in the application for compensation.

### **5. Post-trial**

#### **Sentencing**

While similar maximum levels of sentence exist throughout the member states, mandatory minimum sentences for rape only apply in some jurisdictions. There would appear to be a wide divergence in the average sentences which are handed down by different member states, although it is difficult to obtain precise information on this.

While it was beyond the scope of this study to examine the extent of treatment programmes provided for sex offenders in prisons, the need

for such treatment to be made available was expressed in every jurisdiction.

In some jurisdictions, a system of monitoring the offender after release from prison has been introduced. Again, it is beyond the scope of this study to assess the effect of this upon the victim. However, in some jurisdictions victims are informed when the offender is to be released from prison.

### **Use of victim impact statements**

In inquisitorial systems, the victim's lawyer will present the victim's case for compensation to the court, and will bring evidence as to the impact of the rape upon the victim, in order to establish the level of award. The impact of the rape upon the victim may also be regarded as a particularly aggravating circumstance in the criminal codes of such systems, and so a more severe sentence may be given. However, formal victim impact statements are not generally used in sentencing, other than in Ireland.

### **Training for judges**

A formal system of specialist in-service training for the judiciary in dealing with rape cases is not provided in any jurisdiction, although some level of optional specialist training is provided in some systems. Some measure of training or guidelines in order to provide consistency in sentencing might be appropriate, as in Denmark. Participants in this study expressed the view that training should also be provided for other personnel dealing with the trial of rape and sex offences.

### **Compensation**

Compensation for victims of rape is available in every jurisdiction, but to varying degrees. Compensation plays a far more significant role in the inquisitorial process than it does in adversarial systems; criminal courts will award compensation as a matter of course as part of the trial, which the defendant is ordered to pay, but the state will normally pay if he is unable to afford the amount awarded. State compensation tribunals are also available in many member states.

Difficulties were experienced by the interview sample in relation to compensation. In particular, the bureaucracy surrounding the necessary application, the need to show injury, and the difficulty in establishing losses in order to receive special damages were all mentioned. There is also a lack of awareness around the entitlement to claim compensation, perhaps because it is not seen as the function of prosecutors, police etc. to inform the victim about the compensation scheme.

In Ireland, although a state compensation tribunal exists, it no longer awards compensation in respect of general damages, and so awards are low. However, the range of compensation payable differs widely between member states, with some imposing a maximum amount which they may award.

The experience in Denmark shows that levels of award do not have to be high; once the entitlement to a certain amount of compensation has been established, it becomes accepted by victims as a norm and can offer a role for victim participation in the trial process (this was the reason why legal representation for the victims of rape was first introduced in Denmark).

### **Civil remedies**

Quite apart from the criminal process, civil remedies are available through the civil courts in all systems, and are useful to victims in common law systems as an alternative where the prosecution decides not to pursue a case. Other safeguards also exist in inquisitorial systems, e.g. in France through the *partie civile*'s right to demand that the investigation of the case continue even against the wishes of the prosecution.

## **5. Recommendations: Post-trial**

- 5.1. Statistics should be kept on sentencing, in order to establish a pattern of average sentences for rape in different jurisdictions.
- 5.2. The impact of the rape upon the victim should be taken into account at the sentencing stage through the presentation of a victim impact statement by the victim's lawyer.

- 5.3. The introduction of specialist training in dealing with rape cases for the judiciary, particularly in the sentencing process, is recommended.
- 5.4. Training and support mechanisms should be provided for all legal personnel and other professionals (police, doctors, counsellors etc.) who regularly deal with rape through their work. This would contribute to changing prevalent attitudes and myths around the trial of rape.
- 5.5. Treatment programmes for all sex offenders should be made available in prisons.
- 5.6. The victim should be informed when the offender is due to be released from prison.
- 5.7. The trial court in an adversarial system should be empowered to award compensation to the victim, which the defendant should pay. If he is unable to pay, then the victim should be compensated by the state.
- 5.8. Compensation tribunals should also be established, with a separate power to pay compensation, both for special and general loss. Compensation awards should not be dependent on a criminal conviction (e.g. if the perpetrator is unknown), nor should they be subject to a maximum amount.

## 6. Statistics

The available research literature shows that a large proportion of rapes go unreported. Literature also indicates that even where rapes are reported, they may not be recorded as rape.

Even in relation to those rapes which are reported and recorded, difficulty was encountered in obtaining statistics from different jurisdictions. In particular, it was found that different methods were used for the recording of statistics in different countries, and so comparison between states is problematic. While those statistics provided for individual countries should therefore be treated with caution, they do provide some guideline as to the extent of attrition rates within different member states. The small proportion of convictions arising out of the number

of reported rapes should generally be a cause of concern. Clearly, there is a need for more detailed comparative research into this area.

## **6. Recommendations: Statistics**

- 6.1. A uniform method of recording crime statistics generally should be adopted by member states. This would assist greatly in the conduct of comparative research such as the present study.
- 6.2. Further research is necessary to examine the extent of non-reporting and non-recording of rape cases, and to assess the rates of attrition of rape cases in different countries, in order to ascertain at what stage and why cases are lost from the system before proceeding to trial.
- 6.3 State funding should be provided to enable more detailed studies to be conducted into violence against women generally, within the EU.

## **7. Reform**

A best practice model for the treatment of rape should incorporate all the recommendations included in this chapter. In particular, the victim should be entitled to legal representation, both at the pre-trial stages and during the trial itself. The findings of this study show that such representation is the norm in European legal systems, and that the victim's overall satisfaction with the legal process is significantly increased where she is legally represented.

Reform of rape law and procedures is ongoing in most of the jurisdictions studied, and there is a heightened awareness of the need for such reform of rape laws and procedures, in order to address more fully the levels of harm done to the victims of rape. However, an insufficient understanding still exists of the level of harm caused by rape, including the psychological impact and the cost to society.

Further, legal reform alone is not enough to address the causes of rape, at a wider level, in the relations between men and women. Clearly, apart from legal change, a preventative approach needs to be taken

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which emphasises the need for education in order to change the attitudes and challenge the myths about rape. This approach was endorsed in the Council of Europe Report on violence against women (1997).

Such education should be aimed at challenging aggressive masculinity and at empowering girls and women, and should take place through the formal education system, through professional training and through the use of public awareness or information campaigns. The twin goals should be creating 'zero tolerance' of male violence, and enhancing the safety of women.

Only when the attitudes towards rape have changed and the myths been exposed through an educative process will the levels of rape decrease in our society. In the meantime, adequate support structures should be put in place within the legal process for victims of rape. The introduction of a right to legal representation, both before and during the trial, would provide vital support to the victims of rape.

## Chapter Two

# Literature Review

### Introduction

A comparative study entitled 'The Legal Process and Victims of Rape' must necessarily be interdisciplinary in nature, involving research of both a legal and a psychological nature. Extensive literature already exists on the impact of rape upon its victims, and on the legal processes relevant to rape, although the present study is unique in its comparative and interdisciplinary focus. In this brief review of the relevant literature, an interdisciplinary approach is adopted, in keeping with the nature of the study. Where possible, any literature specifically directed at any one of the countries in this study is reviewed separately in the chapter on that country.

It is proposed to turn first to the physical and psychological consequences of rape and sexual violence, to explore the effect of the rape on the victim, on her family and on the broader social community, and to examine the impact upon the victim of her involvement in the legal process.

### **1. Rape and sexual violence: the personal, familial and societal impact**

Rape and sexual violence are universal phenomena, in that they are found in one form or another in almost every culture in the world (Ruback & Weiner, 1995). Sexual violence crosses country borders and traverses lines of ethnicity, economic status and age (Koss, 1994). There is therefore no 'typical' or 'stereotypical' victim of rape. Empirical research conducted in the past two decades has challenged some of the traditional beliefs or myths about rape and sexual violence, thereby replacing the 'myth' with the 'reality' of sexual victimisation. With some caveats, there currently exists a better understanding of the prevalence of sexual victimisation, of the impact on the physical and psychological health of the victim, the impact on her immediate family and

across generations, the reaction of society and societal institutions to the victim of rape and the cost of rape to society at large.

Rape and sexual violence are sources of fear, psychological distress, and physical injury for countless women. There are also many indirect victims of rape; the victims partner, members of her family, her children and her grandchildren who are frequently forgotten and yet can also be profoundly affected by the whole experience (Bateman, 1986). The impact on society is also extensive; sexual violence and rape can generate fear and limit women's lives in many regards and the fiscal consequences of sexual victimisation are substantial.

Rape and sexual victimisation are not rare events. An annual report commissioned by UNICEF entitled *The Progress of Nations Report, 1997* outlines a shocking litany of violence against women and girls throughout the world. Findings from the report in relation to sexual violence show that between one in five and one in seven women will be victims of rape in their lifetime. Mary Koss (1996), in a review and critique of prevalence studies conducted world-wide, concluded that in the majority of studies estimates of rape and sexual assault among adult females ranged between 14% and 25%. Kilpatrick, Seymour and Boyle (1991) would predict, based on their findings of a national survey of 4,008 adult women, that every year in the United States 683,000 women are 'forcibly raped'. Recent official statistics published by the US Department of Justice on reported rape specify that there is one 'forcible rape' occurring every five minutes in the United States (1997).

Given the prevalence of rape and sexual assault, it is necessary then to examine the impact of sexual violence. Sexual violence can impact on the victim personally, on her family network, and, on a broader level, on society at large.

### **The impact of rape and sexual violence on women's personal lives**

Experiencing sexual victimisation can impact on women's personal lives in terms of the psychological distress that such victimisation causes and the consequences of victimisation on their physical health. A large body

of empirical research exists to document these effects (Resick, 1987, 1993; Koss, Heise and Russo, 1997).

### **The physical health implications of sexual violence and rape**

A comprehensive review of studies relating to the health implications of sexual violence has been conducted by Koss, Heise and Russo (1997). The findings of this review will be presented in brief. First, women who have been the victims of rape and sexual violence report more negative health behaviours, e.g. smoking, alcohol use and perceive their health less favourably than non-victimised women (Kimerling and Calhoun, 1994). Rape is a recognised risk factor for a range of diseases and reproductive health consequences, and can also be a risk factor for suicide.

Koss *et al* (1997) also found that rape and domestic violence are significantly causally related to disability and mortality rates among women of reproductive age in both the developed and developing worlds. Estimates are, according to these investigators, that gender-based victimisation leads to women between the ages of 15 and 44 losing one out of every five healthy years of life. Koss *et al.* estimate that the health burden which results from gender-based victimisation world-wide is 10.9 million DALY.<sup>1</sup> When this figure was compared to other figures calculated for the global health effects of other conditions (for example, all cancers account for 10 million DALY), it was found that gender-based victimisation, in terms of the disability and loss which it renders, is a comparable health issue world-wide with all forms of cancer and with cardiovascular disease (1997).

### **The psychological health implications of sexual violence and rape**

Given the nature of rape and sexual violence, it is to be expected that victims endure psychological stress as a consequence of their experience. Research has increasingly shown that psychological stress may be the most significant consequence of sexual victimisation (Esselman, Tomz

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<sup>1</sup> DALY refers to disability adjusted life year- and is calculated by assessing the number of healthy years of life lost due to premature death, or spent ill or incapacitated. The severity of the disability experienced determines the number of the disability adjusted life years. The DALY has been used to quantify the health consequences of a range of health-related conditions.

and McGillis, 1997). Many of the psychological effects of rape are conceptualised as 'rape trauma syndrome' which has been categorised as a special case of Post-Traumatic Stress Disorder (P.T.S.D.) (DSM-IV, 1994). Identified by Burgess and Holmstrom in 1974, rape trauma syndrome has been widely accepted as referring to a cluster of emotional responses to the extreme stress experienced by the victim during the sexual assault. Behavioural, physical and psychological effects, including feelings of hopelessness and loss of control, have been delineated. Feelings of anger and guilt and internalisation of anger are also common emotional reactions of victims of rape and sexual violence. Adverse mental and psychological health outcomes include: phobias, depression, sexual difficulties, failure to resume previous social or sexual relationships, failure to return to work, substance abuse, suicidal ideation (Freedy, Resnick, Kilpatrick, Dansky and Tidwell, 1994).

While sexual violence routinely precipitates psychological trauma, individuals respond in different ways to crisis. For example, the psychological coping mechanisms available to the victim and her tendency to use maladaptive responses can determine her reaction to the sexual violence (Cohen and Roth, 1987). In addition, Koss *et al* (1991) note that specific features of the sexual violence experienced, such as the amount of force employed and whether the victim had previously known the accused, may also be determinants of how the victim reacts and the coping strategies she may be capable of employing. It should also be noted that the victim must deal not only with the rape and the impact on her, but also with the reactions of others to the rape (Ward, 1995).

'There are few women who do not feel that the rape has caused a fundamental change in the way they see themselves, their relationship to the world around them or in their attitude towards the future' (Mezey, 1988).

### **Effect of rape and sexual violence on the family of the victim**

Sexual violence can not only affect victims themselves but can cause 'fundamental change' in the lives of their families also. Thus, sexual violence can exert insidious influence even on those individuals who are not direct victims. The first recipient of the disclosure of rape or sexual violence by the victim will more often than not be a family

member or close friend of the victim (Allison & Wrightsman, 1993:220). How these individuals react to such a disclosure can have very important ramifications for the victim and her coping strategies as a consequence. Allison and Wrightsman (1993) also delineate some of the emotional effects that individuals may experience if someone that they care deeply for has been the victim of rape or sexual violence. These authors report that the predominant reactions of significant others to the victimisation of their family member or friend are anger, guilt and confusion.

Koverola (1996), in a Canadian study of the effects of sexual victimisation, found that women who had been sexually victimised experienced more negative family functioning than women who had not been victimised. In the families of women who had been sexually victimised, the level of conflict was higher than in the families of non-victimised women. The authors found that this heightened level of conflict had a significant impact on the degree of distress experienced by the victim (Koverola, 1996). Amick and McMullan (1989) found that indirect victims, such as loved ones of victims, are at an increased risk for developing Post-Traumatic Stress Disorder. Foley (1985) found that between 50% and 80% of a victim's relationships will end as a consequence of her sexual victimisation. Foley also found that as many as four family members of a victim may seek support from psychological services in the aftermath of the victimisation (1985). It should be noted that there is a distinct paucity of empirical investigation of the effects, both short and long-term, of rape and sexual violence on the family of the victim, particularly the effects on the children of victims.

## **Impact of rape and sexual violence on society**

### ***Women's fear of victimisation***

Research conducted in many countries has shown the way in which fear of crime in general and fear of sexual violence in particular can affect the very nature and quality of women's lives (Koss *et al.*, 1997; Edwards, 1996). Kilpatrick, Seymour and Boyle (1991), in a survey of the social impact of violent crime, found that not only were women in general more fearful of crime, but they also reported restricting their

activities to a greater degree than did male respondents. In response to the threat of sexual violence, there are several ways in which women delimit their lives: by placing psychological curfews on their actions, in their concern for developing strategies to help them prevent such violence happening in the first instance, and even in the manner in which they dress (Canadian Statistics, 1993). Warr (1985) reported, in addition, that over half of the women surveyed reacted to the fear of rape by isolating themselves and by forgoing activities which may put them at risk e.g. going out in the evening, taking public transport at night, and that rape was feared by these women more than murder.

Victimologists have also examined the extent to which levels of fear about crime are influenced by media reporting of crime (see, for example, O'Connell and Whelan, 1996), and, in particular, a gender-specific analysis has been developed by Stanko (1990) to explain women's greater fear of crime. Since crimes against women, particularly sexual offences and assaults occurring within the home, are least susceptible to discovery or revelation, women, and particularly girls, may suffer far higher levels of victimisation than revealed even by crime surveys. Elman (1996), in a study of the perception of violent crime among residents of Seattle, reported that most of the women interviewed regarded rape as more terrifying than any other crime including murder, assault and robbery.

### ***Fiscal implications of rape and sexual violence***

Between 10 and 20% of mental health care spending is used to treat victims of violent crime, and in Western Europe rape and domestic violence alone have been estimated to account for 16% of the total health burden (Koss *et al*, 1997). Koss, Koss and Woodruff (1991) report that victimised women are also high utilisers of medical services, in that they visit their medical-care provider twice as often as nonvictimsed women. The economic cost of providing such a level of medical care is also contained in that ratio.

Miller, Cohen and Wiersema (1996) found that victimisations generate US\$105 billion annually in medical costs, lost earnings and costs related to victim assistance. When the values of pain, long-term emotional

trauma, reduced quality of life and risk of death from victimisation are assessed, the costs of personal crime in the United States increase to an estimated \$450 billion annually. Of the one million individuals victimised while working, 500,000 victims lost an estimated 1.8 million work-days each year and over \$55 million in lost wages, not including days covered by sick and annual leave (US Dept. of Justice, 1994). Overall, rape has the highest annual victim costs at \$127 billion per year, followed by assault at \$93 billion, murder (excluding arson and drunk driving) at \$61 billion, and child abuse at \$56 billion (Miller *et al.* 1996).

Behind the monetary figures the researchers have assigned lies the reality of the social toll exacted by violent crime. This social cost consists of the adverse emotional and psychological effects that can have far-reaching consequences for the victims. By taking these factors into account in assessing the effects of violent crime, one can begin to recognise the full consequences of such crime for victims themselves and for society generally.

'Rape is an experience which shakes the foundations of the lives of the victims. For many its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating fear' (Wright, 1996).

## **2. Victims of rape and sexual violence and their experience of involvement with the legal process**

At the same time that they experience the impact of the crime, victims too often endure insensitive treatment at the hands of the criminal justice system, or what has come to be referred to as 'secondary victimisation'. The law on rape and the treatment of rape complainants by the criminal justice system have come under increased empirical scrutiny in recent years. Temkin (1987) reported on findings of studies conducted in a number of countries (in England, Scotland, United States, Australia, Canada, Scandinavia and elsewhere) showing striking similarities in the way in which the legal process treats victims of rape.

Holmstrom and Burgess (1978), in their now classic study of how legal and medical institutions react to the victims of rape, emphasise that the very institutions which exist in part to aid and protect in reality often

further victimise victims. These authors point out that ‘ . . . Rape does not end with the departure of the assailant. Instead, the institutional processing that occurs can be equally devastating for the victim’ (Holmstrom and Burgess, 1978, p.vii). It is ‘essential’, according to these authors, to investigate the factors or elements of these institutions which lead to further harm and distress for victims.

The following are some of the ways victims may experience secondary distress as a consequence of their involvement in the legal process:

- (i) insensitive questioning by police,
- (ii) attitudes of scepticism or disbelief demonstrated by the police or by the prosecuting authorities,
- (iii) fear of reprisal by the defendant or his network,
- (iv) lack of information about the status of the case,
- (v) frustration and inconvenience related to delays in court hearings,
- (vi) anxiety about testifying in open court,
- (vii) hostile questioning by the defence lawyer (Esselman, Tomz and McGillis, 1997).

Common myths and shared cultural definitions of ‘real’ rapes and ‘real’ victims also combine to enhance victims’ fear of being disbelieved (Stewart *et al*, 1996). Factors identified by Stewart *et al* (1996) which are seen to undermine the veracity of a ‘real’ rape include: a prior relationship with the assailant, the woman’s own sexual past, a delay in reporting the crime, being a prostitute, a black woman, a welfare recipient, a hitchhiker, obese or being under the influence of drugs or alcohol (Wood, 1973).

These extra-legal factors are also taken into account both by the police and by prosecutors in deciding whether to pursue a case or not. Prior consent to sexual intercourse with the accused; ‘risky behaviour’ such as getting into a car with a man met at a bar, kissing at a bar, having too much to drink, or inviting a man into the house to have a drink; all are signs of ‘misconduct’ which implicated the woman (Stewart *et al*

1996). 'What did she expect' was the exclamation often heard from the police and prosecutors by the researchers in the course of conducting their U.S. study. They conclude: '...[t]his male definition of reality was one the victims knew to be dominant and determining of the experience they would have in the justice system. It '...therefore shaped the victims' willingness to report and persevere in pursuing their cases through the system (*ibid*). Such extra-legal factors will clearly affect the impact upon the victim of her experience with the legal process.

### **3. Victims' experiences of reporting rape**

The threshold question for every victim of rape is whether or not to report the rape to the authorities, thus taking the experience beyond a personal or private matter, and into the public forum of the legal process. Crime statistics available from many countries would indicate that most victims of rape or sexual violence make the choice not to report the crime to the authorities and as a consequence ' . . . rape remains a hidden crime for many of its victims' (Edwards, 1996, 332).

Estrich further states that rape is distinguished from other crimes not so much because of the 'disproportionate numbers of actual complaints but because of the disproportionate numbers of cases that are never reported' (Estrich, 1987: 54). According to Torrey (1991), no more than 10% of the sexual assaults which take place in the UK, the US and Canada are reported to the police. In Hall's 1985 victimisation study, carried out in London, it was found that one-third of the respondents had been raped or sexually assaulted, and that only 8% of rape victims had actually reported it to the police. Hanmer and Saunders' study in Leeds (1984) used a much broader definition of sexual violence than Hall, and found that 59% of women questioned had been sexually assaulted at least once in the previous year.

A US survey of college women revealed similarly that young women's sexual encounters are often coercive. Over one-quarter of the 3,187 women reported forced sexual intercourse and over 60% reported experiences of unwanted kissing, fondling or petting. The average age of the women interviewed was only 21 (Warshaw, 1988). Koss *et al*

(1987) found that 54% of US women university students had experienced some sort of sexual victimisation, and 28% had experienced rape or attempted rape.

Why then are victims of rape and sexual violence reluctant to report sexual victimisation? Studies have shown that victims may be reluctant to report sexual violence for a variety of reasons (Temkin, 1987:11; Adler, 1987:4; Katz and Mazur, 1979:186). Interviews with victims have consistently revealed that the reasons for not reporting include:

- (i) fear of how they will be treated by people within the criminal justice system,
- (ii) not wanting what happened to them to become public,
- (iii) fear of lack of evidence (U.S. Dept. of Justice, 1994).

Some additional factors which can have an influence on victims' decisions to report include the severity of the assault that they experienced, the injuries they may have incurred, the degree of acquaintanceship with the assailant and the level of social support available to them (Greenberg and Ruback, 1992; Ruback, 1993). The social perception of 'classic' rape (stranger, dark alleyway etc.) is often reinforced by the media, and may partly explain why victims whose experiences do not fit the prescribed pattern fail not only to report but even to recognise these as rape. Moreover, societal presumptions and myths about rape may foster feelings of guilt and self-blame which inhibit victims from reporting.

McColgan (1996) concludes that many women do not define their experience as rape, particularly if they know their attacker; she cites a study in which Russell (1984) found that 83 per cent of rapes which she studied were perpetrated by someone known to the victim, but that less than seven per cent of rapes committed by the victims' friends or dates were reported, compared to 30 per cent of 'stranger' rapes. Amir's earlier study (1971) found that just 50 per cent of victims and offenders in rape cases were known to each other; in a small-scale study conducted more recently in Northern Ireland, it was found that 71.5 per cent of women were raped by someone they knew (Belfast Rape Crisis Centre, 1991). Leonard (1993) cites figures such as these in order

to debunk the myth that rape is an act carried out by a stranger in a dark alley.

Skelton and Buckhart's experiment in motivation to report (1980) on a group of female psychology students confirmed that willingness to report is stronger when more violence is used, and lower when the rapist is an acquaintance of the victim (Winkel and Vrij, 1993). Edwards refers to the low levels of reporting of rape which have been found, in addition to the UK, in Canada, the US, Australia and New Zealand; she attributes women's reluctance to report in all these jurisdictions to a combination of elements: fear of retaliation, shame, distrust of the reaction of family and friends, and lack of confidence in the police and the court process (1996:331; See also McColgan, 1996:56).

In general terms, where a victim has a reason to avoid contacting formal criminal justice agencies, certain areas of criminal behaviour will go unrecorded (Lacey, 1995; Edwards, 1996). Victims who are clearly unlikely to report rape are thus particularly vulnerable to rape, and sometimes may be characterised as 'victims of impunity'. For example, the targeting of vulnerable children by paedophiles has been well documented (Finkelhor, 1984; Law Reform Commission, 1989). The targeting of vulnerable victims by abusers, however, extends also to male victims for the reasons outlined above, and to prostitutes, who are reluctant to report assaults and rape for fear of being prosecuted themselves (McMullen, 1990; McElwee and Lalor, 1997).

The incidence of sexual assaults on prostitutes, in particular, as shown by Silbert (1980), demonstrates the frequency with which sex workers are victimised; 50-66 per cent of Silbert's sample of 200 prostitutes were regularly beaten, and 70 per cent were victimised by customer rape. In Dublin, O'Connor (1996) found that 55 per cent of the prostitutes she interviewed had experienced violence from their clients, and 89 per cent had experienced harassment from the police in the form of abusive language, disdain or aggression. As a consequence, they are especially reluctant to report rape; 83 per cent of the women interviewed in another study of prostitutes expressed hesitancy in going to the police in the event of being attacked by a client (McElwee, 1997:30).

However, there are issues particular to the law on rape which may also serve to discourage its reporting. Widely publicised rape acquittals in particular have a significant impact on women's perception of the criminal justice system, and thus the prospect of acquittal of an attacker will deter other women from reporting in the first place (Edwards, 1996:331-2). In addition, judicial attitudes to women's behaviour undermine further women's confidence in the criminal justice system (*ibid.*).

### **The reasons why victims report rape and/or sexual violence**

'The act of reporting a rape starts in motion a complicated process' (Holmstrom and Burgess, 1975). For this reason, it is also important to examine why the victim chooses to become involved in the legal process in the first instance. Peters *et al* (1976, cited in Katz and Mazur, 1979) in a survey of 634 victims of rape found that victims reported for the following reasons:

- (i) wanting help or support either of a physical, emotional or medical nature;
- (ii) wanting to protect other females and themselves from being raped by the same perpetrator;
- (iii) feeling that the perpetrator should be punished for what he had done.

The victim is not always the one to take the decision to report the rape. Holmstrom and Burgess (1978: 31) found that in more than half of the adult cases which they examined, someone other than the victim was involved in reporting the rape to the police, in many instances directly contacting the police while in others, persuading the victim to contact the authorities herself. Greenberg and Ruback (1992) found that often it was someone in the victim's social network, their family, partners or friends, who contacted the police. Peters *et al* (1976, cited in Katz and Mazur, 1979) in their study noted that in some instances reports were made by others, well-meaning, but without the consent of the victim. In most rape cases the agency first notified was the police or other law enforcement agencies.

#### 4. Police treatment of victims of rape and sexual violence

The behaviour and attitude of the police towards women who report sexual violence is a very important determinant of the women's satisfaction with participation in the criminal justice system. The police often hold considerable power in determining whether a report of rape will be deemed a crime or not and, in turn, whether or not this crime will be passed on to the prosecuting authorities (Heinz and Kerstetter, 1979). What then do police perceive to be 'legitimate' sexual victimisation?

In an interesting study, Krahe (1991) asked East German police officers to define what they considered to be a 'typical' rape and a 'dubious' rape or one which they would find difficult to believe had occurred. The definition they provided of a 'typical' rape fits the stereotype of an assault committed by a stranger, occurring at night, outdoors and which resulted in the victim being physically injured. In contrast, the 'dubious' rape occurred between two individuals who were previously acquainted with each other, occurring at either person's house, where the woman had consumed alcohol and where she had not sustained any physical injuries. The character and the behaviour of the victim, it would appear, contributes in a substantial way to what the police officers in this study considered to be rape.

In a recent investigation of police perceptions of rape, Campbell and Johnson (1997) found that police officers' interpretation of rape legislation, and ultimately what constituted a rape in their view, was influenced by their level of work experience in the field and by general beliefs they held about women and violence. Those officers who defined rape in a manner consistent with the law of the state, by focusing on the element of force or coercion used rather than on the issue of consent, were found to have received specialised training on rape and expressed less acceptance of interpersonal violence.

Traditionally, the view has been that the police hold an unsympathetic view of victims of rape. Some support for the traditional view of the police is to be found in a Scottish study of victims of rape and sexual assault and their experience of coming into contact with the police and

the criminal justice system (Chambers & Millar, 1983, 1986). In general, the women interviewed in this study were critical of the treatment they received from the police. 'In the main the criticisms were concentrated . . . on the unsympathetic and tactless manner in which interviewing was often conducted.' Chambers and Millar (1983: 39-40) also found, in their interviews with police officers, that one quarter of reported rapes were considered by the officers to be false or malicious. Temkin (1986) provides further evidence of police scepticism about rape complaints, and quotes one police review article in which investigating officers were advised to 'allow [the complainant] to make a statement to a policewoman and then drive a horse and cart through it'.

Not all studies, however, would support this finding. For example, LeDoux and Hazelwood (1985) found that police were more sympathetic to victims of rape than either previous empirical research or popular belief would suggest, and they concluded that the police were not 'insensitive to the plight of rape victims'. However, the police officers in this study reported that they would be cautious of victims who had had a prior sexual history with the aggressor, or of victims who did not adhere to traditional stereotypes.

Adler (1990), in a survey of 103 female victims of rape and sexual violence, noted that the vast majority of women spoke favourably of their experience of reporting; she found that 89% of rape victims were satisfied by their treatment by female officers, and 76% were satisfied with the male detectives investigating the case. Only 24% of women did not describe themselves as satisfied with the way in which the case was handled. Lees and Gregory (1993), in their London study, interviewed 24 women who had reported sexual assault. Here again, they found that the majority of those women interviewed were generally satisfied with the treatment they received from the police (1993:20, 23). Frazier and Haney (1996) found that while victims were generally positive about their experience of contact with the police, they were less satisfied with the amount of information received from the police in the aftermath of reporting.

More recently, in a UK study, Temkin (1997) conducted indepth interviews with 23 women who had made a report of rape to the police, and found that those women who were positive about their experience

with the police were most satisfied with ' . . . the believing, sympathetic non-judgemental attitude of the police, the unpressured pace and the supportive manner in which their statements were taken, the access which they had to police officers and to information thereafter and the help and backing they received in a variety of different ways both during the course of the investigation and afterwards' (1997: 524). The reasons for dissatisfaction were almost a mirror opposite, in that interviewees were ' . . . highly negative where they experienced a disbelieving attitude, an insensitive handling of the case including a disrespect for their privacy and a lack of contact and information after the statement was taken' (1997: 524).

Overall, Temkin (1997) found that 70% of the women interviewed were satisfied with the way in which their cases were investigated and with the officers responsible; of those who expressed problems with the police, it was due to a perception that their claims were disbelieved. The greatest source of complaint in the investigation process was from the 43% of victims who complained about a lack of updates and information on the progress of the case. Seven of the women said that their experience with the police substantially exceeded their expectations. Notably, these expectations were low, yet in 30% of the cases individual officers seem to have provided a level of support which went beyond that which might reasonably be expected.

Temkin's research shows, in summary, that while there have been improvements in satisfaction with the police, old police attitudes and practices are still in evidence and continue to cause trauma to victims. This study suggests the need for more research in order to discover whether police treatment of victims has improved further.

In a recent study conducted in the Islington area of London by Gregory and Lees (1997), three-quarters of the women interviewed expressed satisfaction with the way in which they were treated by the police. However, Gregory and Lees found that many of the women had received no information whatsoever about their case, and several respondents commented on the poor flow of information generally. In their interviews with the police, Gregory and Lees found conflicting results; at one level, those police officers whom they interviewed seemed committed to making new victim-centred policies work, but at

another level, many of those interviewed seemed to believe that false allegations of rape are a common occurrence, although women officers were less likely to express such scepticism.

For some groups of women, such as those working as prostitutes, there are particular reasons for distrust of the police. For example, a study conducted by Southall Black Sisters (Mama, 1989) addressed the difficulties faced by black women as victims of crime; the majority of women surveyed had no confidence in the police, although it was acknowledged that the police have sought to achieve a balance between respect for ethnic communities, family privacy and the need to protect victims from domestic violence. Asian and Afro-Caribbean women have felt that the need for family autonomy and the interests of Asian and Afro-Caribbean men have been given priority over women's rights to protection (Edwards, 1992: 253-6). Women who have been abused or raped by their husbands or partners may also have difficulty in reporting this to the police, given that the police have traditionally been slow to take reports of 'domestic violence' seriously.

Despite improvements in police response to rape, latent scepticism on the part of police dealing with rape may continue to contribute to the worryingly high attrition rates which apply to rape cases; Edwards (1996) says that there is no empirical evidence to show that improvements in the policing of rape have resulted in more women coming forward to report rape than previously. In their study of attrition rates in the Islington area of London, Gregory and Lees (1996) found that of 301 cases initially reported as rape or sexual assault, 116 were 'no-crimes' (not recorded as crime), 18 were downgraded to a less serious offence, and only 71 cases proceeded to be prosecuted by the Crown Prosecution Service, from which 41 convictions resulted. Earlier studies in Scotland (Chambers and Millar, 1983) and in England and Wales (Wright, 1984; Grace *et al*, 1992) had found that roughly one-quarter of reported rapes were 'no-crimes' by the police at the reporting stage.

It may be concluded that while police attitudes to and treatment of rape victims have improved, reporting rates for rape remain low and attrition rates remain high, with the result that the true extent of rape remains unknown. Moreover, until women see that the reports of rape which they make to the police are being taken seriously and that prosecutions

are commenced as matter of routine, it is likely that reporting rates will remain low.

## **5. Victims' involvement in the criminal trial**

Within the common law adversarial system, the rape trial has been described by many victims of rape as a 'second rape' (Lees, 1997). Bridgeman and Millns (1998) refer to three particular aspects of rape trials which, they argue, construct the rape victim and her experience in a problematic way. First, they say that the sexual overtone of the trial allows it to be recast as a pornographic spectacle; the second aspect they highlight is the admission and scrutiny of the sexual history of the complainant; and thirdly; they regard the sentencing process as contributing to the stereotypical view of the rape victim.

In addition, the facilities available in court to enable the victim to keep her distance from the defendant; the role of the corroboration warning, whereby the judge warns the jury of the danger of convicting for rape on the basis of the complainant's evidence alone; the aggressive nature of the cross-examination of victims of rape by the defence counsel; and the attitudes of judges and lawyers in general, have all been emphasised as questionable, and as contributing to the reluctance of women to report crimes of rape or sexual assault. In the following paragraphs, it is proposed to give a brief overview of those aspects of the rape trial which are seen as most distressing for victims of rape; but it should be emphasised that many of the aspects identified are relevant only in the adversarial trial process. For example, cross-examination of witnesses does not take the same form within an inquisitorial trial and so will not typically be so hostile or aggressive as it would be within the English or Irish courts. However, many other issues, such as the anonymity of the complainant and the need for training of judges, apply in both types of system.

Issues which emerge as difficult for victims in every system include lack of information about their case and delays inherent in the court system. Indeed, delay is a particularly troubling factor for victims both before and during trials of rape; long periods of waiting before and at hearings,

accompanied by adjournments, have been found to cause stress to victims (Raine and Smith, 1991). In England and Wales, in order to minimise this stress for child victims, a new policy of 'fast-tracking' child abuse cases has been adopted by the prosecuting authority, by means of an agreed timetable between the prosecution, the police and the courts (see *New Law Journal*, 1997).

For the majority of victims, the courtroom remains an alien setting, with its own specialised discourse and rituals. In New Zealand, Wright (1984) found that victims of rape generally described their experience of testifying in court as 'negative and destructive'. Wright, in describing the experience of some victims, reports: 'Three said they considered the ordeal to be even worse than the rape itself, and one likened it to being crucified. Undoubtedly, the court proceedings added to and prolonged the psychological stress they had suffered as a result of the rape itself.' In Sweden, victims and their advocates perceive the criminal justice system and the attitudes of those who work within the system as 'slow, abrasive, indifferent and incredulous' (Elman, 1996).

There is now an increasing acknowledgement of, and empirical evidence in support of, the view that if an individual is traumatised by their court appearance, then this can affect what they say in court, how they say it and consequently their credibility in the eyes of others, such as the judge or jury (Stafford & Asquith, 1992). Ultimately the '... quality of experience a victim has in the courtroom depends greatly upon the quality of the contact that the victim has with key individuals'.

Bottoms and Mc Lean (1978: 134) write that: '... to the court administration, to the judge or magistrate, to the professional lawyer, the court is a familiar place ... they share a common stock of experience which despite their different roles in the courtroom drama, pulls them together and enables them to communicate with each other in ways which are incomprehensible to an uninformed outsider.' Thus, lay witnesses enter a highly professionalised arena which is charged with the responsibility of administering justice, when they appear in court for the first time.

Stafford and Asquith (1992) conducted a study commissioned by the Scottish Office on the views and experiences of lay witnesses in the

Scottish criminal justice system. The findings of this study revealed, once again, that for many witnesses appearing in court is an intimidating experience and one which may result in the witness' participation in the proceedings being adversely effected. Over two-thirds of those witnesses who gave evidence reported that they had been anxious about the prospect, with women reporting a greater likelihood of feeling anxious than men. Almost two-thirds claimed that they felt that they were either badly informed or not informed at all as to what was required of them. The difficulty of being a witness is exacerbated by the lack of preparation or information given prior to the courtroom appearance: 'Ignorance of the requirements surrounding the giving of evidence is a prominent feature in the data' (Stafford and Asquith, 1992: 2).

For some of the witnesses, the presence of the accused in the courtroom heightened their feelings of nervousness. One-third of the witnesses reported that they were in some way influenced by the presence of the accused. The main feeling they reported was nervousness. Such an experience can be an inhibiting factor with regard to an individual's willingness to give evidence or, even more importantly, to report offences in the first place. For some witnesses, the experience left them feeling that it was they and not the accused who had been on trial.

Little account is taken of the demands and the burden that testifying may place on the victim who is providing evidence on a subject which is extremely painful for them. Empirical research has highlighted some of the central concerns in relation to involvement in the legal process for victims.

## **6. The central concerns of victims involved in the legal process**

### **Access to information and communication**

In 1986, Chambers and Millar wrote that '. . . the main problem for women after the initial investigation was undoubtedly the general lack of information resulting in feelings of helplessness and non-involvement' (1986: 51). Being kept informed is important for victims. Shapland *et al* (1985) found that not being informed of developments in

their case by either the police or the courts was a major contributor to victims' feelings of dissatisfaction with those authorities. At the pre-trial stage ' . . . there is a likelihood that the victim's needs, for information, advice and assistance from the various criminal justice and court-based personnel) are relegated to the needs of the court and the demands made by bureaucracy of the criminal justice process' (Davies, 1996: 83).

Wemmers (1995), in a study of Dutch victims of crime, found that keeping victims informed of the developments in their case is an important contributor to their perception of fairness of the justice system. Victims who wished to receive and did receive information about their case were more likely to find that they were treated fairly by the prosecution. Furthermore, victims who were kept informed of the developments in their case were more likely to report being satisfied with the case outcome.

### **Facilities in court**

Inadequacies in the physical environment of the court have been criticised in several studies. Shapland *et al* (1985) comment that ' . . . it was the peripherals of the court system — lack of facilities, cramped surroundings, sitting next to the defendant, lack of warning at the Crown Court, inadequate recompense for their costs and above all, lack of information and knowledge of when the appearance would be and what they have to do — that caused considerable distress and inconvenience'.

Gregory and Lees (1997) found, in their survey of the experiences of rape victims in London, that the women interviewed described the court facilities as appallingly inadequate, often with no heating provided, sparse furnishing and poor canteen arrangements. Also, having to share a restricted space with the defendant unnerved a number of the complainants.

Adler and Millar (1991) found, unsurprisingly, that the participation of lay people as witnesses within the court system is hindered both by the use of technical language and vocabulary, and by working practices and routines developed by professionals. Most witnesses found the court experience 'nerve-racking' and two-thirds were badly informed or not

informed at all as to the court personnel, or the witness's role, so that some could not even distinguish between the prosecution and the defence.

### **Anonymity and media reporting**

It is clear that one of the factors deterring women from reporting rape is the potential violation of their privacy through their identification at the trial. Thus, many legal systems incorporate rules, ensuring that the complainant in rape cases may never be identified publicly, and that restrictions are imposed upon the public right of access to the courtroom, and on the media reporting of rape trials. However, the use of these rules has led to some unforeseen results. Indeed, the research by Chambers and Millar (1983) into the media reporting of rape takes the view that the most important sections of rape trials, during which the complainant gives evidence and is cross-examined, are closed to the public, with the result that people then are often dependent upon 'graphic and chilling' accounts of the complainant's testimony in the media. Thus this protection for the complainant in rape trials has led, ironically, to the lack of any systematic assessment of how rape trials operate, since the public are excluded from knowing fully what goes on, and court observation by professional researchers is often problematic.

The danger of distortion in the media reporting of rape trials was highlighted in a more recent study conducted by Soothill and Grover (1998), into the public portrayal of rape sentencing in Britain. The authors found that up to the 1970s the media coverage of rape sentences broadly matched the reality of the courtroom, but that since the 1980s a distortion had become evident in terms of a disproportionate emphasis by national newspapers on severe sentences. Moreover, they found that the media does not tend to report on acquittals in rape trials to the same extent as convictions and severe sentences; thus, they conclude that the public are unaware of the high level of acquittals in rape cases. Indeed, they argue that 'if the media truly represented what was happening in the courts and even gave a proportionate coverage of acquittals which are occurring, we suspect that an outcry about a high acquittal rate would be much more pronounced' (1998: 464).

### **Judicial language and training**

In a discourse analysis study conducted on sexual assault trial judgments in Canada, Coates *et al* (1996) found that anomalous language was extensively used by judges in dealing with rape cases. The vocabulary they used was often more suitable to the description of consensual sexual acts, rather than to describing acts of assault or violence. This study provides empirical support for the notion of specialist training for judges in rape trials. The issue of training for judges in the conduct of rape trials has long been contentious. According to Malleon (1997), the introduction of processes to improve and monitor standards of performance should be seen as part of structural and cultural changes within the judiciary, and such processes could encourage greater consistency, standardisation and collective decision-making among judges, and erode the culture of individualism prevalent among the judiciary. Indeed, there is increased judicial awareness in common law and other systems of the need for training, as well as the need to develop an awareness of race and gender issues.

In common law systems, judges are chosen from among practitioners, rather than from those specifically trained to be judges (as in most European countries). Common law systems do not have a specialist judiciary (family law judges, etc.) whereas most civil jurisdictions do. However, in both common law and civil law systems the need for judicial training is being examined.

### **Experience of testifying in court and defence strategies**

Edwards (1996: 334) points out that, given the consent-based definition of rape, if the defence counsel are to conduct a successful defence, then they must focus on the issue of the complainant's consent to the acts, thereby unremittingly denying or challenging the victim's account of events. A study conducted by Newby (1980) identified three defence tactics used by Australian lawyers in rape trials, and these have also been identified in other jurisdictions:

- (1) Continual or repeated questioning with regard to the details of the rape, testing the woman's story for inconsistencies;
- (2) The issue of prior knowledge of the accused (if applicable); prior sexual history of the victim;

- (3) Challenges to the general character of the witness; suggestive comments as to her character, with the implication that it would be reasonable to assume that she consented to sexual intercourse with the defendant.

Such re-victimisation in court is conducted to weaken the victim's credibility. Indeed, the cross-examination of victims of rape is one of the most criticised features of common law rape trials, along with the rules of evidence pertaining to rape trials. Duncan (1996) postulates that the use of the subjective *mens rea* test for rape in English law, together with the possibility of the woman's sexual history being put in evidence, the defendant's unassailable shield, the remnants of the corroboration requirements, all contribute to the construction of the rape victim as the 'other' during the trial; the focus is on her behaviour, and she is therefore the object of study by the court.

Empirical studies bear out the problematic nature of rape trials for the victims of rape. Newby (1980) found that the emphasis on the legal issue of consent in rape trials meant that a complainant's credibility is much more likely to be attacked in a rape trial than in a trial for a non-sexual offence. Because of the private nature of most sexual encounters, rape is rarely witnessed by a third party, therefore there is a greater focus on the character, actions and reactions of the complainant in these instances (Edwards and Heenan, 1994).

In adversarial trials, it is often sought to cast doubt upon the reliability of witnesses. Thus, defence lawyers routinely seek to undermine the credibility of prosecution witnesses in cross-examination. However, Brereton (1997) found that on average, it took twice as long to cross-examine complainants in a rape trial than it did in an assault trial, and concluded that while inconsistencies in testimony were exploited by counsel in both types of trial, being a complainant in a rape trial is more distressing than being a complainant in an assault trial because of the intimate character of the questioning; it may also be more upsetting because of the length of time the complainant is expected to spend in the witness box, and the level of trauma associated with the offence itself.

Chambers and Millar (1983) found that, in rape trials, both quasi-legal and extra-legal factors are frequently used to make inferences about the credibility of the victim, but often go unchallenged in open court. In most cases in their study, the accused admitted to having sex with the complainant but said that she had consented. The prosecution, therefore, had to show that intercourse was obtained without consent, sometimes by producing evidence of physical injury, or evidence of threats of violence made to the victim or to those close to her. These evidentiary requirements meant that signs of injury were usually taken as corroborating lack of consent, but on occasion the defence was allowed to imply that injuries were self-inflicted, in order to lend credence to the defence case. Defence counsel also occasionally tried to suggest in cross-examination that the complainant, while sustaining physical injuries, had in fact enjoyed the violence.

Studies such as these demonstrate the difficulty for a woman in proving her lack of consent by verbal resistance alone. In questioning the victim regarding the physical measures taken to repel the attack, the defence often focuses on what she did not do to repel her attacker, as opposed to what she did. This focus puts the victim into the position of having to provide negative replies, thus making her feel guilty. Defence questioning is based on the premise that it is more honourable to fight back against a sexual assault, rather than to retreat or submit in order to try and preserve safety and life.

Frequently, Chambers and Millar (1986) found that questioning and cross-examination concerned factors which were clearly extraneous to the incident itself; a wide-ranging enquiry into the complainant's character and lifestyle sometimes took place. Personal living arrangements and general social activities were examined, and there was explicit questioning regarding the complainant's sexual history, use of contraceptives and knowledge of sexual terms. The prosecution occasionally asked such questions to draw attention to the woman's 'virtue', perhaps to strengthen the prosecution's case, whereas defence counsel frequently utilised suggestions of blameworthiness, and carried out insensitive questioning or repeated questioning on detail. Intimidation was also used, by making repeated reference to the seriousness of the allegations made by the complainant.

Much of what happens in adversarial rape trials is not unique to that type of trial, but rather is symptomatic of the nature of the adversarial system: the strict laws of evidence, the judicial concepts of relevance, the way in which lawyers are trained to examine and cross-examine witnesses and interpret evidence, and general courtroom work practices (Brereton 1997: 269). However, special rules and procedures around the trial of rape make it particularly difficult for victims.

Procedural changes have been introduced in both English and Irish law to make rape trials in adversarial systems less overtly difficult for the complainant. For example, at common law the defendant could be convicted of rape on the complainant's word alone, but the judge was required to warn the jury of the dangers of convicting solely on her evidence; this rule, which did not apply in relation to any other specific offence, was described by Kennedy (1992: 117) as an 'unacceptable anomaly [which] has the overwhelming effect on a jury of undermining perfectly credible women'. The mandatory corroboration warning has now been abolished in both jurisdictions, and is only given at the discretion of the trial judge, but it would appear that judges will generally exercise this discretion in favour of giving the warning.

Finally, in England and Ireland, where the defendant is not legally represented, he may cross-examine the victim himself, and this has given rise to lengthy and intimidating questioning on occasion. In a comprehensive study conducted by the UK Home Office, it was recommended that 'there should be a mandatory prohibition on unrepresented defendants personally cross-examining the complainant in cases of rape and serious sexual assault' (1998: 12). Indeed, in several other European jurisdictions, the defendant is not permitted to represent himself in cases of a serious nature.

### **Prior sexual history of the victim**

One feature unique to rape trials is the manner in which evidence of the complainant's sexual history may be introduced. As Fennell (1993) writes, feminists have always questioned why evidence about the sexual past of the victim is ever relevant. Such evidence is frequently used solely to undermine the credibility of the victim's evidence as to the rape itself. Even if her sexual history is not raised, lawyers frequently

use tactics which are 'equally oppressive and invidious' (Temkin, 1987: 6); that is, determined efforts are made to discredit the general character of the complainant. Repeated and persistent questioning is also used to draw attention to minor details and inconsistencies in the complainant's story, and also controversial is the use of cross-examination strategies designed to show that the victim did not 'react' as a real victim would have reacted (Edwards and Heenan, 1994).

Some reform of the law on the use of prior sexual history evidence has been attempted. For example, in several jurisdictions, as in Ireland, such evidence is only admissible at the discretion of the judge. However, where the test for its admission is that of 'relevance', it has been argued (Temkin, 1993) that this is an 'insufficiently objective criteria', and that in practice admissibility is often determined according to traditional views of women's sexuality and credibility.

More radical change has been adopted elsewhere. In the US, Fattah (1989) describes how 'rape shield' laws, which prohibit the use of either reputation or opinion evidence of an alleged victim's past sexual behaviour, have been introduced in many states, with the effect of limiting the introduction of certain evidence by the defence. In New South Wales, sexual history evidence is regarded as inadmissible, except in a number of limited situations (Crimes Act, 1981, Section 409B). A similar rape shield provision applies in Canada (section 276, Canadian Criminal Code). This grants a judicial discretion to determine the relevance of sexual history evidence; but there are built-in safeguards for the victim, providing that such evidence is not admissible to support an inference that the victim is more likely to have consented, or is not to be believed.

This approach is favourable from the victim's perspective, since it establishes a norm whereby such evidence should not be admitted. In a consideration of provisions relating to previous sexual history, Baird (1998) recommends that the English law on admissibility of prior sexual history evidence be changed, so that it mirrors the present Canadian approach. Indeed, the UK Home Office has suggested that one of the reasons why women withdraw complaints of rape may be that they are deterred by the prospect of being cross-examined as to their previous sexual history (1998: 68).

### **Separate legal representation for victims**

There is a scarcity of research on the effectiveness of separate legal representation for the victims of rape, although all of the studies conducted on victims' experiences of the legal process (see above) support the contention that the victim should be kept fully informed about the progress of the case and about her role at court; and that victims should be allowed a participative role in court proceedings. Empirical research establishes that the traumatic impact of the 'secondary victimisation' of the legal process upon victims is thereby reduced.

In inquisitorial jurisdictions (see above), there is an established tradition of legal representation whereby all victims of crime are entitled to seek compensation as civil parties to the proceedings. This system is reviewed in later chapters of this report, but it is not particular to victims of rape.

By contrast, the right to legal representation for victims in Denmark and Norway was introduced specifically for victims of rape, but has since been extended to victims of other violent crime. Temkin (1986:20), in reviewing the Danish and Norwegian systems, suggests that their model of legal representation for rape victims could be used as a basis for improving the position of victims in adversarial rape trials in other jurisdictions. In his paper discussing the merits of introducing separate legal representation for rape victims into the Irish system, Connolly (1993) argues similarly that 'the presence of an active agent on behalf of the complainant could fill the gap in the roles allocated by the system' (1993: 41).

A review of the system of legal representation for rape victims in Norway is beyond the scope of this study, but it is very similar to the Danish model. Victims in Norway must be informed by the police of their right to have a lawyer when they report rape; they are entitled to have the lawyer present during their police interview, and the lawyer has the right to attend at court to offer assistance and support to the victim, and may intervene at trial concerning any procedural issues which affect their client. This entitlement is state-funded, and was extended in 1994 to victims of other crimes of violence (Norwegian Criminal Procedure Act, 1981, No. 25, chapter 9(a), amended July 1, 1994).

## 7. Victim participation in the legal process

Wright highlights what he considers to be the central problem for victims of sexual crimes: ' . . . offenders are usually passive spectators at their trial, and victims are left out of it altogether, except sometimes as witnesses' (1996). Shapland *et al* (1985) found that victims want a 'respected and acknowledged role' within the criminal justice system. Participation can involve an opportunity to express one's concern about the crime or simply to be kept informed about what is happening in one's case. Victim participation in the criminal justice process, whether active or passive, is also important for the victim's conception of fairness (Umbreit, 1990). The perception that they have been treated fairly by the criminal justice system appears to provide a 'cushion of support' for victims making unfavourable outcomes more accepted by them. Some authors such as Fattah (1986) are critical of this view and would counter-argue with the claim that outcome is more important than treatment received during the process. Fattah contends that the victim may have expectations from participation which are unlikely to be met. Thus, a negative outcome may result in increased dissatisfaction with the criminal justice system.

Victim involvement and the opportunity to voice concerns are necessary for victim satisfaction with justice, and with psychological healing (Erez, 1990). Victim participation enhances deterrence because it enhances prosecutorial efficiency. Talbert (1988) makes the interesting point that victim participation may also promote offender rehabilitation, as the offender is confronted with the reality of the harm that they have caused to the victim. Erez cautions against compulsory participation, which may have the effect of causing further trauma for the victim (1990).

Freedy *et al* (1994) surveyed 251 direct and indirect victims of crime on their experiences with the criminal justice system. They found that more than 90% of all victims in their study believed that the criminal justice system should be responsible for providing a broad range of services, including information on case status, personal protection, assistance in dealing with the police and the courts, along with legal assistance. Actual access to such services, however, fell well below victims' expectations. While Freeddy *et al.* acknowledge that financial constraints

were in part the reason why the criminal justice system was not adequately addressing their needs, nevertheless these authors point out that some very crucial services can be provided with minimal financial outlay (1994). The examples that are cited include information about how the judicial process works, referrals to community-based victim services or agencies, and follow-up contact to report on case status. Such services might encourage victims to feel that the justice system is interested in their welfare, thereby enhancing their satisfaction with the criminal justice system in general.

While Joutsen points out that from the 'point of view of the court system, allowing the victim a potentially active role in the proceedings can be frustrating and time-consuming,' nevertheless Joutsen acknowledges that 'allowing the victim to be heard in court personally maintains a lifeline to the reality of the experience of victims — something which may otherwise be lost in the everyday court routine' (1994: 63).

Victims, however, can have different interests and expectations in turning to the criminal justice system. Some may wish to be heard, while others may not want to play such an active participatory role in the process, but would prefer to allow the legal personnel to deal with the case. Joutsen points out that from the point of view of the victim, the ideal system would allow the victim to choose whether or not to opt for greater participation.

Wemmers (1995) investigated which factors influenced victim satisfaction with the criminal justice system. 83% of victims expressed the desire to be kept informed about developments in their case, but only one-fifth of those victims who wished to be kept informed had in fact been kept informed by the Public Prosecutors Office. The vast majority of victims in the study (87%) reported feeling that the Public Prosecutor had shown little or no interest in them. To the issue of how fairly they were treated by the prosecution, most (67%) held ambiguous views, reporting that they had been treated neither fairly or unfairly. Over one-fifth (22%) reported that they had been treated very fairly and 11% (one in ten respondents) reported that they had been treated very unfairly. On the other hand, in respect of their satisfaction with the outcome achieved by the prosecution, 38% of victims reported being

very dissatisfied with the outcome. Wemmers found only moderate satisfaction with the prosecution.

The findings of Wemmers' study generally support the contention that victim participation in the criminal justice system enhances the perceived fairness of the treatment received at the hands of the various legal authorities. Failure to keep victims informed of the developments in their case is associated with low satisfaction with the outcome achieved by the prosecution. Being treated correctly or fairly by legal personnel appears to be an important determinant of the level of satisfaction that a victim experiences after her participation in the criminal justice system.

A study conducted by Frazier and Haney (1996) assessed rape victims' perceptions of their experiences of the legal system. Attitudes towards the police were significantly more positive than were attitudes towards the legal system in general. In respect of the legal system generally, victims typically reported that they believed that the defendants had more rights than the victims, that victims' rights were not protected and that the legal system was unfair. They reported that they did not receive enough information and lacked control over how the case was handled. Frazier and Haney's (1996) study would suggest that victims are generally satisfied with the police but not with the legal system generally.

Kelly (1982) found that a sense of participation was more critical to victims' satisfaction with the criminal justice system than how severely the defendant was punished. Kilpatrick *et al* (1989) report that victim participation not only affected potential co-operation within the criminal justice system but also promoted victims' recovery from the aftermath of crime by helping them to reassert a sense of control over their lives. 'The "perception of control" variable has been identified as a key factor in understanding the impact of victimisation . . . A criminal justice system which provides no opportunity for victims to participate in proceedings would foster greater feelings of helplessness and lack of control than one that offers victims such rights'.

'Ultimately the major factor in victim satisfaction with the operation of the criminal justice system is probably not the formal role of the victim

but the extent to which the victim is accorded dignity and respect' (Joutsen, 1994: 65).

## **8. Victims' involvement in the sentencing decision**

Changes have recently been made in many jurisdictions to encourage greater participation by victims in the sentencing process. However, as Joutsen writes (1994), there is no consistency across Europe in the role which the victim takes in the sentencing process; a number of different channels exist to enable them to provide an input. Indeed, criminal proceedings in most of Europe do not generally include a separate sentencing hearing as they do in Ireland, the UK or the US. Rather, verdict and sentence are handed down simultaneously by the trial court. Moreover, in most EU member states other than Ireland and the UK there is an established tradition of victim participation throughout the trial, and in the sentencing process. Thus, recent laws providing a heightened role for victims at the sentencing stage are more notably a feature of common law jurisdictions.

For example, the majority of US states have by now enacted some form of 'victim participation' statute. These statutes typically allow crime victims to participate actively in the criminal case, in terms of having a voice in relation to sentencing, parole etc. (Hall, 1991: 234-5). It has been argued in favour of victim participation in sentencing that if victims are allowed to convey their feelings during the process, usually through the use of victim impact statements, this will lead to an increased level of effectiveness in sentencing.

According to Rubel (1986), the process will become 'more democratic and reflective of the community's response to crime'. Henderson (1985) also argues that victim participation will provide recognition of the victim's wishes for party status and individual dignity, and that it emphasises to judges, juries and prosecutors that the 'state' is in reality a person with an interest in how the case is resolved. Moreover, victim participation will lead to greater victim belief in the system, leading to greater levels of reporting and victim co-operation, thereby enabling the criminal justice process to operate more widely and effectively in relation to levels of actual crime.

Erez argues further that victim involvement is necessary for victim satisfaction with justice, psychological healing and restoration (1990). Finally, victim participation should be allowed in the interests of fairness; since the court hears from the offender, the offender's family, friends and lawyers, the person who has borne the brunt of his/her actions should also be allowed her say.

However, prosecutors may in fact fear victim input at this stage of the case, as their control over the case may be weakened, and the certainty of outcome may be eroded. Defence lawyers, naturally, will see victim involvement as hindering the defence.

Concerns also exist that the use of a victim impact statement may raise expectations among crime victims that could not be met in reality (Fattah, 1986). However, on the positive side, victims have not been found to be especially punitive when allowed to participate in the sentencing process, and those who recommend sentences of imprisonment often do so because they are not aware of alternatives such as community service (Henderson and Gitchoff, 1981). Moreover, research in jurisdictions which allow the use of the victim impact statement in their criminal justice process shows that it does not cause either delay or additional expense (Heinz and Kerstetter, 1979).

A Polish study conducted by Erez and Bienkowska (1993) suggests that satisfaction levels among victims who choose to participate in the criminal justice system are higher than the levels of those victims who do not participate; but a study by Lurigio and Resick (1990: 60-61) provides inconclusive results on the levels of rape victim distress for victims who had participated in the preparation of a victim impact statement at the sentencing stage.

In summary, the findings of studies relating to victim satisfaction with participation at the sentencing stage are at best inconclusive, perhaps because different models for victim input at this stage are used in different legal systems. It might also be speculated that where a victim has not been kept informed of the progress of a case, and has not felt involved as a participant at the trial stage, then involvement at the sentencing stage might come too late.

## Compensation

The notion of providing compensation to the victims of crime is relatively new to some systems which operate a retributive model of sentencing. Shapland *et al* (1985) describe how compensation schemes for victims were the first expression of the growing awareness of victims' needs in the sentencing process. In New Zealand, a victim compensation scheme was set up in 1963, followed in 1964 by the Criminal Injuries Compensation Board for England, Scotland and Wales. State compensation schemes for victims of crime now exist in many jurisdictions world-wide. However, the research conducted by Shapland *et al* found a great disillusionment on the part of victims and witnesses with the criminal justice system and with state compensation boards. Frequently, victims encounter great difficulty in recovering compensation from these boards or tribunals.

## Monitoring of convicted offenders

In relation to sentencing, new developments in different jurisdictions have focused on the need to monitor offenders even after release, often through maintaining registers of convicted sex offenders and paedophiles. Russell (1998) describes how the names of convicted sex offenders and paedophiles are listed according to their zip code on the internet, in Alaska and California. In California, under 'Megan's Law', the right exists for members of the public to view the names of convicted high risk serious sex offenders on CD Rom. Part 1 of the Sex Offenders Act 1997 (UK) represents an attempt to deal with the same problem by monitoring the movements of some categories of sex offenders.

Conway and Butler (1997) have expressed concern about the implications of laws on monitoring or 'banishing' paedophiles, and there is no doubt that such laws will continue to generate disagreement and controversy as to their effectiveness, and their impact on the rights of offenders. While such laws are generally welcomed by those who support a tough criminal justice policy, feminists are divided as to their merits. In this context, Donnelly (1996:37) argues that 'it should not be forgotten that the interests and aims of the "law and order" advocates and of feminists are not the same. Feminists must seek always to politicize sexual offences and to show the ways in which such offences

are often condoned by societal norms'. Thus, new developments in sentencing policy should be kept under critical review by feminists and those concerned with victims' rights, to ensure that their introduction does genuinely improve the situation for victims, without encroaching unduly upon the rights of offenders.

## **9. Overall impact of involvement in the legal process on victims of rape and sexual violence**

In order, finally, to investigate whether victims who participate in the criminal justice system are thereby re-victimised, it is necessary to examine the relationship between victims' attitudes towards the system, and their recovery.

A study conducted by Cluss, Boughton, Frank, Stewart, and West (1983) would seem to suggest that deciding to prosecute may be beneficial for victims, but that the actual pursuance of the case through the later stages of the legal system may be problematic. More specifically, these authors found that victims who chose not to prosecute had lower self-esteem at 12 months post-rape than those who chose to prosecute (irrespective of whether or not they were subsequently able to prosecute). However, victims who wanted to prosecute but were unable to do so reported better work adjustment and more rapid improvement in their self-esteem at six months post-rape when compared with those victims who were able to prosecute. This indicates that victims who were able to prosecute were experiencing greater difficulties in adjusting socially, and also that being involved in a criminal prosecution carries implications for their emotional health within the time-frame of six months after the rape. At the 12-month assessment, however, there were no significant differences found between those who were able to prosecute and those who were unable to, on any of the self-esteem, depression, or social adjustment measures.

Two further studies, while not directly investigating the impact of involvement in the legal process on victims, found that when assessing the level and sources of fear and stress in victims of rape, the experience of 'testifying in court' was one which proved to be a significant stressor for many victims (Calhoun, Atkeson and Resick, 1982; Kilpatrick,

Veronen and Resick, 1979). Moreover, Sales, Baum and Shore (1984) found that victims who reported a rape which resulted in charges being laid showed fewer symptoms at an assessment six months post-rape than victims who had not reported. However, there were some indications in their study that as the case progressed to the trial, victims exhibited more symptoms of trauma than they had in any earlier assessments.

Thus, the limited evidence available would seem to suggest that the decision to press charges may be adaptive for victims, although actually going through the process may in fact exacerbate their symptoms.

## **Conclusion**

### **Role of the criminal justice system in the recovery of victims**

The criminal justice system may play a role in allowing victims to reconstruct their lives. For example, Kilpatrick *et al* (1989) report that victim participation not only affected potential co-operation by victims within the criminal justice system; it also promoted victims' recovery from the aftermath of crime by helping them to reassert a sense of control over their lives.

However, attempts should be made to render both the reporting and the adjudicating process of rape less threatening for victims. Victims of rape must be encouraged to report, but a higher level of reporting will not occur unless victims are assured that by reporting their victimisation, they will not be further victimised by the criminal justice system and the personnel whom they encounter. As Mawby and Walklate state, 'It is clear that the quality of experience is .. highly dependent upon the quality of the contact that the victim has with key personnel with the criminal justice system and the quality of information received from the system as a whole' (1993: 188).

### **Changing the legal process**

Although victims' lobbying groups have been successful in achieving change in some areas of policy, more change is clearly necessary to ensure that the trial process does not impact adversely upon the victim. If the goal, as stated by Holmstrom and Burgess (1978), is to minimise the harm and distress caused to victims by their involvement in the

criminal justice system, then it is only by ascertaining which elements of the process are most distressing that adequate support can be provided for a victim and constructive change be made to the system.

The question, then, is what changes are necessary to the system. Freedy *et al.* (1994: 453) write that: 'The success of the criminal justice system in prosecuting wrongdoers might be substantially improved by offering more sensitive and humane treatment to the victims of crime'. Both Kelly (1990) and Kilpatrick and Otto (1987) emphasise that the victim who believes that she will be listened to, believed, protected, guided and offered essential services, may be more likely to co-operate with the criminal justice system. 'Our society makes the lot of the rape victim difficult' (Holmstrom and Burgess, 1978: 1). Changes are necessary to make the lot of the rape victim less difficult, and to ensure that she will be treated with respect and dignity. Such changes must provide the victim with more information on the process, and a more participative role within the process. By documenting and analysing the experiences of victims in a number of different jurisdictions, we are in a better position to recommend change in the legal process for all victims of rape. It is to be hoped that some consideration will therefore be given to the proposals for constructive change made in this Report.

# **An Exploratory Investigation within Five EU Member States: Victims of Rape and Sexual Violence and their Experience of the Legal Process**

### **1. Objectives of the study**

This study proposed to interview victims of rape and sexual offences from five EU countries (Belgium, Denmark, France, Germany and Ireland) who had been through the legal process in their respective member states. The substantive and procedural law relating to rape and sexual offences in these five member states is outlined in later chapters. The main objective of the current study is to examine how those laws and procedures impact on victims experience of involvement in the legal process.

This study concentrates on the experiences of a sample of victims of sexual violence who chose to report the offences and examines how their decision to report and subsequent involvement as a witness in a criminal prosecution has impacted on their lives. Those who took part in the study are referred to as 'participants' rather than as 'victims'. This term was chosen in order to convey the active involvement and participation of the sample in the interview process, and to distinguish the sample in the current study from victims of rape more generally.

The overall goal of the project is to ascertain, based on the participants' direct experience, those practices and procedures which were deemed most equitable, taken together with participants' own recommendations for change, to develop 'a model or code of best practice' for the treatment of victims of rape and other sexual offences involved in the legal process.

## **2. The Methodology of the study**

### **Rationale for the method of inquiry adopted in the study**

Locke (1989) points out that the validity and adequacy of any research method depends on the purpose of the research and the questions being asked. If the purpose of a research study is to examine the experience of individuals and the meaning these individuals ascribe to that experience, i.e. their 'subjective understanding', then Seidman (1991) recommends in-depth interviewing as the best method of inquiry to employ (p.3). As the purpose of the current study is to examine the experience of a sample of victims of rape and sexual violence who have been through the legal process and the meaning they made of that experience, the method of inquiry opted for was a standardised structured interview schedule.

There were a number of additional advantages in the current study of using such a method of inquiry. First, it was only possible to meet each participant once, so using a structured interview schedule ensured that the same array of topics was presented to each participant. Secondly, the interview was standardised to the extent that the same questions were presented in a similar order for discussion to each participant. Patton (1989) points out that 'it can be helpful to minimise issues of legitimacy and credibility by carefully collecting the same information from each individual who is interviewed' (1989: 286). Thirdly, using a standardised, structured interview schedule, which was produced in advance of interviewing, meant that those who were facilitating access to participants had a sample copy of the questions which participants would be asked. Finally, having a clear interview structure also contributes to the process of establishing and maintaining rapport during the interview and ultimately improves the quality of the data obtained.

## **3. Sampling strategy and representativeness of the participant sample**

Here again a number of authors (Patton, 1989; Seidman, 1991) state that the sampling strategy should be selected to fit the purpose of the study, the resources available, the research questions being asked and the constraints being faced. It must be noted that the basic assumptions

underlying an interview study are different from those of an experimental study, therefore the selection of participants is approached differently.

The main criteria for identification and selection of participants for interview in this study were:

- (i) that participants would have experienced sexual violence and as a consequence of this victimisation would have become involved in the investigative and legal process in their jurisdiction;
- (ii) that participants were adult and female.

Given the research purpose and the practical exigencies of time and other resources, it was initially determined that the sample size should range between 20 to 25 participants. A sample of such a size and drawn from a number of countries will invariably contain a high level of heterogeneity or individual variation, which can be problematic. Each individual case can be very different from the next. Nevertheless, both Patton (1989) and Seidman (1991) suggest that when random selection of a large sample of participants is not an option then it is best to use the strategy of purposeful sampling for selecting participants. The function of purposeful sampling, like the goal of interviewing itself, is to select information-rich cases whose indepth examination will elucidate the research questions which have been posed.

Patton (1989, 169) outlines several different strategies for purposefully selecting information-rich cases. Of the strategies which Patton outlines, Seidman (1991) endorses the use of maximum variation sampling as the most effective basic strategy for selecting participants for interview studies. Seidman contends that using maximum variation sampling turns the weakness of having a very heterogeneous sample into a strength, in that any common patterns which emerge from such a heterogeneous population are of particular value in ' . . capturing the core experiences and central, shared aspects' of that population. Using such a sampling strategy, however, means that rather than attempting to generalise findings to all future cases, the focus is on looking for information which illustrates both variation, and significant common patterns which emerge from within that variation. Seidman adds that this 'method of

indepth phenomenological interviewing. . . gives enormous power to the stories of relatively few participants' (1991: 45).

#### **4. Accessing participants for the study**

In the present study a number of alternatives for contacting potential participants were considered. It was decided that participants were to be identified and selected by either of two means:

- (i) Through establishment of contacts and lines of correspondence with associations who provide rape crisis services, or kin organisations, in the participating member states informing them of the objectives of the study and seeking their co-operation in attaining those objectives. Those associations which agreed to co-operate were requested to seek participants who were victims of rape and other sexual offences who had been through the legal process and were willing to participate in the project;
- (ii) The appearance of a feature outlining the project and calling for volunteer participants in a suitable national/local newspaper. This was further supplemented by advertisements in newspapers in Denmark and Germany, where accessing participants through the crisis centres or equivalent proved problematic. Participants were asked to contact an appointed person who would schedule interviews on behalf of the project.

Access to participants was in the main facilitated through crisis centre personnel in the various member states. The majority of participants were first approached by crisis centre staff and asked if they would be willing to participate in a study on their experience of the legal process. Those participants who responded to the advertisements in the newspapers also made first contact with a crisis association in their respective member state, and the crisis centre personnel then contacted the interviewer with the participants details. Where possible and practicable, the interviewer contacted potential participants to explain the objectives of the study, thereby building on the potential interview relationship while further identifying whether the participant matched the predetermined selection criteria of the study. Regular liaison with the crisis centre

personnel was maintained throughout the data collection phase of the study.

As is customary, when empirical research focuses on emotionally-charged and potentially traumatic experiences of individuals, recruitment is difficult. The cross-national nature of the research, in addition, meant relying on the generous goodwill and continued trust of the crisis centre personnel who were facilitating contact with victims of rape/sexual violence and arranging meetings on behalf of the study. The contribution of these personnel was fundamental to achieving the objectives of the study.

## 5. Research participants

One-to-one in depth interviews were conducted with a total of twenty adult females (n=20), all of whom had been victims of sexual violence and who, having reported the offence(s), subsequently became involved in the criminal justice process in their respective jurisdictions.<sup>1</sup> The total sample for analysis is composed of the data collected from these participants.

The sample was drawn from five member states of the European Union. See Table 1 below for the distribution of participants across the member states selected for the study.

**Table 1. Distribution of participants across the selected member states**

Member State	No. of Participants
Ireland	6 participants
France	5 participants
Belgium	4 participants
Germany	4 participants
Denmark	1 participant

<sup>1</sup> It should be noted, once again, that the present sample are representative only of that small percentage of victims who have reported the offence/s and who have become involved in the legal process. Thus, no assumptions can be made that the victims interviewed for this study are representative, in general, of victims of rape or other sexual offences.

Participants ranged from 25 to 48 years of age with the mean of 34.62 years of age. While the age distribution of the participants in the sample does not explain a particular trend, it should be noted that the study was concerned with the experiences of female adults, and thus child or male victims of sexual violence were not included in the sample.

### Marital status of participants

Nine of the participants were unmarried, representing 45% of the total sample (n=20). Seven participants were separated or divorced, representing 35% of the total sample. The remaining four participants were married or co-habiting with their partner, representing the remaining 20% of the sample. Eleven of the 20 participants had one or more children.

### Educational history of participants

Table 2 below presents the highest level of education attained by participants. Seven of the 20 participants had obtained a university education. A further eight participants had obtained a vocational qualification, and one participant was in the process of completing a vocational training course at the time of interview. Second-level education was begun but not completed by three participants, while one participant had finished primary level education but had not gone on to secondary level.

**Table 2. Educational background of participants**

<b>Educational Level</b>	<b>Level Incomplete</b>	<b>Level Complete</b>	<b>Cumulative Percentage Fequency</b>
Postgraduate Degree	0	5	25
Third Level Degree/Diploma	2	0	35
Vocational Qualification	1	8	80
Secondary Level	3	0	95
Primary Level	0	1	100

<sup>2</sup> Data were collected from one male participant. However, it was decided that the data provided by the male participant would not be included for analysis in the current study. This decision was taken to control for the gender of participant in the sample undergoing analysis. In addition, the laws and legal procedures which pertain to victims who have not attained the age of majority are somewhat different from those which apply to adult victims and given the sample size it was decided to control for this.

**Participants' employment status**

The majority of participants (n=14) representing 70% of the total sample were employed outside of the home. A variety of occupations were represented in the fields of business and administration, service provision, and in the health sciences. The remaining six participants either worked in the home, were in full-time education or were unemployed at the time of interviewing.

**Participants' previous experience of the legal process**

Almost two-thirds or 65% (n=13) of the total sample of participants had no previous experience of going to court before the legal proceedings relating to the sexual offence(s). Seven participants (35%) had previously been involved in legal proceedings, the majority in respect of family-law related issues.

**The time-period of sexual victimisation which led to participants' involvement in the legal process**

Over one-third, or 35% of the participants had been sexually victimised, which resulted in their involvement in legal proceedings, within a three-year time period preceding this study (1995-1998). The same proportion, 35%, had been victimised between four and eight years prior to this study (1990-1994), and the remaining 30% of participants had been victimised more than eight years prior to this study (prior to 1990).

**Typology of sexual offences experienced by participants**

Eleven participants, representing 55% of the total sample, had experienced sexual violence perpetrated by a person or persons that they had previously known. Each of these participants had known their aggressor for more than one year prior to the rape/sexual violence. Seven out of eleven of the aggressors were either spouses, partners or close relatives of the participants. In the remaining four cases the aggressor had been an acquaintance of the participant for one year or more prior to the rape/sexual violence. For nine of the participants, representing 45% of the total sample, the sexual violence had been inflicted by a person or persons previously unknown to the participant. For eight participants, a charge of rape and/or aggravated rape was brought against the accused.

The remainder of participants in the sample cited charges ranging from sexual assault to sexual coercion and sexual abuse.

## 6. Psychological interview schedule

### Development of the psychological interview schedule

The first task in the development of the interview schedule was to establish the objectives and parameters of the research study. Once the research objectives were established, a review of relevant empirical research in the area of sexual violence and the law was conducted to explore the methodologies and materials developed in previous related studies. Based on this review, a pool of items pertinent to the study's objectives was compiled. The pool of items were then ordered into meaningful sub-sections. This first draft of the schedule was then assessed by an independent psychological adviser to ensure the validity of pool of items, that there was a thread of questioning from one sub-section to the next and that items were not replicated. Once this assessment was conducted, a second draft of the interview schedule was constructed. The next task involved the pre-coding, where practicable, of responses to items. Once again an independent assessment was conducted to ensure the validity of responses to items. The responses for approximately half of the items in the schedule are pre-coded, the remaining items require open-ended responses. The third draft of the schedule was then produced.

This third draft was piloted on a sub-sample of the participant population to ascertain the acceptability of, *inter alia*, item wording, item order and pre-coded responses. Amendments were made subsequent to piloting which took into account the recommendations of the pilot interviewees. A number of additional changes were made by the researcher subsequent to conducting the pilot interviews in order to enhance the administration of the interview schedule. The final version of the interview schedule was then constructed.<sup>3</sup>

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<sup>3</sup> See Appendix 1 for a copy of the psychological interview schedule.

### **Outline of the psychological interview schedule**

Participants were asked specific questions about each stage of the legal process: their initial decision to report the rape, their experience of contact with the police, the medical examination, the support services, the trial itself and the various legal or court personnel. Participants also reported on the impact on their lives of being involved in the criminal justice system. In addition, participants provided their assessment of the needs of victims of rape and how in their view those needs could and should be met by the criminal justice system. Participants were asked specific questions regarding their feelings at various stages in the legal process. As the purpose of the research study was to examine the experiences of victims of rape and/or sexual violence who had become involved in the investigative and legal process, items relating to the circumstances of the rape or the sexual assault itself, or the participants feelings in relation to the rape or sexual assault, were not included.

The interview schedule can be broken down into five discrete sub-stages, as follows:

- (i) Social background information.
- (ii) Experience of reporting and the pre-trial process.
- (iii) Experience of the trial process.
- (iv) Impact of and satisfaction with involvement in the legal process.
- (v) Recommendations for reform of the legal process.

### **7. Procedure: The interview process**

All interviews were planned and conducted with care and sensitivity, ultimately respecting each participants voluntary co-operation with the objectives of this study. Interviews were held at a location where participants felt safe and comfortable; either in the privacy of a room in the crisis or resource centre or alternatively in the participant's own home. The duration of interviews varied from one-and-a-half to four hours, with allowance for breaks. All interviews were conducted by the

same female interviewer, to control for interviewer bias.<sup>4</sup> The interviewer recorded participants' responses and where consent was given the interviews were tape-recorded and later transcribed. Because of the sensitive nature of the issues arising during the interview a minority of participants' stated preference was not to tape-record the interview; this preference was, of course, accommodated. In all cases, including cases where interviews were tape-recorded, great care was taken to record the interviewees responses verbatim.

As the study was conducted across five EU member states,<sup>5</sup> covering five spoken languages, Danish, English, Flemish, French and German, there was a necessity in some interviews for the presence of an interpreter to ensure an accurate translation of the participants' responses. The interpreter was, in the majority of cases, a member of the personnel of the crisis centre or association who had established contact with the participant.

From the outset, the researcher established rapport with the participant by providing adequate information about the purpose of the interview and the boundaries of research. The researcher covered issues such as the kinds of questions which would be asked during the interview, what the information collected would be used for, how the information would be handled, including issues of confidentiality, and how the findings of the study would be disseminated. Participants were also informed of their right not to answer any particular item, along with their right to withdraw from the interview and the study at any stage.

Participants were also informed that though no questions would be asked about the sexual violence itself, the interview might nevertheless open wounds. Participants were then asked to think of a support person

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<sup>4</sup> All elements of the structure, process and practice of interviewing can be focused on reducing the effects of the interviewer and the interview context on how the participant presents their experience. However, many authors (Oakley, 1981; Patton, 1989; Seidman, 1991) have acknowledged that the interviewer is also a key element of the research process. In many interview studies, as is the case in the present study, the interviewer has to conduct the interview, and also work with the material gathered therein in interpreting and analysing it.

<sup>5</sup> Cf. Patton (1985) for discussions of some of the issues which arise in cross-cultural interviewing.

<sup>6</sup> Patton (1989) points out that understanding the purpose of the interview can increase the motivation of the participant to respond openly and in detail (p. 327). See also Seidman (1991) Chapter 7 'Interviewing as a Relationship' for an excellent overview on the conduct of interviews for research purposes.

or persons whom they could readily contact after the interview if necessary. This was to ensure as far as was possible that the participant would have emotional support subsequent to the interview itself so that the potential for re-traumatisation would be minimised. Such a measure was deemed important for all participants but especially for those interviewees who were not recruited through crisis centres or victim support organisations. At the end of this introductory phase of the interview, participants were once again asked if they wished to and consented to participate in the study.

Prefatory statements were used during the course of the interview, typically at a transition in the interview when one section had been completed and a new section of the interview covering a different subject area was about to begin. The use of such prefatory statements alerts the participant to the nature of the subject matter about to be discussed and allows them to focus their thoughts on the new subject. This strategy helps in the overall flow of the interview.

Given that the interviews were concerned with a subject which is understandably sensitive for participants, the conclusion of the interview was also given careful consideration. Here again it was vital to ensure that any negative feelings and/or thoughts which may have emerged during the interview did not linger after the interview had been concluded. Thus, where possible, interviews concluded with a reiteration of the availability of the crisis centre personnel if participants wished to contact them, together with a general discussion between the interviewer and the participant about neutral topics and the participant's plans for the day. As Seidman (1991) notes '... interviewing is both a research methodology and a social relationship that must be nurtured, sustained and then ended gracefully' (1991: 72).

# Quantitative and Qualitative Analysis of the Interviews with Victims of Rape and Sexual Violence about their Experience of the Legal Process

The quantitative and qualitative analysis of the data collected in the interviews will be presented in the format adopted in the psychological interview schedule. The findings will be presented under four main section headings: the pre-trial process, the trial process, the post-trial experience and the recommendations for reform. There are distinct subsections within the main sections, also based on the format adopted in the interview schedule. To better understand the context of the data presented, each subsection will commence with an outline of the questions addressed. A summary of the findings will then be provided, to be followed by a presentation of detailed findings relating to the issues addressed in that subsection. Detailed statistical analysis for each subsection is presented in Appendix 2 at the end of the report.

## SECTION ONE: THE PRE-TRIAL PROCESS

### 1.1 Participants' experiences of reporting the offence

Often the threshold question for victims is whether or not to report the offence(s) to the authorities. While empirical research has found that most victims of rape and sexual violence choose not to report, all participants in this study took the decision to officially report the offence(s) to the police. In taking this decision, participants initiated contact with the legal system, and set in motion a complex process. In this segment of the interview, participants were questioned about their experience

of reporting the offence. Participants were asked who it was that took the decision to report, whom the report was made to, and by what method of communication the report was made. Participants were also asked whether or not they had any doubts or hesitations about reporting and why it was that they took the decision to report. Finally, participants were asked to describe their subjective feelings when making the report.

### **Summary of findings in relation to reporting of the offence**

The majority of participants reported the offence(s) to the authorities themselves. While a minority of participants had informally reported the offence(s) to another, all participants made their first official report of the offence(s) to a law enforcement agency. Almost all participants made their report either by telephoning the police or by making a personal visit to the police station. More than half of the participants reported having some doubts about reporting, the main concern being that they feared that they would not be believed by the police. Participants typically made the decision to report because of a fear for their personal safety, a desire to protect others from being sexually victimised by the same perpetrator, or a desire that the perpetrator be punished for what he had done. Participants typically reported feeling fearful and upset when making the report. A minority of participants stated that they were still in a state of shock at the time of making the report. Finally, the majority of participants reported that they felt they had taken the correct decision for them in reporting the offence to the law enforcement authorities.

### **Detailed findings in relation to reporting of the offence**

Sixteen participants, representing 80% of the total sample, reported the offence(s) to the authorities themselves. For the remaining four participants, someone other than the participant either made the decision to report or acted as an intermediary at the request of the participant. The reporting agent was typically either a family member or a friend or acquaintance of the participant. One of the four participants reports:

'A neighbour actually phoned the police, I was not able to think, I am not sure if I would have phoned them if it had only been myself.'

**(France 2)**

All participants made their first official report of the offence(s) to the law enforcement authorities.<sup>1</sup> In their method of first reporting the offence(s) to the police authorities, nine participants reported by telephone, a further nine participants made a personal visit to the police station, while in the remaining two cases the police, after having been informed of the occurrence of a sexual offence, called to the participant's own home.

Thirteen participants, representing 65% of the total sample, stated that they had experienced some doubts about reporting, while six participants stated that they experienced no doubts or hesitations in making the report to the police. Fear of not being believed was the main reason given as to why participants had doubts about reporting:

'I didn't want to report initially, because I thought I wouldn't be believed.'

For one Irish participant though, the fact that she had never had any previous involvement with the police made her doubtful about whether or not to report.

'I kept wondering if I was doing the right thing.' **(Ireland 3)**

All twenty of the participants in the current study went on to report the offence. The reasons they provided for deciding to report can be categorised into three main groups. First, concern for their own safety because of a belief or fear that they themselves might be raped again prompted a number of participants to report. Secondly, participants reported in order to protect other women from being raped by the same perpetrator. Thirdly, a minority of participants stated that they wanted the suspect to be punished for what he had done. These three reasons are captured in the words of one participant:

'I decided to report because I was so afraid and I wanted to be protected by the police, I was angry also, I wanted him to be punished. I wanted to stop him assaulting other women. I felt a strong duty to report what had happened.' **(France 1)**

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<sup>1</sup> A minority of participants (n=3) had disclosed the rape/sexual violence in the course of seeking professional psychological support; however, the first official report in these instances was made to the law enforcement authorities.

When describing their feelings in relation to the process of reporting itself, participants typically reported feeling anxious, afraid and upset. Three participants reported that they were in a state of shock and felt numb when making the report.

'I felt very afraid when reporting, I was in a state of panic or shock. I felt very detached, I had the feeling that I was not in my body. It was like it was someone else who was reporting and I was looking at them as if they were in a film.' **(France 5)**

Finally, the decision to report was viewed positively by over half of the participants. A number of participants reported that they felt they had taken the correct decision for them in reporting the offence to the law enforcement authorities. One participant said of her decision to report that:

'For the first time in my life I felt that the body of justice had been placed between me and my abuser.' **(Belgium 1)**

It should also be noted that a minority of participants reported experiencing some mixed reactions in the aftermath of reporting. One participant reported feelings of powerlessness after she had made the initial report.

'I felt like once I had reported that it was taken out of my hands completely, I had no say after that.' **(Ireland 4)**

Another participant cautioned that:

'If you take the strength to go to the police and make a report, afterwards you are wrecked, you really have no more to give. You have to be extremely strong and have someplace very safe where you can go afterwards.' **(Germany 4)**

## **1.2 Participants' contact with the law enforcement authorities**

All participants in the current study made their first official report of the offence(s) to a law enforcement agency. Making contact with the police and being interviewed for the purpose of taking a statement or

deposition is one of the most important stages in participants' involvement with the criminal justice system. Participants related their experience of being interviewed by the police and their subsequent contact with the law enforcement authorities. Participants were asked about the gender of the chief police interviewer, the location of the police interview and to describe the attitude and behaviour of the chief police interviewer. Participants were further requested to rate the attitude of the chief police interviewer on two seven-point semantic differential scales, from Warm to Hostile, and from Sympathetic to Unsympathetic. Participants also rated on a five-point scale how satisfied they were with the treatment they received from the police interviewer. Finally, participants rated their overall experience of contact with the police.

### **Summary of findings in relation to participants' contact with the police**

While a minority (15% of the total sample) were interviewed by the police in a location specially designated for interviewing victims of sexual violence, participants in the main were interviewed in an office at a police station. Participants interviewed in this latter setting were particularly critical of the austere surroundings and the lack of privacy shown during the interview. A minority of participants participated in an identification parade and described this experience as particularly distressing. 50% of the participants were interviewed in chief by a male police officer and 50% were interviewed in chief by a female police officer. 70% of participants, however, expressed a preference for being interviewed by a female police officer.

Participants rated female police officers as more sympathetic and less hostile on average than their male counterparts; however, this difference was not statistically significant. Participants also reported higher satisfaction with the treatment they received from female police interviewers when compared to male police interviewers. However, participants' rating of satisfaction with the treatment received from the police interviewer was not found to be significantly affected by the gender of the police interviewer but rather by the overall attitude of the police interviewer towards the participant. The more positive the attitude of the police interviewer, the more satisfied the participant with the treatment she received. Satisfaction with the treatment received from the

police was also affected by the responsiveness of the police interviewer to the feelings and the needs of the participant and the degree of sympathy exhibited by the interviewer. A minority of participants were critical of their subsequent contact with the police, and reported feeling frustrated by lack of communication on the part of the police.

## **Detailed findings in relation to participants' contact with the police**

### ***Location of police interview***

Twelve of the participants (60%) were interviewed and their statements or depositions recorded in an ordinary office or room located in the police station. Three of the participants were interviewed by the police in specialist sexual assault units attached to a main police station. A further three participants were interviewed in their own home for the purpose of taking their statements. Being interviewed in a specialist assault unit was not found to be significantly related to more positive ratings by participants of their overall experience of contact with the police.<sup>2</sup> Nevertheless, a number of those participants who had been interviewed in the police station were highly critical of the interview location. Participants commented particularly on the lack of privacy during the interview and on the cold or 'sterile' atmosphere in the office or room in which the interview took place.

'I had the idea that the interview would be much more discreet, people kept coming in and out at the beginning. It took place in a very sterile office, with three male police officers present, a desk and a computer. Very cold and very unwelcoming.' (**Belgium 4**)

### ***Participation in an identification parade***

Three participants were required to participate in an identification parade. This experience was described by all three as very distressing. One participant stated that for her the experience was 'barbaric'. She went on to describe what had happened and what it was that she found particularly distressing:

'I had to go up to the accused and touch him as the way of identifying him. I did not know who the other people in the parade were, I did not

<sup>2</sup> See Table A in Appendix 2.

know if they were local people, who might know me, and guess what had happened.’ **(Ireland 2)**

Another participant stated that for her the identification parade was the only aspect of the investigative and legal process which was accurately or realistically represented in television programmes. She described the one-way mirror system and how she had to identify the suspect by reference to his number in the line-up. She went on to describe how she felt:

‘I was so afraid that he would be able to see me. I was also afraid that I would forget what he looked like. But I was sure from the first glance that it was him.’ **(Germany 3)**

### ***Gender of police interviewer***

A female police officer was the main interviewer of half of the participants (n=10), a male police interviewer for the other half (n=10).

### ***The experience of being interviewed by a female police officer***

All participants who had been interviewed in chief by a female police officer reacted positively to being interviewed by a female and none expressed a preference to be interviewed by a male police officer. In the main, participants who had been interviewed by a female police officer described her attitude and behaviour towards them in positive and often in very positive terms. Female police interviewers were typically described as patient, supportive, empathic and/or ‘clued in’ to the needs and feelings of the participant.

‘The policewoman was very understanding, she took my story very personally, and she stayed with me until I had finished what I had to say. Everyone in this situation should be dealt with by a policewoman.’  
**(Ireland 4)**

Two participants, both of whom were interviewed in the main by a female police officer, reported that their expectations that a female officer would be more understanding and sympathetic during the interview than a male officer were not met. One participant in describing the female police officer stated that she behaved in a ‘business-like way’ towards the participant; the participant had expected because she was a female officer that she would be more ‘receptive’. However, even given

that their expectations were not met, neither of these two participants expressed a preference to have been interviewed by a male police officer.

### *The experience of being interviewed by a male police interviewer*

Four of the ten participants interviewed by a male police officer reported having negative feelings in respect of this and stated that they would have preferred to have been interviewed by a female police officer.

‘The two policemen were very cold, they were not very welcoming or sympathetic. It seemed like they didn’t believe me, they seemed very sceptical. They said things like ‘I hope you’re not wasting our time.’ I do think that if it had been a policewoman she wouldn’t have treated me in this way.’ (Belgium 3)

However, six of the ten participants interviewed by male police officers described the experience of being interviewed by a male in either neutral or positive terms. And for one of the ten participants, the experience of being interviewed by a male police officer was particularly positive:

‘The police officer behaved very respectfully towards me. In a way for me it was therapeutic for me to tell a man and for him to hear it so respectfully. I could see he was touched by what he heard.’ (Belgium 1)

### *The attitude of the police interviewer*

In addition to providing a description of the attitude of the chief police interviewer, participants were requested to rate the attitude of the interviewer on two seven-point semantic differential scales ‘Warm to Hostile’, and ‘Unsympathetic to Sympathetic’.

The ‘Hostility Scale’<sup>3</sup> elicited a score representing the degree of hostility exhibited by the police interviewer as perceived by the participant. The scale went from 1 to 7 with 1 representing ‘warm’ and 7 representing ‘hostile’. Therefore, the higher the score accorded the more hostile the police interviewer was perceived to be. The mean rating for degree of hostility exhibited by the police interviewer was 3.25. The mean rating

<sup>3</sup> The seven-point ‘Hostility Scale’ presented to participants was in the following format:

Warm    1    2    3    4    5    6    7    Hostile.

of the degree of hostility exhibited by male police interviewers was 3.94 and by female police interviewers was 2.25. Thus, male police interviewers on average were perceived as demonstrating a more hostile attitude towards participants than were female police interviewers. When these mean ratings were compared to examine whether participants perceived male police officers as significantly more hostile in their attitude than female police officers, no statistically significant difference was found, though it should be noted that the difference was approaching statistical significance.<sup>4</sup>

The 'Sympathy Scale' elicited a score describing the degree to which the chief police interviewer was perceived to be sympathetic towards the participant. The scale<sup>5</sup> went from 1 to 7 with 1 representing 'unsympathetic' and 7 representing 'sympathetic'. Again, the higher the score the more sympathetic the police interviewer was perceived to be. The mean rating of the degree of sympathy exhibited by the police interviewer was 4.66. The mean rating of the level of sympathy exhibited by male police interviewers was 3.94 and by female police interviewers was 5.70. Thus, participants perceived that on average female police interviewers were more sympathetic in their attitude than male police interviewers. When these mean ratings were compared to examine whether participants perceived male police interviewers as significantly less sympathetic in their attitude than female police officers, no statistically significant difference was found though once again it should be noted that the difference was approaching statistical significance.<sup>6</sup>

When compared with participants from the other four selected member states, Irish participants rated the attitude of the chief police interviewer more positively. This difference was found to be statistically significant.<sup>7</sup>

<sup>4</sup> **The meaning of statistical significance.**

The use of statistical procedures allows the researcher to calculate the probability (p) of a particular finding arising purely by chance. Since even the least likely result can occur by chance, statisticians have adopted  $p=.05$  (or a 1 in 20 chance) as the norm for deciding that an association is statistically significant. A strongly significant result is  $p$  less than or equal to .01 (at best a 1 in 100 chance); such an unlikely finding would only be expected to occur by chance in 1% or less of all samples. Therefore, any association which is found to be significant in this study is where  $p$  is equal to or less than .05 and strongly significant findings are signaled where  $p$  is equal to or less than .01. (Acknowledgment for definition is due to O'Connell & Whelan (1994)).

See Table A in Appendix 2.

<sup>5</sup> The seven-point 'Sympathy Scale' presented to participants was in the following format:

Unsympathetic	1	2	3	4	5	6	7	Sympathetic
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<sup>6</sup> See Table A in Appendix 2.

<sup>7</sup> See Table M in Appendix 2.

***Satisfaction with treatment received from police interviewer<sup>8</sup>***

Participants were requested to rate how satisfied they were with the treatment they received from the police interviewer on a five-point scale, the ‘Satisfaction Scale’<sup>9</sup>, with a score of 1 representing ‘Very Dissatisfied’ and a score of 5 representing ‘Very Satisfied’. Therefore, the higher the score accorded the more satisfied the participant was with the treatment she received from the police interviewer. The mean satisfaction rating of treatment received from the police interviewer was 3.08. The mean satisfaction rating of treatment by male police interviewers was 3.00 and by female police interviewers was 3.39. Thus, participants reported on average to be more satisfied with the treatment they received from female police interviewers than from male police interviewers; however, the difference between the mean satisfaction ratings for male and female police interviewers was not found to be statistically significant.

While the gender of the police officer *per se* was not found to be significantly related to participants’ satisfaction with treatment received, the attitude of the police interviewer (rated on a three-point scale as either positive, neutral or negative) was found to be significantly correlated with participants’ ratings of satisfaction with the treatment received.<sup>10</sup> The more positive the attitude of the police interviewer was perceived to be, the more satisfied participants were with the treatment they received.

A number of patterns emerge in the verbal descriptions provided by participants of the treatment received from the police interviewer which may account for these findings. The two themes most commonly mentioned in this regard were:

<sup>8</sup> See Section 2.8 below for a comparison of participants’ mean satisfaction ratings of the professionals (law enforcement, medical, support service, legal and judicial) encountered during their involvement in the legal process.

<sup>9</sup> The five-point ‘Satisfaction Scale’ presented to participants was in the following format:

Very Satisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Dissatisfied
1	2	3	4	5

<sup>10</sup> See Table A in Appendix 2.

- (i) the responsiveness of the police interviewer to the feelings and the needs of the participant and
- (ii) the degree of sympathy exhibited by the interviewer.

The latter theme, of the degree of sympathy exhibited by the police interviewer, has been examined in a preceding section. Whether or not the police interviewer was perceived to be responsive appears to be associated with a certain style or manner of questioning employed by the police interviewer. Specifically whether or not the interviewer:

- (a) provided explanations of what he or she was about to do and
- (b) prefaced the questions they were about to ask with an apology, thereby communicating to the participant that they understood the difficulty of the interview situation.

Participants, on the whole, reacted positively to this style of interviewing.

'In the police station, I was very upset, but the police officer explained the procedures to me and gave me a lot of space and freedom. I would have left if he had not have been so supportive.' **(Belgium 1)**

A number of issues also arose which caused concern or were problematic for participants. The most frequently mentioned were: the feeling of not being believed, the indifferent attitude of certain police officers, and finally the making of inappropriate remarks to the participant.

'The reaction of the police officer who interviewed me was very cool. He put me through the mill. The other officer acted indifferently, as if I was reporting that someone had broken a window. The reaction of the police to things like the clothes that I was wearing at the time, was prehistoric.' **(Ireland 5)**

### ***Overall experience of contact with police***

A minority of participants were critical of their subsequent contact with the police or, more accurately, were critical of the paucity of contact with the police after the initial report had been made.<sup>11</sup>

<sup>11</sup> See Section 1.7 below, where the issue of official communication of case developments is examined in greater detail.

‘After the initial reporting, I was very frustrated with the police. There was no communication, they never informed me about the case.’  
**(Ireland 4)**

This frustration with lack of communication or contact on the part of the police was reiterated by a number of participants. In addition, two participants were highly critical of the attitude of and treatment by the investigating police officers.

‘My experience with the police got worse, I think very much that they didn’t believe me. They treated me as if I had asked for it. Also, in my case they did not follow the basic procedures.’ **(Belgium 4)**

Given these criticisms, the majority of participants spoke very favourably of the treatment they received from the police overall. Participants reported that in the main they had been treated with respect and consideration by the police both at the time of reporting and afterwards. In the words of one participant:

‘I felt that the police treated me very well, that they believed me, that they were there if I needed them and I felt very confident about this.’  
**(France 4)**

Participants were asked to rate not just their satisfaction with the treatment received from the chief police interviewer but also their experience of contact with the police overall on a seven-point ‘Negative-Positive Scale’<sup>12</sup> with a score of 1 representing ‘Extremely Negative’ and a score of 7 representing ‘Extremely Positive’. Here again, the higher the score accorded, the more positively the experience of contact with the police was rated. The mean rating of participants overall experience of contact with the police was 3.87. Participants’ overall experience of contact with the police was found to be significantly correlated with three police-related factors.

First, overall experience of contact was found to be significantly associated with participants’ rating of the sympathy shown by the chief police

<sup>12</sup> The seven-point Negative-Positive Scale’ presented to participants was in the following format:

Extremely Negative	1	2	3	4	5	6	7	Extremely Positive
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interviewer. The more sympathetic the police interviewer was perceived to be, the more positively participants rated their overall experience of contact with the police. Secondly, participants' rating of the level of hostility shown by the chief police interviewer was found to be significantly correlated with participants' rating of their overall experience of contact with the police. Therefore, the more hostile the attitude of the police interviewer was perceived to be, the more negatively participants rated their overall experience of contact with the police. And thirdly, participants' satisfaction with the treatment received from the chief police interviewer was significantly associated with their rating of their overall experience of contact with the police; thus the more satisfied participants were with the treatment they received from the police interviewer, the more positively they viewed their experience of contact with the police overall.

A stepwise regression was performed and the level of sympathy exhibited by the police interviewer emerged as the variable which significantly explains the greatest degree of variance. This finding would indicate that the degree to which the police interviewer was perceived as sympathetic has the greatest effect on the the positivity of participants' rating of their overall experience of contact with the police.

Empirical research has documented that there have been changes in recent years in terms of police practice regarding the treatment of victims of rape and sexual violence. It was therefore deemed important to examine whether the time-period (i.e. since 1994, 1990-1994, prior to 1990) in which the report was made to the police and the participant came into contact with the police in relation to their sexual victimisation had an impact on participants' experience of contact with the police. A one-way analysis of variance was conducted to examine whether the time period in which the report was made had an effect on participants' overall experience of contact with the police. No significant effect was found, however. Thus participants who reported since 1994 were no more or no less likely to state that their experience of contact with the police was more positive than that of participants who had reported the offence(s) to the police eight or more years ago.

### **1.3 Participants' experience of the forensic medical examination**

Reporting a rape activates a complicated process which can involve several agencies alongside the law enforcement agency. Depending on the circumstances of their experience, participants after reporting to the police, may be required to attend a medical examiner for the purpose of gathering forensic medical evidence. Those participants who had attended a medical examiner for the purpose of gathering such evidence were asked questions relating to this experience. Data were collected on the gender of the medical examiner, the location of the medical examination, whether other individuals were present or not during the examination and the attitude of the medical examiner towards the participant. Participants were further requested to rate the medical examiner on the two seven-point semantic differential scales: the 'Hostility Scale' and the 'Sympathy Scale'. Finally, participants' overall satisfaction with the treatment they received from the medical examiner was ascertained using the 'Satisfaction Scale'.

#### **Summary of findings in relation to the medical examination**

Fourteen of the twenty participants underwent a medical examination for the purpose of collecting forensic evidence. In the main, participants attended a general hospital for the forensic medical examination. Examinations were conducted in specialist sexual assault units for a minority of participants. Many of the participants commented on the anguish and distress they experienced while undergoing the medical examination. The majority of participants stated that they would prefer, in these circumstances, to be examined by a female medical examiner. However, nine out of the fourteen participants, representing 64% of those who underwent a forensic medical examination, were examined in chief by a male medical practitioner. The remaining five participants were examined in chief by a female medical examiner. Those participants who had been examined by a female doctor in general rated her treatment favourably. In contrast, those participants who had been examined by a male doctor tended to describe his treatment of them in either neutral or negative terms.

Participants' satisfaction with the treatment received from the medical examiner was not found to be significantly affected by the gender of

the medical examiner but rather by the overall attitude of the medical examiner towards the participant. The more positive the attitude of the medical examiner, the more satisfied the participant with the treatment she received. Satisfaction with the treatment received from the medical examiner was also affected by the responsiveness of the doctor to the feelings and the needs of the participant and the degree of sympathy exhibited by the doctor. Thus, the more responsive and sympathetic the medical examiner was, the more satisfied participants were with the overall experience of the medical examination. Participants were critical of a number of issues relating to the forensic medical examination, namely, the impersonal attitude of and the unsupportive remarks made by certain medical examiners, the inappropriate overfamiliarity of other medical personnel, and for one participant the 'manifest lack of co-ordination' between the police and the medical authorities.

### **Detailed findings in relation to the medical examination**

#### ***Location of medical examination***

Fourteen participants out of the total sample (n=20) were required to attend a medical examination for the purpose of collecting forensic evidence. Seven of the fourteen participants attended a general hospital for examination, and four participants were examined in specialist sexual assault units. The remaining three participants were examined in alternative locations, one participant was examined forensically by her own general practitioner, while the forensic examination in one case was conducted by a medical practitioner in a room in the police station.

One participant reported experiencing pressure to attend a hospital for the purpose of the forensic medical examination, in her own words:

'I was more or less forced to go to the hospital and not to my own doctor. I didn't want to go because I had very negative expectations. I said that I wanted to come again at another time but the police officer said that I could not leave, that the evidence had to be collected then.'

**(Germany 3)**

Another participant reported that the first hospital that she was taken to by the police was not able to examine her because 'they didn't deal with cases of rape'. She then had to be taken to another hospital. This

participant commented that there appeared to her 'to be a lack of co-ordination' between the police and the medical authorities. This lack of co-ordination led to her experiencing a sense of confusion, of 'not knowing where she was' at this time.

Many of the participants commented on the upsetting nature of the experience of a medical examination. One of the strongest comments in this respect:

'The medical examination was a horrible experience, it was very, very upsetting for me.' **(Ireland 6)**

### ***Gender of medical examiner***

Nine out of the fourteen participants, representing 64% of those who underwent a forensic medical examination, were examined in chief by a male medical practitioner. The remaining five participants were examined in chief by a female medical examiner.

### ***The experience of being examined by a female medical examiner***

Five participants were examined in chief by a female medical practitioner. None of the participants examined by a female doctor cited negative feelings in relation to having been examined by a female and none expressed a preference for being examined by a male doctor in the given situation. In the main, participants who had been examined by a female medical examiner described her attitude and behaviour towards them in positive terms. Female medical examiners were typically described as open, calming, helpful and supportive.

'I was glad to be examined by a female doctor, I think if it had been a male doctor then that would have freaked me. She asked me a lot of questions for her report but I didn't really feel like talking.' **(Ireland 2)**

One participant describes the female doctor who examined her as 'very professional but not very sympathetic'; however, she did not express a preference for being examined by a male doctor.

### ***The experience of being examined by a male medical examiner***

Six of the nine participants who had been examined by a male doctor stated that they would have preferred to have been examined by a

female doctor. Participants who had been examined by a male medical examiner tended to describe his attitude and behaviour towards them in either neutral or negative terms. A minority of participants described the medical examiner as professional, behaving in a cool and detached manner. However, the majority examined by a male doctor described the doctor's attitude and behaviour as insensitive, rough and impolite. The following is one of the strongest statements in respect of a male medical examiner's treatment.

'The doctor who examined me was quite disrespectful and insensitive. I felt as if I was just an object. For two hours I wasn't allowed to go to the toilet. Everyone was going in and out, I was so stressed. I asked the doctor some questions but he didn't answer, in fact he was very rude and impolite.' (**France 5**)

However, for one participant the experience of being examined by a male doctor was less negative, in that she reported that the male doctor had treated her in a sympathetic manner:

'At the medical examination I was frightened and cried. Each time the doctor touched me I thought of the rape. The doctor was very patient and understanding, when I was too nervous and afraid he stopped and waited until I was able to continue.' (**France 4**)

### ***Attitude of medical examiner***

As was the case in respect of the attitude of the police interviewer, participants were requested to rate the attitude of the examiner on the 'Hostility Scale' and the 'Sympathy Scale' described above.

In examining the degree of hostility exhibited by the medical examiner as perceived by the participant, note again that the higher the score the more hostile the medical examiner was perceived to be. The mean rating for degree of hostility exhibited by the medical examiner was 3.81. The mean rating of the degree of hostility exhibited by male medical examiners was 4.37 and by female medical examiners was 2.83. Thus, male medical examiners on average were perceived as demonstrating a more hostile attitude towards participants than were female medical examiners. However, when these mean ratings were compared to examine whether participants perceived male doctors as significantly

more hostile in their attitude than female doctors, no statistically significant difference was found.<sup>13</sup>

The 'Sympathy Scale' elicited a score describing the degree to which the medical examiner was perceived to be sympathetic towards the participant; here again, the higher the score the more sympathetic the medical examiner was perceived to be. The mean rating of the degree of sympathy exhibited by the medical examiner was 3.93. When the gender of the medical examiner was considered, it was found that the mean rating of the level of sympathy exhibited by male medical examiners was 3.12 and by female medical examiners was 5.00. Thus, participants perceived female medical examiners to be more sympathetic on average in their attitude than male medical examiners. However, when these mean ratings were compared to examine once again whether participants perceived male medical examiners as significantly less sympathetic in their attitude than female medical examiners, no statistically significant difference was found.<sup>14</sup>

#### ***Satisfaction with treatment received from medical examiner<sup>15</sup>***

Participants were requested to rate how satisfied they were with the treatment they received from the medical examiners on the 'Satisfaction Scale', as described above. Once again, the higher the score accorded the more satisfied the participant was with the treatment she received from the medical examiner. The mean satisfaction rating of treatment received from the medical examiner was 2.71. The mean satisfaction rating of treatment by male medical examiners was 2.25 and by female police interviewers was 3.33. Thus, participants reported that they were, on average, more satisfied with the treatment they received from female doctors than from male doctors; however, the difference between the mean satisfaction ratings for male and female medical examiners was not found to be statistically significant.<sup>16</sup>

<sup>13</sup> See Table B in Appendix 2.

<sup>14</sup> See Table B in Appendix 2.

<sup>15</sup> See Section 2.8 below for a comparison of participants' mean satisfaction ratings of professionals (law enforcement, medical, support service, legal and judicial) encountered during their involvement in the legal process.

<sup>16</sup> See Table B in Appendix 2.

On the other hand, as with the findings in respect of the police interviewer, the attitude of the medical examiner (rated on a three-point scale as either positive, neutral or negative) was found to be significantly correlated with participants' ratings of satisfaction with the treatment received. Thus, the more positively the attitude of the medical examiner was rated, the more satisfied participants were with the treatment they received from the medical examiner.

Participants' satisfaction with the treatment received from the medical examiner was found to be significantly correlated with two medical examiner-related factors. First, satisfaction with treatment received was found to be significantly associated with participants' rating of the sympathy shown by the medical examiner; the more sympathetic the medical examiner was perceived to be, the more satisfied participants were with the treatment received from the examiner. Secondly, participants' rating of the level of hostility shown by the medical examiner was found to be significantly correlated with participants' satisfaction ratings of the treatment received from the medical examiner; thus the more hostile the attitude of the medical examiner was perceived to be, the less satisfied participants were with the treatment they received from the medical examiner.

A stepwise regression was performed and (as was the case in relation to the police interviewer) the level of sympathy exhibited by the medical examiner was selected as the variable which significantly explains the greatest degree of variance. This finding would indicate that the degree to which the examiner was perceived as sympathetic has the greatest effect on participants' satisfaction with the treatment of the medical examiner.

Patterns emerged in the verbal descriptions provided by participants of the treatment received from the medical examiner which may elucidate the differences in participants' satisfaction ratings. These patterns were strikingly similar to those which arose in participants' descriptions of the attitude and behaviour of the chief police interviewer. The two themes most commonly mentioned as having an effect on the participants' experience of the medical examination were, once again:

- (i) the responsiveness of the medical examiner to the feelings and the needs of the participant and
- (ii) the degree of sympathy exhibited by the examiner.

The latter theme of the degree of sympathy exhibited by the medical examiner has been examined in an earlier section. Moreover, it should be noted that the qualitative data lends weight to the findings of the stepwise regression on the importance of the role that the degree of sympathy exhibited by the medical examiner plays in participants' satisfaction with.

Whether or not the medical examiner appeared to be responsive to the feelings of the participant seems to be reflected in a certain style of behaviour adopted by the examiner specifically whether or not the medical examiner:

- (a) provided explanations of what they were about to do and
- (b) prefaced the questions they were about to ask or the procedures they were about to conduct with an apology, thereby communicating to the participant that they understood the difficulty of the situation that the participant was experiencing. Participants reacted positively to this empathic approach.

‘The doctor who examined me kept apologising for any hurt that she might be causing me and for each step she explained what she was doing and why she was doing it. She was calm and that helped me to calm down.’ **(Ireland 5)**

A number of issues also arose which caused concern or were problematic for participants. Among these the most frequently mentioned were: the indifferent and often austere and attitude of certain medical examiners, the treatment received from certain other medical personnel and finally the experience of having the medical examiner make inappropriate remarks to the participant.

Two participants made reference to the treatment they received from nurses or nursing assistants. Both participants remarked on the inappropriate overfamiliarity of the nurses/nursing assistants. One of the participants describes her experience as follows:

'One of the nurses that I met behaved inappropriately towards me, she assumed that I was a minor so she was treating me like a child, stroking me on the head. When I told her what age I was, she withdrew her hand as if she had been burned. She reacted very insensitively.' **(France 5)**

A minority of participants reported that they had the impression that the medical examiner was annoyed that he<sup>17</sup> had to examine a victim of rape or sexual violence, which in addition to his normal medical-care procedures necessitated the collection of forensic evidence. Specifically, participants felt that this additional evidence-gathering procedure was an imposition on the medical examiner's time. Participants reported feeling that when the medical examiner adopted such an attitude they in effect minimised the traumatic experience or experiences which the participant had been through. The strongest comment by a participant on this matter is as follows:

'The first thing that the doctor who examined me said was that 'without me he would have had free time'. He was angry because he had dealt with a similar case as mine earlier that day and he was in a bad mood. He could not have behaved worse towards me. He said that people like me take up time for other important things.' **(Germany 3)**

Given the purported raised consciousness in recent years among professionals in general and members of the medical profession specifically, in relation to the trauma experienced by victims of sexual violence it was deemed important to examine whether the time-period (i.e. since 1994, 1990-1994, prior to 1990) in which the medical examination took place had an impact on participant's reported satisfaction with the treatment received from the medical examiner. A one-way analysis of variance was conducted to examine whether there was such an effect on participant's satisfaction with the treatment received from the medical examiner. No significant effect was found, however. Thus, participants who underwent a medical examination more recently for the purpose of gathering forensic evidence after having been the victim of rape or sexual violence were no more or no less likely to report that they were satisfied with the treatment they received than were participants who had undergone this forensic medical examination eight or more years ago.

<sup>17</sup> In cases where this was the participants' experience, the medical examiner was male.

## **1.4 Provision of and access to additional support services**

One of the other groups or agencies which participants may have come into contact with are support services which exist to provide aid and support to victims of sexual violence or to victims of violence generally. Participants, in this segment of the interview, were questioned on the additional support services available to and/or contacted by them. The issues explored related to the provision of information on support services, the source of such information, participant's contact with support services and whether or not those support services addressed participant's needs. Participant's overall satisfaction with the support services which were available to them was also examined.

### **Summary of findings in relation to additional support services**

Only 35% of the total sample were provided by an official source with information about support services for victims. Official sources were typically the police, or where the participant had her own lawyer, then her lawyer was the individual who informed her about victim support services. In the main, those participants who had accessed support services or agencies reported favourably on their contact with those services. A minority of participants, though, were critical of their contact with support services. Participants commented particularly on the need for information about support services to be more widely available and to be provided at the time of reporting, for certain services, especially counselling to be provided free of charge and for support services to be more accessible for those victims who do not come from the larger urban areas where support services are currently primarily located. The major source of support for some participants was their family and/or friends, while for other participants their families were decidedly unsupportive of them during their involvement with the legal process.

### **Detailed findings in relation to additional support services**

#### ***Information about and contact with support services***

Seven out of the twenty participants, representing only 35% of the total sample, received information from an official source about support services which were available for victims in general or for victims of

sexual violence specifically. Three of the seven received information from the police, while the remaining four participants received information about additional support services from the participant's own lawyer. Information in the majority of cases (in six out of the seven cases) was provided about services which were specifically concerned with providing support for victims of sexual violence. One participant was provided with information about a service for victims of crime in general. This pattern was also born out in relation to the services which participants actually contacted for support. Here nine of the twenty participants made contact with support services for victims of sexual violence, two participants made contact with private psychological services, while one participant made contact with the service for victims of crime in general.

One participant, who had not contacted any support service while she was involved in the legal process, emphasised the benefits which she believes she would have obtained from having had the opportunity to make contact with a support agency.

'At the time I was going through it, the idea of asking for some information never crossed my mind as a possibility. Now I see that if I had this information or this support I would have found it easier to overcome the difficulties that I faced going through the investigation and the trial.'

**(Belgium 3)**

These words highlight the valuable role which support services can play in the victims' journey through the legal process.

In the main, participants reported favourably on their contact with the support services. Participants were particularly positive about the support, both immediate and long-term, which these services provided and with the network of professionals (in other fields) which the personnel of these support services had contact with.

'The support services available to me were even beyond what I could have imagined. I could phone anyone whenever I wanted to. There was a strong communication or link between the different people, the lawyers and doctors, they knew each other and recommended each other.'

**(Belgium 1)**

A minority of participants, though, were critical of their contact with support services. Participants commented particularly on the lack of services which addressed their needs at the time and on the insensitive manner in which they were treated by certain support service personnel. One of the strongest comments made by a participant is as follows:

‘I phoned one support organisation, I would never do this again. A person from the organisation said that I should be glad that I hadn’t been injured. They also said that without bad women such as me there wouldn’t be any bad men.’ **(Germany 3)**

### ***Satisfaction with support services available***

Satisfaction with the treatment received from the support services available was elicited using the ‘Satisfaction Scale’ as described above. Once again, the higher the score accorded the more satisfied the participant was with the support services available. The overall mean satisfaction rating by participants of the treatment received from support services was 3.16. No significant difference was found between the type of service contacted i.e. whether for rape or sexual violence by participants and their overall satisfaction with the services available satisfaction rating of participants.

In response to whether or not the support services which were available adequately addressed their needs, nine out of the seventeen participants representing 53% of those who responded, stated that the support services had done so. The remaining eight participants stated that the support services had not adequately addressed their needs. When asked why the support services available had not adequately addressed their needs, participants cited a number of deficiencies:

- (i) Lack of information on the services which were available, particularly at an early stage in their involvement in the legal process.

‘I didn’t know where to find help for what had happened, there could be better information provided in the police station. Information should be available early when you report the assault, it is necessary then and it would make things easier.’

**(France 1)**

- (ii) Lack of local services, thus necessitating travel to larger urban centres to access counselling and therapeutic services.

‘Locally there was no support services at all, I had to travel to X which was nearly 100 miles away.’ **(Ireland 1)**

- (iii) Lack of formal financial support with the accompanying difficulty of finding sources of funding for counselling and therapeutic services.

‘I had to work to pay for therapy, having to pay for this service only complicated the matter. There is too much to cope with without having to think of where you are going to get the money to pay for therapy, which you need. The service should be free.’ **(Ireland 4)**

Another point of concern was made by one participant who had made contact with a new court-based service which had been set up in Belgium for the purpose of helping victims who had become involved in the legal process. The main objective of this new service was to act as ‘the “human face” of the prosecution machinery’. However, the participant felt that the service personnel which she had come into contact with only provided her with ‘the institutional line’. She remarked that she felt very dissatisfied by this.

‘I think that the idea of such a service to help victims is very good but it needs to be evaluated to see if it is doing what it says it is doing.’ **(Belgium 4)**

Along with their contact with formal support agencies, participants also commented on the level of support which they received from members of their family and/or their social network. For some participants, members of their family were an important source of support, while for others, family members were unsupportive of them during their time of involvement in the criminal justice system. In addition, three participants were particularly positive of the supportive role which their network of friends played during this time.

‘My family were not very supportive, but I didn’t expect any support from them. I phoned a friend and she was very supportive, she really helped me a lot.’ **(Germany 3)**

## **1.5 Issues relating to withdrawal of the complaint and reduction of charge**

All participants in this sample had taken the decision to report, though as stated earlier<sup>18</sup> some participants had reported experiencing doubts or hesitations prior to or at the time of reporting. In this section of the interview, issues were explored in relation to whether or not the participant had wanted to withdraw their complaint at any stage after having made the report. Participants were asked whether or not they had wished to withdraw their complaint, why they had wished to do so, whether or not they had experienced pressure to withdraw their complaint and if so the source of that pressure. Items also covered the charges (if any) brought against the accused and whether or not the issue of reducing or down-grading of charges arose.

### **Summary of findings relating to withdrawal of the complaint and charges brought**

While 60% of participants stated that they did not at any stage of the legal process wish to withdraw the complaint, a substantial minority of participants reported that they had wished to withdraw their complaint. A number of participants reported that they had experienced pressure from various sources, typically from the aggressor and/or his social network or from their own family network, to withdraw the complaint. Other reasons why participants had contemplated withdrawing the complaint were difficulties in obtaining information about developments in the case and the long delays in the case coming to trial. Of note is that a minority of participants reported experiencing pressure, whether implicit or explicit, to continue with the case. While the majority of participants felt that they could have withdrawn their complaint if they had wanted to do so, for some participants this option was not available.

Charges were brought against the suspect(s) in seventeen out of the twenty cases. In just under half of the cases where charges were brought, the charge laid was one of rape or aggravated rape. In the remaining cases charges ranged from attempted rape through sexual assault to sexual coercion. Two participants reported that charges were downgraded

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<sup>18</sup> See Section 1.1. above.

to a lesser offence than rape (or its equivalent) before the trial. Participants reported reacting negatively on being informed that the charge had been downgraded.

### **Detailed findings in relation to withdrawal of the complaint and charges brought**

#### ***Issues in relation to withdrawal of complaint***

Twelve participants stated that they did not at any stage of the legal process wish to withdraw the complaint. Seven of the participants reported that they had wished to withdraw their complaint but had not done so, their reasons for not doing so are outlined below. While one participant reported being unsure about her feelings in respect of withdrawing the complaint.

Participants cited the length of the process, and the experience of pressure to withdraw from various sources as the main reasons why they had contemplated withdrawing the complaint. For one participant, though, the lack of communication about the case made her think about withdrawing the complaint.

‘Closer to the time I didn’t know what was going on, I was very confused and even though I was trying hard to get help, I couldn’t get the assistance that I needed.’ **(Ireland 2)**

Seven of the participants reported that they had experienced pressure to withdraw the complaint, this pressure came from a variety of sources; from the participant’s own network of family and friends in three cases and four participants reported that they had experienced pressure from the accused and/or his network to withdraw the complaint. One participant experienced pressure from a number of sources to withdraw.

‘The accused tried to coerce me not to give evidence, he wrote letters and came to where I was staying. The support service that I made contact with initially was very unsupportive, they said that I should be more concerned with where I had to live and where I would get money than with going to court.’ **(Germany 2)**

It is interesting to note that a minority of participants remarked that rather than experiencing pressure to withdraw their complaint that they in fact had experienced pressure not to withdraw.

'I felt that there was more pressure on me to stay with the case, that everyone was relying on me. My family out of concern, did ask me if it was worth what I was going through.' **(Ireland 2)**

Another participant reported experiencing a lot of pressure to continue with the case. She felt that if she had withdrawn at any stage then the police would have believed that she had made a false complaint initially.

' . . . the police were seeing if I was determined enough to continue, to see if I should be believed.' **(France 5).**

Eleven participants when asked, reported that if they had wanted to they could have withdrawn their complaint easily. Five participants reported being unsure as to the ease with which they could withdraw their complaint if they had wanted to. While four participants did not think that it would have been easy for them to have withdrawn. For one participant<sup>19</sup> the fact that she could not withdraw from the process even though she wanted to was particularly distressing for her.

'I would have liked to have withdrawn from the beginning. But this is not possible. I thought about leaving, disappearing and about suicide.'  
**(Germany 3)**

### ***Charges brought against the suspect(s)***

In eight of the seventeen cases where charges were brought against a suspect, the charge laid was one of rape or aggravated rape.<sup>20</sup> In the remaining cases charges ranged from attempted rape through sexual assault to sexual coercion.

Two participants reported that charges were downgraded to a lesser offence than rape or its equivalent before the trial proper, in addition two other participants were unsure as to whether or not the charges had been downgraded. In the two cases where charges were downgraded the participants reported having a negative reaction to the downgrading of the charge laid against the accused/suspect. One participant comments:

<sup>19</sup> In this case, the participant did not take the decision herself to report to the law enforcement authorities.

<sup>20</sup> Or equivalent in participant's jurisdiction.

'The charges brought against the accused were already lower, there was no sexual element charged with, as he was my husband. This shouldn't have mattered' (**Germany 2**)

## **1.6 Decision on detention prior to trial and concerns about personal safety**

Participants were questioned in this section of the interview on issues relating to the authorities' decision on whether or not to detain the accused prior to the trial hearing, whether this decision was officially communicated to the participant and the source of any official communications in relation to detention. Finally, participants were asked to rate how concerned they were in respect of their safety.

### **Summary of findings in relation to decision on detention prior to trial**

In ten cases, representing 59% of the cases where a suspect had been charged, the accused was not held on remand until the trial date. The decision not to detain the accused left the majority of participants feeling angry and fearful. Notification of the decision on detention varied from case to case, some participants were informed officially of the decision soon after it was made. A minority of participants, however, were either not officially notified until after a considerable length of time or were not officially notified of the decision at any point. For a number of participants, the issue of not being formally notified of the decision on the detention of the accused was particularly problematic. Additionally, many participants reported having strong concerns for their physical safety, particularly before the trial date.

### **Detailed findings in relation to decision on detention prior to trial**

In seventeen out of the twenty cases in the sample, charges were brought against the suspect(s). In seven cases the accused was not granted bail and was held on remand until the trial date. In the remaining ten cases, that is in 59% of the cases where a suspect had been charged, the accused was not held on remand until the trial. Seven participants reported having negative feelings about the decision to grant the accused bail. They reported feelings of anger, disbelief and

fear and of feeling 'crushed, both physically and mentally' by the decision not to detain the accused.

'When he (the accused) was granted bail I went mad, I was really afraid, I didn't want to go anywhere. I was afraid he'd come after me. He had told me that he would harm me and that I would have no peace for the rest of my life.' **(Ireland 1)**

Where the accused was granted bail (n=8), four of the participants were officially notified of this decision. Such notification was made either on the day or within two days of the decision being taken. In the remaining four cases, participants either read about the decision in the written media or were informed by a member of their network, that is either by a family member or by a friend. One of the four participants who found out unofficially found out about the decision within 2 days of the decision being made, the remaining three participants did not find out for one week or more, that the accused had been granted bail. One participant did not know for five months that the accused had been granted bail.

'I did not know that the accused had been released, the judge told me at one of the hearings that he had been released almost five months earlier. I was very angry about this, this put me in a dangerous situation and I did not know.' **(France 1)**

For another participant the situation was reversed but was no less distressing an experience.

'I was not told until two months later that he was being held in prison. For those two months I had thought that he was still free and I was terrified that he would come after me.' **(Ireland 2)**

A minority of participants, who had been informed by the authorities of the decision on detention, commented on what appeared to them to be the co-incidental manner in which they were informed. Typically, they had contacted the police for other information and in the course of this contact were informed of the decision on the detention of the accused.

'I had rang up the police about another matter and was only then told that he had been released over a month earlier.' **(Ireland 5)**

Not being officially informed of this consequential decision caused much dissatisfaction and unnecessary distress for a number of participants.

There was a significant difference in detention patterns when comparing Ireland to the other four selected member states.<sup>21</sup> All those charged in Ireland were not detained prior to trial, whereas, seven of the ten defendants charged in the other four selected member states were detained prior to the trial hearing. It was found that the average length of delay in the case coming to trial was related to the detention decision.

### **Concerns for safety**

Participants typically reported feelings of fear, terror and of obsession with their safety. Many participants reported being concerned for their physical safety, as the accused knew of or could obtain access to their address. One participant stated that she was particularly preoccupied with encountering the accused. She had ensured that her address did not appear on any legal documents but she was nevertheless very afraid that he would be able to find her.

'I was obsessed with the fact that I wanted to be the one to see him first so that I could somehow control the situation.' **(France 5)**.

Some participants reported fearing for their lives.

'I was afraid every day that he would come, he threatened me that if I reported to the police that he would kill me. He kept telephoning me and asking me to meet him, the police told me to do everything that he wanted.' **(Germany 3)**

It is clear from participants responses to the questions on their concerns for their safety, that the experience of being raped and sexually violated, which have been described as 'life-threatening experiences', that the participant's feelings that they were being threatened did not necessarily cease when the rape or sexual violence itself ended.

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<sup>21</sup> See Table M in Appendix 2.

## **1.7 Communication with participants about developments in the case**

Participants were questioned about their communication with the various authorities regarding developments (if any) in the case. Participants were asked to rate the degree of difficulty in obtaining information about the progress of the case and to state the source(s) of any information received (if applicable).

### **Summary of findings in relation to communication about developments in the case**

More than half of all participants reported that they experienced difficulties in obtaining information about their case from either or both the law enforcement agencies or the prosecuting authorities. Participants remarked that information about the case was either not volunteered or was not provided willingly and that in many cases there was no individual or body who viewed the provision of such information to be part of their occupational functions or duties. Participants who had their own lawyer typically were kept informed of any developments in the case by this lawyer. Where participants did not have their own lawyer then the police were generally the source of any information. Irish participants reported they had experienced significantly greater difficulties in obtaining information about their case when compared to participants from the other four selected member states. In Ireland, the sole source of information was the police. Where participants had access to their own legal representative then it was typically s/he who provided the participant with information about developments in the case.

### **Detailed findings in relation to communication about developments in the case**

Eleven of the twenty participants reported that they experienced difficulties in obtaining information about their case from either or both the police and the prosecuting authorities. The degree of difficulty in obtaining information was elicited using a seven-point scale, with a rating of 1 representing 'Very Difficult to Obtain Information' and a rating of 7 representing 'Very Easy to Obtain Information'. Therefore, the higher the rating the easier it was to obtain information on the case. The mean rating of the degree of difficulty in obtaining information

was 3.14. Participants commented specifically on two issues in respect of communication with the authorities. Firstly, a number of participants remarked that information about the case was either not volunteered or was not provided willingly. Secondly, there was in many cases an abdication of responsibility for the provision of information, that is, that no one individual saw the provision of such information as part of their occupational functions or duties. The difficulties experienced by a number of participants are best captured in the account by one participant of her experience of finding out what was happening in her case and the impact that it had on her.

'I found it impossible to get information, no-one gave information willingly. I found out about 1% of the information that I wanted. Whenever I went to find out something, I was always told that it was not that person's job. It is no-one's job, no-one's responsibility to inform you about what you are entitled to. The police have to remain impartial, the prosecuting authorities don't want to be seen as coaching, but this is an awful state to be put in considering what you have already experienced.'

**(Ireland 2)**

When participants did receive information (n=15), they did so from their own lawyer in seven cases, from the police in five cases and from the prosecuting authority in three cases.

A significantly greater number of Irish participants reported they had experienced difficulties in obtaining information about their case, compared to participants' experiences in the other four member states.<sup>23</sup> All six Irish participants reported that they had experienced difficulties in obtaining information about their case whereas only five of the thirteen non-Irish participants reported that they had had difficulty in obtaining information about the case.

There was, in addition, a significant difference between Ireland and each of the other four member states in the source, if any, of information which participants received about the case. In Ireland the sole source of information, when received, was the police, whereas there was a wider range of sources of information about the case reported across the other four member states. Typically where the participant

<sup>23</sup> See Tables M and P in Appendix 2.

had access to their own legal representative then it was s/he who provided the participant with any information about the case.<sup>24</sup>

## **1.8 Preparation of participants for the trial process**

In this section of the interview, participants rated their level of understanding of what was expected of them at trial. In addition, participants reported on whether or not they had received any preparation from official sources for their role at trial. If they had not received any preparation for their role in the legal process, participants were asked whether they would have liked to have done so. If participants stated that they would have liked to receive some form of preparation, they were asked to outline the form of preparation they would have liked to receive.

### **Summary of findings in relation to preparation of participants for the trial process**

On average, participants reported that they had a poor understanding of what was expected of them at trial. 59% of those participants whose cases were proceeding to trial reported that they had not received any formal preparation for the trial. Where participants did receive any preparation they did so generally from their own lawyer, or from the police. 82% of those participants going forward to trial, including some of those participants who had received some preparation, stated that they would have liked to receive more information and preparation for their role in the trial process. Participants reported that they would have liked to receive basic information on the workings of the legal process generally, on the roles of the various legal personnel and more specifically on the role of the victim-witness and on what they might expect to happen at the trial. Some participants stated that they would have liked to have had the opportunity to familiarise themselves with the layout of the courtroom, while others stated that they would have valued more active preparation in the form of role-playing.

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<sup>24</sup> See Tables L, M and P in Appendix 2.

### **Detailed findings in relation to preparation of participants for the trial process**

Participants were requested to rate how clearly they understood their role in the trial process, on a seven point scale, with a rating of 1 representing 'Very Poor Understanding of Role' and a rating of 7 representing 'Very Clear Understanding of Role'. The higher the rating accorded, the clearer the participants' understanding of their role in the trial proceedings. The mean rating of participants' understanding of the trial process was 3.53. This would suggest that on average, participants reported that they had a poor understanding of what was expected of them at trial. The effect of participants' level of understanding on their participation in the trial will be examined in greater detail in a subsequent section.

Ten of the seventeen participants, representing 59% of those whose cases were proceeding to trial, stated that they had not received any formal preparation for the trial. The remaining seven participants reported that they had received some formal preparation for trial. This preparation was typically, that is, in four out of the seven cases, provided by their own lawyer. In the other three cases, the police provided some preparation in one cases, the prosecuting authority in another, and a lawyer not involved in the case provided information to a third participant.

While one participant held the view that she didn't think that ' . . . anything can prepare you really for the experience of testifying' (**Ireland 6**), the majority of participants expressed a desire to have been more formally prepared for their part in the legal proceedings. Fourteen of the seventeen participants, representing 82% of those participants going forward to trial, and including some of those participants who had received some preparation, stated that they would have liked to receive more information and preparation for their role in the trial process. The type of information and/or preparation which participants stated they would have liked to receive varied from one participant to another but could be categorised as follows:

- (i) information on court proceedings and the workings of the legal process, in general,

- (ii) information on the roles of the various legal players,
- (iii) information on the role of being a witness,
- (iv) information on what might be expected to happen during a trial for rape and/or sexual violence,
- (v) involvement in a process of familiarisation with the courtroom,
- (vi) some element of role-play, whereby the witness might gain more practical information on the roles of the various legal players.

These recommendations for provision of information and preparation are encapsulated in the words of one participant:

‘You should know what each person in the courtroom does and what they can do, what they are allowed to do. You must remember that most people have never seen a courtroom from the inside. The legal personnel are very familiar with the process. They don’t know that you don’t know what is happening. They need to give you some information so that the situation is known to you and the only thing that is unknown to you is the questions that you will be asked. You should be able to go to court beforehand and make a role-play. You should be told about the role of being a witness. There should be someone who should or could tell you what is likely to happen.’ **(Germany 4)**

## **1.9 Contact with the prosecuting authorities/ prosecutor prior to trial**

One of the main legal players victims encounter during the legal process is the prosecutor, whose role it is to prosecute the case on behalf of the state and to try and secure a conviction. In this section of the interview, participants were asked about the gender of the state prosecutor, if they would have preferred to have the opportunity to select the prosecutor themselves, whether they had the opportunity to meet with the prosecutor prior to the trial and if so then at what stage this meeting took place. Participants were also asked to rate how satisfied they were with the amount of time they had in contact with the prosecutor and if they, in their opinion, would have needed more contact time with him/her and if so what their reasons were for requiring additional time in contact with the prosecutor.

**Summary of findings in relation to contact with the prosecuting authorities/prosecutor prior to trial**

In two-thirds of the cases (n=15) which proceeded to trial the prosecutor was male. 60% of participants stated that they would have liked to have had the opportunity to chose the prosecutor themselves. In nine out of the fifteen cases, representing 60% of the cases which went forward for trial, participants' first contact with the prosecutor was on the day of the trial itself. Participants, in the main, were dissatisfied (to some or to a great extent) with the amount of contact time they had with the prosecutor. All Irish participants reported requiring additional contact time with the state prosecutor.

**Detailed findings in relation to contact with the prosecuting authorities/prosecutor prior to trial**

In ten of the fifteen cases which proceeded to trial, the prosecutor was male. Two participants stated that they had negative feelings about the prosecutor being male, while in none of the five cases where the prosecutor was female did participants report negative feelings about the gender of the prosecutor. Nine of the fifteen participants stated that they would have liked to have had the opportunity to have chosen the prosecutor themselves.

In nine out of the fifteen cases, representing 60% of the cases which went forward for trial, the participants' first contact with the prosecutor was on the day of the trial itself. Two participants met with the prosecutor at some time in the week preceding the trial, while in three cases participants had met with the prosecutor for the first occasion at some-time between three and six months prior to the trial. Satisfaction with the amount of contact time with the prosecutor was elicited using the 'Satisfaction Scale' described above. Once again, the higher the score accorded the more satisfied the participant was with the amount of contact time with the prosecutor. The mean satisfaction rating of participants in relation to the contact time they had with the prosecutor was 1.75. In other words, participants in the main were dissatisfied (to some or to a great extent) with the amount of contact time they had with the prosecutor.

'I met the prosecutor one day before the hearing, the case had been adjourned for one day which meant that I got to meet him then for 10 minutes.' **(Ireland 4)**

Participants typically stated that the reason for their dissatisfaction was that since they did not have the opportunity to meet with the prosecutor prior to the trial, that meant the prosecutor had no personal knowledge of the participant, of the participant's character, her feelings or her experience.

'I had no contact with the prosecutor until the morning of the trial. I would have liked to have with her at least once so that she would see what I was like. She was very personable, but because we had no contact beforehand, I feel that she only did her job to the extent that she could.' **(Ireland 3)**

Due to this lack of knowledge of the participant, participants were often of the belief that the prosecutor was representing the state and the state alone.

'I had absolutely no contact with the prosecutor before the trial. It was obvious that he was representing the state and not me.' **(Ireland 6)**

Unlike the findings in respect of participants' contact with the police interviewer and with the medical examiner, the issue of the attitude of the prosecutor was not mentioned so much as the lack of opportunity to meet with and communicate with the prosecutor.

Irish participants reported needing more contact time with the state prosecutor, whereas only three other participants, two from France and one from Germany, reported requiring additional contact time with the state prosecutor. This difference was found to be statistically significant.<sup>25</sup>

## **1.10 Contact with a victim's lawyer prior to trial**

In those countries where participants could have access to their own lawyer, participants were asked about the gender of their lawyer, whether or not this lawyer was assigned by the state or chosen by

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<sup>25</sup> See Tables M and P in Appendix 2.

themselves, whether they had the opportunity to meet with their lawyer prior to the trial and if so then at what stage this meeting took place. Participants were also asked to rate how satisfied they were with the amount of time they had in contact with their lawyer and if they, in their opinion, would have needed more contact time with him/her and, if so what their reasons were for requiring additional time in contact with their lawyer.

### **Summary of findings in relation to contact with a victim's lawyer prior to trial**

In nine of the seventeen cases, representing 53% of cases where charges were brought against an accused, participants had a lawyer to represent their interests in the legal proceedings. Participants, in general, reported being very satisfied with the amount of contact time with and the accessibility of their lawyer.

### **Detailed findings in relation to contact with a victim's lawyer prior to trial**

In nine of the seventeen cases where charges were brought against an accused, participants had a lawyer to represent their interests through the legal proceedings. In six of the nine cases, the victim's lawyer was female. In the main, participants reported being very satisfied with the amount of contact time with and the accessibility of their lawyer.

'Straight after the arrest I first made contact with my own lawyer, she was recommended to me. I had a lot of contact with her and she told me a lot about the procedures during the trial.' **(France 5)**

One participant, however, felt that she would have needed more contact time with her lawyer. The reason she provided was that the extra time with her lawyer would have in her view made her feel less insecure and more confident about what would happen during the trial.

One issue arose in respect of being informed of the right to have a victim's lawyer. One participant was not informed of her right to have her own lawyer.

'I met my lawyer, just after the third interrogation by the police. This was about three weeks before the trial. I received no information from the police on the right to have a lawyer.' **(Denmark 1)**

Satisfaction with their legal representative was elicited using the 'Satisfaction Scale' described above. Once again, the higher the score accorded the more satisfied the participant was with the treatment they received from their legal representative. These data are presented in Section 2.8 below. In addition, the effect on a wide range of factors of having or not having a victim's lawyer is also examined and the data presented in Section 3.6 below.

## **SECTION TWO: TRIAL PROCEDURES**

Seventeen of the total sample of twenty cases proceeded to trial. In fifteen of the seventeen cases, participants were required to testify, while in the remaining two cases a guilty plea was entered by the accused, which meant the participants did not need to testify.

### **2.1 Length of time waiting for the trial and the impact of the delay**

In this section of the interview, participants were asked about the length of time they had to wait from the time of reporting to the trial date. Participants reported on how the delay impacted on them.

#### **Summary of findings in relation to length of time waiting for the trial and the impact of the delay**

The longest average delay across the five selected member states was experienced by participants from France; participants from Ireland, however, reported significantly more impact from the delay than did the participants from France. The following issues were reported as problematic in respect of the time participants had to wait from the reporting of the offence to the trial date. Participants commented on the length of the delay, with some participants having to wait two or more years for the trial to come to court. Participants reported on the difficulties in having to remember all the details over this length of time, often with the consequence of not being able to recover or make progress in their own lives. Insufficient or inadequate notification of the trial date was also commented on.

### Detailed findings in relation to length of time waiting for the trial and the impact of the delay

The waiting period from reporting to trial commencement ranged from one month to three and a half years, with the average waiting time being just over nineteen months. Table 3 provides a breakdown on the average length of time participants had to wait for the trial to commence.

**Table 3. The mean delay in months from the time of reporting to commencement of trial by EU member state**

EU Member State	Mean Delay (in months)
Ireland	21.5 months
Belgium	11 months
Germany	15.5 months
France	23.5 months
Denmark	1 month

The impact of the delay in the case coming to trial was very similar across the majority of participants. Twelve of the fifteen participants who were required to testify reported having negative feelings in respect of the time which had elapsed between their making of the report and the trial itself. While the longest average delay, across the five selected member states, was experienced by participants from France, participants from Ireland reported significantly more impact from the delay than did the participants from France.<sup>26</sup>

One participant stated that for her, ‘. . . every delay felt like a new abuse.’ (**Belgium 1**). Almost all of the participants remarked on the fact that the delay had a very negative impact on their personal lives. Participants remarked that they had wanted to forget what had happened, but couldn’t because they had the case ‘hanging over them.’ This in their view had a very negative impact on their recovery in that they had great difficulty in ‘getting ahead’ until the case was over.

<sup>26</sup> See Table P in Appendix 2.

'On the whole I found the process very long. During the whole time, you cannot forget what happened because you know you will have to talk about it again and again and be expected to remember everything clearly.' **(France 5)**

Many stated that over the time period from reporting to commencement of the trial the trial was their sole concern or preoccupation during this time.

'The trial was the most important thing in my life for over two years. It was very difficult to get ahead.' **(Germany 1)**

A number of participants reported that their cases were adjourned a number of times. This experience of preparing for the case for it then not to take place was both distressing and frustrating for participants.

'The delay in the trial coming up was a nightmare, the case just dragged and dragged, I couldn't concentrate on anything else, there would be a big build up and then the hearing would be adjourned, this happened a number of times, at this stage I wished that I hadn't told anyone.' **(Ireland 1)**

For one participant the issue of adjournment was related to the inadequate notice of proceedings which she received which had a direct impact on the level of support which she had at the trial.

'The case had been adjourned many times, I was given a day's notice, well it was really only ten hours notice before the trial itself. I wasn't given enough time to arrange to have a person from the support service with me during the case.' **(Ireland 1)**

## **2.2 Facilities and conditions of waiting in the courthouse**

Participants were asked about the conditions in the courthouse on the day(s) of the trial, how long they had to wait, what waiting facilities were available and whether or not they encountered the accused or his support network in the waiting areas during the proceedings and if so how this encounter made them feel.

### **Summary of findings in relation to waiting facilities in the courthouse**

There were specialised courthouse waiting facilities for victims in only 13% of the cases which went to trial. Thus, 87% of the participants had to wait in general public waiting areas of the court building. All of those participants (n=13) who were required to wait in public waiting areas encountered either the accused and/or members of the accused's network. All participants reported experiencing negative feelings about these encounters. The experience of having to wait in public areas (with the possibility of meeting the accused and/or his network) was described by participants as upsetting, unnerving, and intimidating.

### **Detailed findings in relation to waiting facilities in the courthouse**

While the courtroom itself is a very organised space, with separate and appointed positions for the various players, waiting to enter the courtroom can be a different matter. In only two of the fifteen cases were there any specialised waiting facilities for victims in the courthouse. Thirteen participants, representing 87% of those who were required to attend court, were required to wait for the proceedings to begin and/or for their turn to give evidence in the general public waiting areas of the court building. While six of the participants had to wait for less than one hour, the remaining participants had to wait for longer than two hours, some for much longer, in these public waiting areas.

'Outside the courthouse I saw his friends, and I had to wait in the same place with them. This was a horrible experience.' **(Ireland 3)**

All of the thirteen participants who waited in these public waiting areas encountered either the accused and/or members of the accused's network (i.e. his family and/or friends). All thirteen participants reported having negative feelings about this encounter. This experience of waiting, with the potential to encounter the accused's network of family/friends and in some instances even the accused himself, was variably described as upsetting, unnerving, and intimidating.

'I was very intimidated when I saw him (the accused), you should have seen his eyes, they could pierce through steel. Just his presence, just seeing him was very intimidating.' **(Ireland 5)**

Another participant describes her reaction to encountering the accused as follows:

'I saw him, on the day of the trial and it felt like being struck by lightning.' (Germany 1)

### **2.3 Participants' involvement in the trial process**

In this section of the interview, participants whose cases had come to trial and who had testified were asked about the place from which they testified, whether they would have preferred to testify via other means, whether or not they had support persons present during the trial and if so who the support person or support persons were. Participants were asked to estimate the total length of time that they spent giving evidence and whether or not breaks were allowed.

#### **Summary of findings in relation to participants' involvement in the trial process**

80% of participants testified from the witness stand. A minority of participants testified from alternative locations in the courtroom or from another room in the court building via audio-link. The majority of participants had support persons, typically family members and/or friends, present with them during the trial process. The average length of time participants spent testifying was 45 minutes.

#### **Detailed findings in relation to participants' involvement in the trial process**

Twelve of the fifteen participants who testified gave evidence on the witness stand, and two participants testified from their seats in the courtroom while the remaining participant gave evidence via an audio-link from another room in the court building. Three of the twelve participants who testified from the witness stand stated that they would have preferred to have testified from somewhere other than the witness stand; the typical request was from behind a screen, though one participant cited that she would have preferred to have testified via a television link-up with the courtroom proper.

Thirteen of the participants had support persons present when they were testifying. These support persons were drawn, in the main, from family members, friends and/or support service personnel.

The average length of time spent testifying ranged from 16 minutes to intermittently over a 24 day period. The majority of trials lasted between one and three days. The average length of time participants spent testifying was 45 minutes. Breaks during participants testifying were allowed in four cases, typically food breaks or overnight breaks.

## **2.4 Conditions in the courtroom during the trial process**

Participants were asked to estimate (approximately) the number of persons present in the courtroom while they testified. Participants also reported on whether or not there were members of the media present when they gave their evidence, and on whether or not their identity was protected during the course of the trial. Questions in relation to the presence of the accused in the courtroom and whether or not he was allowed to cross-examine the participant during the course of the trial were also covered.

### **Summary of findings in relation to conditions in the courtroom during the trial process**

In five of the seventeen cases which went to trial there were between 41 and 100 persons present in the courtroom when the participant was testifying. There were restrictions on who was allowed to be present during the trial in just over half of the cases where a trial had taken place. The media were present in 40% of the cases which went to trial. Participants' reported anxiety and stress levels when testifying were not found to be significantly effected by the presence of the media during the trial process. 60% of participants reported that their identity had been protected during the course of the trial, while the remaining 40% of participants reported that their identity had been revealed. The accused was present for the duration of the trial in all but one of the fifteen cases which went to trial. The majority of participants reported having negative feelings in relation to the presence of the accused in the courtroom during the trial. Participants in many cases were distressed by having to pass very close to where the accused was sitting while on their way to the witness stand. Participants were questioned, in the main, by the accused's lawyer. In two cases, the trial judge was the only

person to question participants, while in another two cases the accused was permitted to cross-examine participants.

### **Detailed findings in relation to conditions in the courtroom during the trial process**

‘The atmosphere in the courtroom was so cold, almost sinister.’  
(Belgium 2)

Participants were requested to estimate approximately the number of persons present in the courtroom during the trial process. Table 4 below presents an outline of these estimates.

**Table 4. Participant estimates of the number of persons present in courtroom during the trial process**

<b>Number of Persons Present in Courtroom</b>	<b>Frequency of Cases</b>
Between 1 and 20 Persons Present	9
Between 21 and 40 Persons Present	3
Between 41 and 100 Persons Present	5

Thus, in five of the seventeen cases which went to trial there were substantial numbers of persons present in the courtroom; one participant described the courtroom in the following terms: ‘it was like a train station, there were so many people coming and going’. In addition, a number of participants stated that because the courtroom was so crowded and the sound facilities therein so inadequate, they could not hear clearly what was being said during the trial.

In eight cases there were restrictions on who was allowed to be present. In six of the cases which went to trial the participant reported that members of the media were present during the trial. One case ran counter intuitive, in that the participant remarked that the complainants in the cases actively sought not to have any restrictions on trial attendance so as to keep the trial open to the public.

'All the victims involved, including myself, put pressure on the tribunal for the trial to be public. We thought that it would be useful for other victims who had not reported. Our wishes were accepted.' **(France 5)**

Participants' reported anxiety and stress levels when testifying were not found to be significantly affected by the presence of the media during the trial process.

Nine participants reported that their identification was protected during the course of the trial, while the remaining six reported that their identification was revealed.

'Even though theoretically my identity was protected in the press, it was still very obvious where I came from.' **(Ireland 2)**

Participants' overall satisfaction with the legal process was not found to be significantly affected by the revelation of their identity during the course of the trial.

In all but one of the fifteen cases which went to trial the accused was present for the duration of the trial.<sup>27</sup> Thirteen of the participants reported having negative feelings in relation to the presence of the accused.

'When I gave my evidence, I had to sit facing the accused for the whole time. This was awful, to have to look at the person who had broken a part of my life. He stared at me the whole time I was testifying and I found this to be one of the most inhumane experiences. I do think though that it was good to show him that you would fight for your rights, it was still very intimidating though.' **(France 3)**

On the other hand, one participant commented that testifying in front of the accused did not intimidate her but rather made her feel angered.

'Before I testified, I just wanted to look the accused in the eye, he looked pathetic, he didn't intimidate me at all. I just felt really angry towards him.' **(Ireland 6)**

The issue of proximity to the accused in the courtroom itself was commented on by a number of participants. Participants were critical of the

<sup>27</sup> For Denmark 1, the accused was not present when the participant was testifying, at the request of the participant. The request was made to the court through the participant's lawyer.

fact that when making their way to the witness stand to testify, they in many cases had to pass very close to the accused and this was particularly distressing and intimidating experience for them.

'I had to walk very close to where the accused was sitting six times. This was an awful experience. I did not want to go back in after the break. He was sitting too close to the witness stand. I found this very intimidating.'

**(Ireland 3)**

One participant commented on the difficulty she experienced with the number of people present who were there to provide support for the accused.

'I found it hard to see all the people that the accused had with him, the priest, his family, I found that hard to deal with, all the support he got, even though I was the victim. I was really angry, annoyed and upset.'

**(Ireland 1)**

In the main, participants were questioned by the lawyer representing the accused. In two cases, the trial judge was the only person to put questions to the participants, while in two cases the accused was permitted to put questions to or to cross-examine the participants. While both of the participants commented on the difficulties inherent in being questioned by the accused, when comparisons were conducted with participants who were not subjected to questioning by the accused, it was found that the accused's questioning or cross-examination did not have a significant effect on participants' overall satisfaction with the legal process.

## **2.5 Participants' experience of and feelings in relation to testifying**

In this section, participants were asked to describe in their own words how they felt when testifying. Participants were, in addition, requested to rate on seven-point semantic differential scales how anxious they felt when giving testimony, how confident they felt, how articulate they perceived themselves to be, how intimidating the experience of testifying was for them, and altogether how stressful they found the experience of testifying.

### **Summary of findings in relation to participants' experience of and feelings about testifying**

80% of participants reported having negative feelings about testifying. A number of participants reported on the loneliness of the experience of testifying, particularly those participants who had to testify on the witness stand. A substantial minority of participants also reported that during the trial, and particularly when they had to testify, they felt humiliated and embarrassed. Almost all participants reported that the experience of testifying had been very stressful for them. On average, participants reported that they were very anxious when testifying. Participants from Germany reported feeling significantly less anxious when testifying than did the participants from the other four selected member states. Participants also rated their experience of testifying as intimidating. Participants from Germany, once again, rated the experience of testifying significantly less intimidating than did participants from the other four selected member states. Participants in addition reported, on average, feeling inarticulate to some degree when testifying. Irish participants reported feeling significantly less articulate when testifying when compared with participants from the other four selected member states. On average, participants' confidence levels when testifying were neither very high nor very low. When comparisons were conducted between Irish participants and participants from the other four selected member states, Irish participants reported feeling significantly less confident when testifying.

### **Detailed findings in relation to participants' feelings about and experience of testifying**

Twelve of the fifteen participants reported having negative feelings about testifying. Participants typically described the experience of testifying as lonely, at times humiliating and extremely stressful. A minority of participants reported that they felt detached from the experience, and that in order to be able to get through the experience of testifying they had to suppress their emotions.

A number of participants reported on the loneliness of the experience of testifying, particularly those participants who had to testify on the witness stand. The sense of isolation is conveyed in the succinct comment of one participant:

'You really feel so alone up there. You are alone.' **(Germany 4)**

Almost all participants reported that the experience of testifying was very stressful for them. A number of participants, however, stated that testifying was the most stressful experience of their lives, for some even more stressful than the rape or the assault itself.

‘The experience of testifying for me was like an execution. I felt like I was going for the guillotine. It was the most stressful experience of my life.’ **(Ireland 2)**

### **Humiliation**

A substantial minority of participants also reported that they had at times during the trial and especially when they had to testify, felt humiliated and embarrassed. The humiliation was caused, in the main, by the way in which intimate details of their personal lives were discussed in public.

‘I was very embarrassed and humiliated having to go through such intimate details in public. The whole experience of testifying was very stressful, very tense and it got worse instead of better.’ **(Ireland 3)**

‘At the beginning the whole trial was very tough, I don’t have a past anymore, everything about me was known.’ **(Germany 2)**

Other participants reported that they felt that they had to mask their emotions in order to be able to go through the ordeal and perform the tasks required of them.

‘I felt no real emotions during the trial. I felt that my emotions had separated from me and I was able to report what had happened, I really wanted to do this.’ **(Germany 1)**

### **Participants’ experience of testifying<sup>28</sup>**

#### ***Participants’ ratings of the stressfulness of testifying***

Those participants who were required to testify, were asked to rate on a scale of 1 to 7, with a score of 1 representing ‘Stressful’ and a score of 7 representing ‘Unstressful’, how stressful the experience of testifying was for them. The higher the rating accorded, therefore, the less stressful the experience of testifying for participants. The mean rating accorded by participants of the stressfulness of the experience of testifying was 1.13. The highest rating that was given on this scale was a 3, indicating

<sup>28</sup> See Table C in Appendix 2.

that for all participants who testified, the experience was either a stressful or an extremely stressful experience for them.

### ***Participants' reported level of anxiety when testifying***

Participants rated how anxious they felt when testifying on a scale of 1 to 7 with a score of 1 representing 'Anxious' with a score of 7 representing 'Not Anxious'. The higher the rating accorded, therefore, the less anxious the participants. The mean rating of level of anxiety experienced when testifying was 2.23. Thus, on average participants reported that they were very anxious when testifying. Participants from Germany reported feeling significantly less anxious when testifying than did the participants from the other four selected member states.<sup>29</sup>

### ***Participants' reported level of intimidation experienced when testifying***

Participants also rated how intimidating testifying was for them on a scale of 1 to 7 with a score of 1 representing 'Intimidating' and a score of 7 representing 'Unintimidating'. The mean rating of level of intimidation experienced when testifying was 2.57. On average, participants rated their experience of testifying as intimidating. Participants from Germany, once again, rated the experience of testifying significantly less intimidating than did participants from the other four selected member states.

### ***Participants' reported level of articulateness when testifying***

Participants' level of articulateness when testifying was measured on a 7 point scale with a rating of 1 representing a feeling of being 'Extremely Articulate', and a rating of 7 representing a feeling of being 'Extremely Inarticulate' when testifying. Thus, the higher the rating accorded, the less articulate the participant felt when she was testifying. The mean rating of level of articulateness experienced when testifying was 3.63. Thus, participants on average reported feeling inarticulate to some degree when testifying. Irish participants reported feeling significantly less articulate when testifying compared with participants from the other four selected member states.<sup>30</sup>

<sup>29</sup> See Table P in Appendix 2.

<sup>30</sup> See Table M in Appendix 2.

### ***Participants' reported level of confidence when testifying***

Participants' level of confidence when testifying was measured on a 7 point scale with a rating of 1 representing a feeling of being 'Confident', and a rating of 7 representing a feeling of being 'Unconfident' when testifying. Thus, the higher the rating accorded, the less confident the participant felt when she was testifying. The mean rating of the level of confidence experienced when testifying was 4.31. This would indicate that on average, participants' confidence levels when testifying were neither very high nor very low. All three Irish participants rated themselves as feeling extremely unconfident when testifying and when comparisons were conducted with participants from the other four selected member states, Irish participants reported feeling significantly less confident when testifying.<sup>31</sup>

## **2.6 Legal issues raised during the trial and their impact on the participant**

In this section of the interview, participants were asked about the legal issues which may have been raised during the trial. Specifically, participants were asked if any of the following issues were raised during the trial: prior acquaintanceship with the accused, issues relating to their previous sexual history, the degree of resistance they raised against the accused, the level of force used by the accused at the time of the rape or sexual violence, the issue of delay in reporting (if applicable), and whether or not assertions were made that the victim herself was in some way to blame for what had happened. Participants were also asked to describe how they felt if any of these issues were raised during the trial proceedings.

### **Summary of findings in relation to legal issues raised during the trial and their impact on the participant**

For eight of the fifteen participants the fact that they had previously been acquainted with the accused was an issue which was raised during the trial. In seven cases the issue of previous sexual history was raised in four of these seven cases participants were not only questioned on sexual history with the accused but also this questioning extended to

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<sup>31</sup> See Tables M and P in Appendix 2.

their sexual history with persons other than the accused. The degree of resistance which the participant used to defend herself during the rape/assault was raised in the 80% of the cases. Finally, the degree of force which was used by the accused at the time of the rape or the assault was raised in nine out of the fifteen cases which went to trial.

### **Detailed findings in relation to legal issues raised during the trial and their impact on the participant**

During the course of the trial legal issues, such as prior sexual history, may be raised by defence counsel, prosecution counsel or the judge, which go to substantiate or discredit the testimony of the participant. Table 5 below presents in tabular form the legal issues, which may be raised and the number of cases in which each issue was raised during the course of trial proceedings.

**Table 5. Frequency of cases where issues raised during trial**

<b>Issue Raised</b>	<b>Frequency of Cases</b>
Acquaintance with Accused	8
Previous Sexual History	7
Degree of Resistance by Participant	12
Degree for force by Accused	9
Delay in Reporting	7

#### ***Acquaintance with the accused***

For eight participants the fact that they had previously been acquainted with the accused was an issue raised during the trial. Participants' previous acquaintance and/or prior relationship with the accused was raised primarily when the case in question was one of spousal rape. However, for one participant who was only acquainted with the accused in passing, the inference was made that she had known the accused better and that because of this in her own words:

' . . . I felt that others believed that I had made up the rape.' **(Ireland 3)**

### ***Previous sexual history***

In four of the seven cases where the issue of previous sexual history was raised, participants were not only questioned on their sexual history with the accused but also their sexual history with persons other than the accused.

‘They asked me questions about my boyfriend from when I was a teenager. Also asked me about my relationship with the accused. They also made claims that I was a prostitute. They spent 3 days dealing with this claim. This made me feel very bad at the beginning but I knew that I could call witnesses eventually who would disprove this. At one point I said even if I had been a prostitute does this mean that he had the right to treat me like he had done.’ **(Germany 2)**

Participants reported that some of the questioning on their prior sexual history caused them great distress and in the main, made them feel that they were not being treated fairly.

‘All the decisions seemed to go in favour of the accused, I was questioned about my previous sexual history and this was very unfair, and very upsetting.’ **(Ireland 2)**

### ***Resistance***

The degree of resistance which the participant used to defend herself during the rape/assault was raised in twelve out of the fifteen cases. While this issue went to substantiate the prosecution’s case, a significant minority of participants reported that the degree to which they resisted did not resist was used in evidence against them. One participant relates the remarks made by the trial judge in relation to how she resisted the accused during the rape itself.

‘I told the court that I fought against him with my arms, but that after he strangled me, I had no air left so I couldn’t fight back, I was then asked why I couldn’t have resisted with my legs.’ **(Germany 3)**

This questioning of the participant’s actions had a powerful effect on how she viewed herself.

‘I began to think maybe I had been the fault of what happened because I had heard this from so many people. I was told all the time, that I wore the wrong clothes, that I didn’t resist enough. In the end I didn’t know

what to believe, but the one thing I knew was that I was not the one who was guilty.’ (**Germany 3**)

### ***Force***

The degree of force which was used by the accused at the time of the rape or the assault was raised in nine out of the fifteen cases which went to trial. Here again, participants commented on the insensitive remarks made in reference to the rape and the lack of physical injuries sustained by participants.

‘On three occasions the judge said that this was not a violent rape.’ (**Ireland 3**)

‘It was read out that the bruises on my neck from the strangling were not observable, but it was many days after the rape that I had the medical examination, so the bruises had gone. What was also mentioned and this made me very angry, was the injuries that I didn’t have, for example, no knife wounds. The judge said that he had seen women who looked more injured after a rape and that I looked well.’ (**Germany 3**)

No consideration was given in either of these two cases to the psychological injury or trauma which both participants sustained and which empirical research indicates can have as debilitating an effect as physical injury or trauma on a victim of sexual violence.

## **2.7 Experience of cross-examination: impact on the participant**

Participants who were cross-examined in the course of the trial proceedings were asked to describe this experience. Participants were asked about the questioning strategies adopted by the defence lawyer or other legal personnel during the trial proceedings. Specifically, participants were asked if, in their opinion, any of the legal personnel used the strategies of asking the same question repeatedly, of asking insensitive questions or of asking questions which were embarrassing or were intended to cause embarrassment to the participant while she was giving evidence. Participants in addition were asked to report on how they felt if any of these questioning strategies were adopted during the cross-examination.

### **Summary of findings in relation to participants' experience of cross-examination**

Where they were cross-examined participants reported that the accused's lawyer typically adopted one or more of the following strategies in order to challenge the credibility of their testimonies:

- (i) Insensitive and repeated questioning of the participant with the aim of causing her confusion. This was achieved through humiliation, shock tactics, or by deliberately misrepresenting parts of her testimony or statement with the possibility of undermining their value.
- (ii) Attempts to minimise the effect of the rape on the participant, i.e. either the physical or the psychological injury caused to the participant.
- (iii) By implying that the participant had been to blame in some way for the rape or the sexual violence.

### **Detailed findings in relation to participants' experience of cross-examination**

In relation to the questioning or cross-examination of participants during trial, ten of the fifteen participants reported that there had been suggestions of victim precipitation or that they had in some way been to blame for what had happened. The strategy of repeated questioning was also reported by ten of the fifteen participants, while eight participants reported that insensitive questioning had been employed. Nine of the participants stated that they had been asked questions which had in their opinion been asked with the intention of embarrassing them and which had been embarrassing for them to answer.

'The defence lawyer asked me some very humiliating questions, both in their nature and in the details that were required to answer them. I cried very much through the whole experience.' (**Belgium 3**)

One participant reported that the lawyer for the accused had misrepresented her testimony and she felt strongly that the judge should not have permitted this to happen.

'I was shocked by some of the things that the accused's lawyer said and did, he used some words which I had used in my testimony and turned

them to say or mean something else. I would have liked to be able to say something about that, I was very shocked that he could do that.’  
**(France 1)**

Participants also commented on the strategy of trying to minimise the effect of the rape on them.

‘The defence lawyer tried to minimise the effects that the rape had on me. I had been very prepared by the support group that I was in, so I stood strongly and defended myself well. I had the feeling that the defence lawyer was really annoyed by my testimony, because it was so strong and so clear.’ **(France 5)**

Of particular note are the comments relating to the lack of overt symptoms exhibited on the part of the participant.

‘I was told that I didn’t look as if I had been so affected by the rape. Not on the outside maybe, I wouldn’t let anyone see how I really felt on the inside.’ **(Germany 3)**

Here again, another remark made during the trial disregards the psychological trauma that sexual victimisation can precipitate.

‘In the trial it was said that even though I had bruises on my neck after he had attacked me, this did not mean that I had suffered any psychological harm.’ **(Germany 2)**

A number of participants described how they reacted to the strategies adopted by the accused’s lawyer by suppressing their emotions on the one hand or by over-compensating on the other.

‘The basic strategy of the accused’s lawyer was to confuse me, to the point where I was blocking out everything and just concentrating on the questions that he was asking me. He kept harassing me in a subtle way, he kept trying to trip me up. I just had to go into automatic mode, but then that is just delaying your reactions, you are suppressing your emotions just to get through, you are like a volcano of emotions.’  
**(Ireland 2)**

‘When I was testifying I felt absolutely terrible, I was warned twice to answer the questions that were asked. I don’t cry in the presence of others, I wasn’t nervous, instead I got angry and made ironic comments. The judge warned me twice not to do this.’ **(Germany 3)**

## **2.8 Participants' satisfaction with the treatment received from legal personnel**

In this section of the interview, participants were asked to describe the attitudes of, to rate the degree of hostility and sympathy exhibited, and to rate how satisfied they were with the treatment received during the course of the trial, for each of the following legal personnel: the prosecutor, the defence lawyer, the trial judge, and the victim lawyer. Participants were also asked to state which of the legal personnel they were most satisfied with during the course of the trial, and with whom they were most dissatisfied.

### **Summary of findings in relation to participants' satisfaction with the treatment received from legal personnel**

A substantial minority of participants reported that the attitude of the state prosecutor towards them was negative. In addition, only 27% of those participants whose cases had proceeded to trial stated that in their opinion the state prosecutor had represented their interests adequately. In 80% of the cases which went to trial the accused was represented by a male lawyer. All participants reported that the attitude of the accused's lawyer towards them was either negative or neutral. Participants were, on average, somewhat dissatisfied with the treatment of the accused's lawyer. Irish participants rated the defence lawyer as significantly more hostile when compared with participants' ratings from the other four selected member states. Participants reported quite diverse reactions to the attitude of and the treatment they received from the trial judge. Irish participants rated the trial judge as having a significantly more positive attitude when compared to the ratings of participants from the other four selected member states. While participants from Belgium rated the trial judge's attitude as significantly more negative than did participants from the other four selected member states. On average, participants rated the lawyer representing them as being very warm and sympathetic, and participants were very satisfied with the treatment they received from their lawyer.

Comparisons were made on the 'Hostility', 'Sympathy' and 'Satisfaction' scales between the various personnel: law enforcement, medical and legal, which the participant may have encountered during the trial process. The accused's lawyer received the highest hostility rating, with

the trial judge receiving the second highest hostility rating. In contrast, the participant's legal representative received the lowest hostility rating. The participant's legal representative received the highest sympathy rating with the chief police interviewer being rated as the second most sympathetic individual encountered. In contrast, the accused's lawyer received the lowest sympathy rating. Finally, of all the personnel encountered, participants were by far the most satisfied with the treatment they received from their own legal representative. Satisfaction with the treatment received from the state prosecutor was rated the second highest. Participants were least satisfied with the treatment they received from the accused's lawyer.

### **Detailed findings in relation to participants' satisfaction with the treatment received from legal personnel**

#### ***State prosecutor***

Six participants reported that the attitude of the state prosecutor towards them was negative, three participants reported that s/he had a neutral or non-partisan attitude, while five participants reported that the attitude of the state prosecutor towards them was positive. A number of participants had had relatively high expectations of the state prosecutor with the result that, more often than not, the state prosecutor did not or could not meet these expectations.

'The state prosecutor was useless, the feeling that I got was that I was really on my own. The judge on a number of occasions stopped the defence counsel asking certain questions but the prosecution never once objected. It was hard to know if he was even interested in the case.'

**(Ireland 2)**

'The state prosecutor was standoffish, he just seemed to be totally indifferent. He didn't represent my interests, if he had, then he would have asked me about what had happened to me, he wouldn't have just read what had happened off the statement.'

**(Ireland 5)**

On the other hand, a number of participants reported favourably on the attitude of and the treatment they had received from the state prosecutor.

'The prosecutor was O.K. The way she defended society, I could identify with what she was saying. She also asked the judge to give the maximum penalty.'

**(France 5)**

'The state prosecutor was fair, objective and unsentimental. I felt supported by him. he really had the competence to go up against the defence.' **(Germany 4)**

Only four out of the fifteen participants stated that in their opinion the state prosecutor had represented their interests adequately. The four Irish participants who responded to this item held the view that the state prosecutor did not represent their interests adequately, whereas only two out of five participants from the other four selected member states reported this view. Overall, however, the difference was not found to be statistically significant.

### ***Accused's lawyer***

In twelve of the fifteen cases which went to trial the accused was represented by a male lawyer.

Eight participants reported that the attitude of the accused's lawyer towards them was negative, the remaining participants reported that s/he had a neutral or non-partisan attitude towards them. No participant reported that the attitude of the accused's lawyer towards them was positive. One of the strongest comments made in respect of the treatment received from the accused's lawyer follows:

'I was very shocked with the defence lawyer and his manner, instead of finding mitigating circumstances for the accused, he attacked and criticised the victims. His lawyer kept trying to contradict what each of us had said, so that it looked as if we were responsible for being raped. He also managed to turn the accused into a victim which was unbearable.'

**(France 5)**

Participants rated the accused's lawyer on the seven-point 'Hostility Scale' described earlier. Note again that a rating of 1 represented 'Warm' and a rating of 7 represented 'Hostile'. Therefore, the higher the rating the more hostile the accused's lawyer was perceived to be. The overall mean hostility rating in respect of the accused's lawyer was 5.75, which would indicate that overall participants rated the accused's lawyer as hostile. Participants' rating of the accused's lawyer on the 'Sympathy Scale' with a rating of 1 representing 'Unsympathetic' and a rating of 7 representing 'Sympathetic' produced a mean rating of 1.73, suggesting that on average participants viewed the accused's lawyer as

unsympathetic. Participants were also requested to rate their level of satisfaction with the treatment they received from the accused's lawyer on the 'Satisfaction with Treatment Scale' with a rating of 1 representing 'Very Unsatisfied' and a rating of 5 representing 'Very Satisfied'. The mean satisfaction rating of the accused's lawyer was 1.73, indicating that participants were on average somewhat dissatisfied with their treatment by the accused's lawyer.

When comparisons were conducted to examine if there was any effect of the country of origin of participants, it was found that Irish participants rated the defence lawyer as more hostile, with a mean hostility rating of 7.00 when compared with participants from the other four selected member states, who had a mean hostility rating of 5.33. This difference between the means of Irish participants and participants from the other selected member states in relation to the perceived hostility of the defence lawyer was found to be statistically significant.<sup>33</sup>

### *Trial judge(s)*

Participants reported quite diverse reactions to the attitude to them and the treatment they received from the trial judge. On the one hand, a number of participants described the trial judge's actions in favourable terms.

'In my experience, the judges I met throughout the legal process were very fair, they were respectful and always polite to me.' **(Ireland 5)**

However, for a minority of participants the trial judge's actions, or specifically some of the remarks made during the course of the trial, caused great upset.

'The judge said during the trial, that I was responsible also, he said that: 'I had opened the door to allow him to rape me'. This wasn't true, I was very upset that the judge had said this.' **(Germany 1)**

'I told the court that I had been living alone for X years before the rape happened, the judge then asked me if I had provoked the accused.' **(Germany 3)**

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<sup>33</sup> See Table P in Appendix 2.

Here again, participants rated the trial judge on the 'Hostility Scale'. Note again that a rating of 1 represented 'Warm' and a rating of 7 represented 'Hostile'. The overall mean hostility rating in respect of the trial judge was 4.39. Participants' rating of the trial judge on the 'Sympathy Scale' with a rating of 1 representing 'Unsympathetic' and a rating of 7 representing 'Sympathetic' produced a mean rating of 2.17, suggesting that on average participants viewed the trial judge as somewhat unsympathetic.

In addition, the general attitude of the trial judge was measured on a seven-point scale with a score of 1 representing 'Extremely Positive' and a score of 7 representing 'Extremely Negative'. Therefore, the higher the rating the more negative the trial judge's attitude was perceived to be by participants. Irish participants (n=4) rated the trial judge as having a more positive attitude, with a mean score of 1.25 compared to a mean score of 2.55 for participants from the other four selected member states (n=9). This difference between the means was found to be statistically significant. Participants from Belgium reported a significantly worse perception of the trial judge's attitude than did participants from the other four selected member states.<sup>34</sup>

Finally, participants were also requested to rate their level of satisfaction with the treatment they received from the trial judge on the 'Satisfaction with Treatment Scale' with a rating of 1 representing 'Very Unsatisfied' and a rating of 5 representing 'Very Satisfied'. The mean satisfaction rating of the trial judge was 3.19, indicating that on average, participants were neither very satisfied nor very dissatisfied in respect of the treatment they received from the trial judge.

### ***Victim's lawyer***

While a more detailed description of participants' experience of having their own legal representative will be presented in a subsequent Section 3.6, participants' ratings of their satisfaction with the treatment they received from their lawyer will be presented here.

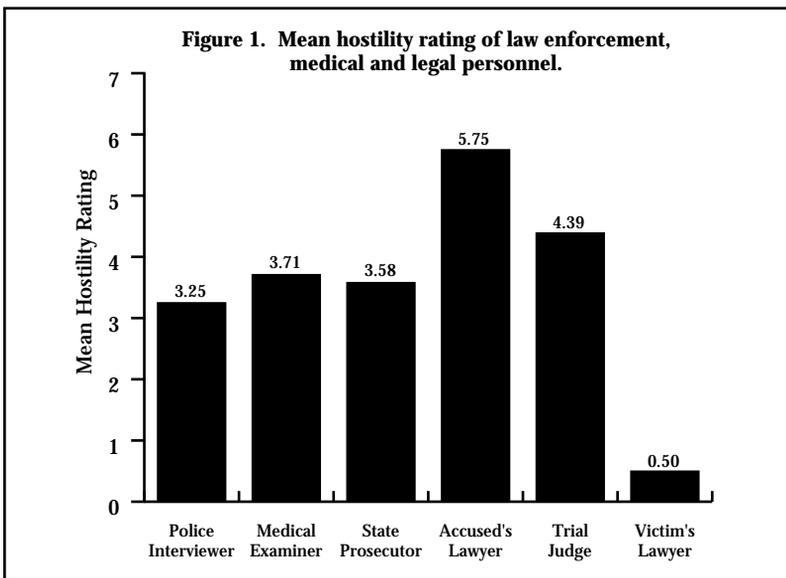
Participants' mean rating of their legal representative on the 'Hostility Scale' was 0.50. Note again that a rating of 1 represented 'Warm' and

<sup>34</sup> See Table P in Appendix 2.

a rating of 7 represented 'Hostile', indicating that on average participants rated their legal representative as very warm. Participants' mean rating of their legal representative on the 'Sympathy Scale' with a rating of 1 representing 'Unsympathetic' and a rating of 7 representing 'Sympathetic' was 6.33, suggesting that on average participants viewed their legal representative as very sympathetic. Participants were also requested to rate their satisfaction with the treatment they received from their legal representative on the 'Satisfaction with Treatment Scale' with a rating of 1 representing 'Very Unsatisfied' and a rating of 5 representing 'Very Satisfied'. The mean satisfaction rating of the participant's legal representative was 4.25, indicating that on average, participants were very satisfied with the treatment they received from their lawyer.

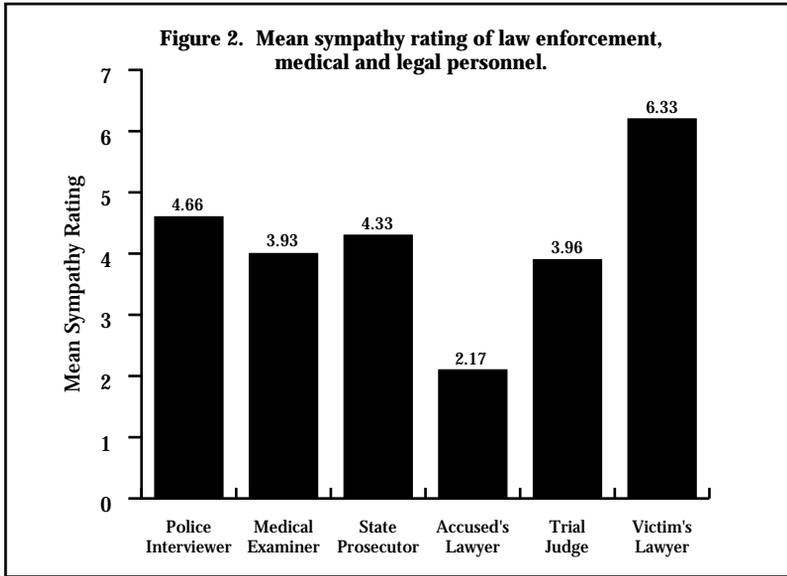
***Comparisons on the 'Hostility', 'Sympathy' and 'Satisfaction with Treatment' scales of the various personnel encountered by the participant***

Participants' mean ratings of the various law enforcement, medical and legal personnel on the 'Hostility Scale' are contrasted with one another, and the data presented in Figure 1.



The accused's lawyer received the highest hostility rating, with the trial judge receiving the second highest hostility rating. In contrast, the participant's legal representative received the lowest hostility rating.<sup>35</sup>

Participants' mean ratings on the 'Sympathy Scale' for the various law enforcement, medical and legal personnel are compared with one another and the data presented in Figure 2.

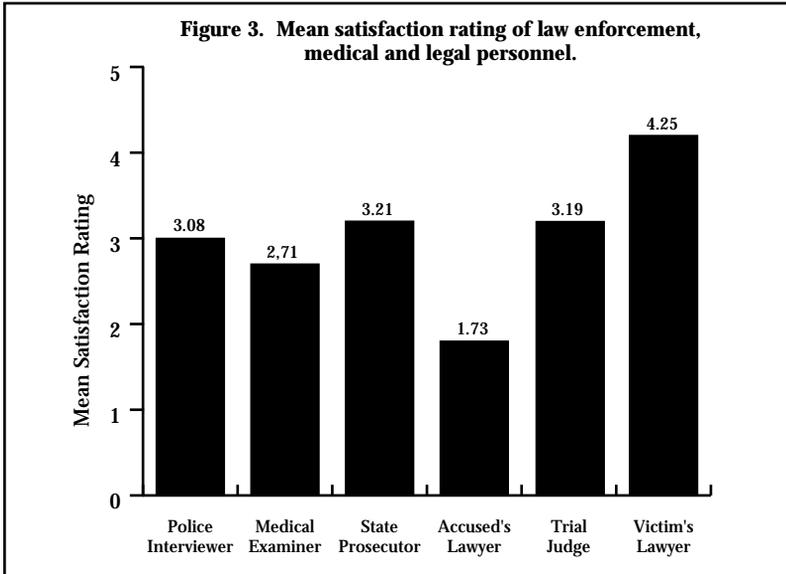


The participants' legal representative received the highest sympathy rating, with the chief police interviewer being rated as the second most sympathetic individual encountered. On the other end of the scale, the accused's lawyer received the lowest sympathy rating.<sup>36</sup>

Participants' mean 'Satisfaction with Treatment' ratings across the various law enforcement, medical and legal personnel are contrasted with one another, and the data presented in Figure 3.

<sup>35</sup> See Table E in Appendix 2.

<sup>36</sup> See Table F in Appendix 2 for a tabular representation of this data.



Of all the personnel encountered, participants were by far the most satisfied with the treatment they received from their legal representative. Satisfaction with the treatment received from the state prosecutor was rated the second highest. Participants were least satisfied with the treatment they received from the accused's lawyer.<sup>37</sup>

In addition to rating the various personnel encountered on the predetermined scales, participants were also asked to state which member of the legal personnel they were firstly, most satisfied with and secondly, least satisfied with. Table 6 below presents the data on the legal personnel cited by participants with whom they were most satisfied with and the corresponding number of participants who stated that they were most satisfied with that individual.

**Table 6. The legal personnel participants were most satisfied with (in rank order)**

Victim's Lawyer	5 Cases
State Prosecutor	3 Cases
Trial Judge	2 Cases

<sup>37</sup> See Table D in Appendix 2 for a tabular representation of this data.

Two participants reported not that they could not choose who they were most satisfied with, that they were not fully satisfied with any one.

'I felt most satisfied with my lawyer, he was with me 100%, by my side.'

**(Denmark 1)**

'The legal person I was most satisfied with was the state prosecutor. He was a pillar for me. He had an insight into what was going to happen to me and he had an understanding of women's position in society.'

**(Germany 4)**

'The judge was better than the prosecution, I felt that he was more on my side at least there was some element of sympathy coming from him.'

**(Ireland 2)**

Table 7 below presents the data on the legal personnel participants were least satisfied with and the corresponding number of participants who stated that they were least satisfied with that individual.

**Table 7. The legal personnel participants were least satisfied with (in rank order)**

Accused's Lawyer	5 Cases
State Prosecutor	2 Cases
Trial Judge	2 Cases

'I was least satisfied with the defence lawyer, he was disrespectful and unsympathetic.' **(France 1)**

'I was most dissatisfied with the judge who had said that I was responsible for the crime, this was not true.' **(Germany 1)**

'I was most dissatisfied with the prosecution team as I had the expectation that they would be on my side.' **(Ireland 2)**

## 2.9 Trial outcome and sentencing

Participants in this section of the interview were asked how satisfied they were with the final outcome of the trial proceedings and, if the accused was found guilty and sentenced, what their reaction was to the sentence passed down. Participants were also asked if they had prepared a statement of how the rape or sexual violence had impacted on them

(a victim impact statement or its equivalent) and if so whether or not this statement was presented to the court.

### Summary of findings in relation to trial outcome and sentencing

In fourteen of the seventeen cases the outcome of the trial was that the accused either pleaded guilty or was found guilty. More than half of the participants were present in the courtroom when the sentence was handed down. Where a finding of guilt was made participants reported having negative feelings in nine of the fourteen cases.

### Detailed findings in relation to trial outcome and sentencing

In fourteen of the seventeen cases the outcome of the trial was that the accused either pleaded or was found guilty. Nine of the fourteen participants were present when the sentence was read out. The sentencing practice in respect of custodial sentences is outlined in Table 8 below, which features sentence length alternatives and the number of cases where a custodial sentence of a particular length was passed down.

**Table 8. Sentencing practice in respect of custodial sentences**

Length of Sentence	No. of Cases
Custodial sentence of more than seven years	5
Custodial sentence of between three and seven years	3
Custodial sentence of between one and two years	3

In the remaining cases non-custodial sentences were given.

While three participants reported feeling positive about the sentence, nine of the fourteen, representing the majority of participants, reported having negative feelings in relation to the sentence which was passed down.

‘The accused was found guilty but was given a suspended sentence. I wanted him to be put in jail. The sentence was not enough for what he did. People do not take sexual assault very seriously.’ **(France 1)**

Another participant questions the sentencing practices employed in her case:

‘Even though the accused had committed several rapes, because he had not been arrested previously, he was not considered a recidivist. This meant that he could not be sentenced to a higher maximum sentence for re-offending. I felt deceived by the sentence that he was given. It was not the maximum sentence that could be given. The lawyer had told us that the sentence he got was the fashion.’ **(France 5)**

Based on her experience of sentencing practice she wanted to know the answer to the following question;

‘What do you have to have happen to you before the accused will get the maximum sentence?’

Those participants who were positive about the sentence passed down had had no expectation from the outset that the accused would receive a custodial sentence.

‘At first I couldn’t believe that he got a prison sentence, I had been told that he wouldn’t get one.’ **(Germany 1)**

The strongest positive statement in respect of the sentence passed down was made by one participant who stated that:

‘His imprisonment was my liberty.’ **(Belgium 1)**

Three participants prepared a victim impact statement; however, in only one of these cases was the victim impact statement presented in court.

## **2.10 Compensation and participation in civil proceedings**

In this section, participants were asked about whether or not they had sought criminal or civil compensation and if so, whether they had experienced any practical difficulties in obtaining such compensation. Participants were also asked if there were any issues they would like to raise in respect of their experience in seeking compensation, either through the criminal or the civil courts.

## **Summary of findings in relation to compensation and participation in civil proceedings**

Only four participants sought either criminal or civil compensation with three of the four receiving compensation. Participants reported a number of difficulties in respect of obtaining compensation; these were: the 'red tape' involved in applying for compensation, the requirement of showing 'real' injury; and the insufficiency of the amount of compensation awarded.

## **Detailed findings in relation to compensation and participation in civil proceedings**

Four of the participants sought criminal compensation with three of the four receiving compensation.

'The compensation gave me the opportunity to get away. You can get compensation even if you have not gone to court, it is state-funded.'

**(Denmark 1)**

However, participants reported a number of difficulties in respect of obtaining compensation through either the criminal courts or the civil courts. First, one participant noted the bureaucracy attached to applying for compensation and the devaluing experience of trying to obtain even minimal compensation.

'Applying for compensation was more hassle, the forms are very detailed and you need to have kept receipts, it seems so unimportant after what you have been through. In theory you are supposed to apply for it straight afterwards but in reality you are not in a state to do so. For me it was very humiliating and very belittling of my experience to have to run around for a small amount of money. The other thing is that you have to show how much you lost in work, but if you don't have an independent income if you are unemployed, are a housewife or a student then how can you show loss of earnings?' **(Ireland 2)**

Another participant commented on the requirement to show 'real' injury or damage.

'I will try to get some compensation but I don't think that I will be successful. I have no physical injuries which is what they look for.'

**(Germany 2)**

For another participant, the amount of compensation she received was wholly inadequate.

'I got about a quarter of the costs for my lawyer from the state. I had to get a loan from the bank to cover the costs of the case.' (Germany 3)

## **SECTION THREE: POST-TRIAL STAGE**

### **3.1 Overall impact of the trial on the participant's personal life**

In this section participants were asked to rate how their involvement with the legal process impacted on their personal lives. Using the seven-point 'Negative-Positive' Scale, participants rated the impact of their involvement with the legal process on their relationship with their partner (if applicable), on their relationship with their family generally, with their friends and finally the effect on their employment (if applicable).

#### **Summary of findings in relation to the overall impact of the trial on the participant's personal life**

Where participants were employed at the time of the court proceedings they rated their employment as most negatively affected by their involvement with the legal process. Involvement in the legal process had a significantly more negative effect on the family lives of Irish participants when compared to the reported effect on the family lives of participants from the other four selected member states. In contrast, participants from France reported a significantly less negative effect on their families because of their involvement in the legal process than did participants from the other four selected member states.

#### **Detailed findings in relation to the overall impact of the trial on the participant's personal life**

The effect of involvement in the legal process on participants' personal lives was measured using the seven-point 'Negative-Positive' Scale. Participants rated the impact of their involvement with the legal process on their relationship with their partner (if applicable), on their relationship with their family generally, on their relationship with their friends and finally on their employment (if applicable). Here again a score of 1

represents an 'Extremely Negative' and a score of 7 represents an 'Extremely Positive' rating. Thus, the higher the rating the more negative the effect of involvement with the legal process on aspects of the participants' personal lives. See Table 9 below for the mean ratings of the impact of the trial process of the personal lives of the participants.

**Table 9. Mean ratings of impact of trial on participant's personal life**

Aspects of Personal Life	Mean Rating (Scale 1-7)	Standard Deviation
Impact on Employment	1.8	SD=1.87
Impact on Family	1.82	SD=1.08
Impact on Personal Relationship(s)	3	SD=3.46
Impact on Friendship(s)	3.67	SD=1.87

All ratings, on average, were either somewhat negative or very negative. Where participants were employed at the time of the court proceedings, they rated their employment as most negatively affected by their involvement with the legal process. The impact on participants' families was also rated as very negative during their involvement with the legal process.

'What about mediating factors for the survivor, how much of their educational development they have lost, how their ability to relate to others has been affected, how their ability to parent has been affected'  
**(Ireland 6)**

Involvement in the legal process had a significantly more negative effect on the family lives of Irish participants when compared to the reported effect on the family lives of participants from the other four selected member states.<sup>38</sup> In contrast, participants from France reported a significantly less negative effect on their families because of their involvement in the legal process than did participants from the other four selected member states.<sup>39</sup>

<sup>38</sup> See Table M in Appendix 2.

<sup>39</sup> See Table P in Appendix 2.

### **3.2 Participants' perceptions of the fairness of the legal process and their views on whether justice was achieved in their case**

Participants were asked to rate how fair they thought the legal process was, and whether or not they thought that justice had been done as a result of the trial.

#### **Summary of findings in relation to participants' perceptions of the fairness of the legal process and their views on whether justice was achieved in their case**

The majority of participants who had proceeded through the legal process reported that they did not think that they had been treated fairly by the legal process. Irish participants perceived the legal process to be significantly more unfair than non-Irish participants. In contrast, participants from Germany perceived the legal process as significantly more fair than participants from the other four selected member states. Perceived fairness of the legal process was found to be significantly associated with participants' satisfaction with the contact time that they had with the state prosecutor, and with their satisfaction with treatment they received from their legal representative.

The majority of participants whose cases had proceeded to trial did not believe that justice was achieved in their case. A number of participants referred to the injustice of the outcome of the trial and/or the sentence handed down. In addition a number of participants reported that the treatment they received during the course of the trial proceedings led them to believe that the legal process was unduly balanced in favour of the accused.

#### **Detailed findings in relation to participants' perceptions of the fairness and justice of the legal process and their views on whether justice was achieved in their case**

##### ***Participants' perceptions of fairness of the legal process***

The majority of participants, thirteen of the seventeen, reported that they did not think that they had been treated fairly by the legal process. Participants were further asked to rate how fair they perceived the legal

process to be on a five-point scale, with a rating of 1 representing 'Very Fair' and a rating of 5 representing 'Very Unfair'. Thus, the higher the score accorded by participants the more unfair they perceived the legal process to be. The mean rating of how fair participants perceived the legal process to be was 4.19, which would indicate that participants on average viewed the legal process as unfair. Irish participants perceived the legal process to be much more unfair than did non-Irish participants, and this difference was found to be statistically significant.<sup>40</sup> All Irish participants rated the legal process as being very unfair. In contrast, participants from Germany perceived the legal process as significantly more fair than did participants from the other four selected member states.

Statistical analysis was conducted to ascertain which factors were associated with participants' perceptions of the fairness of the legal process. Perceived fairness of the legal process was found to be significantly related to two factors.<sup>41</sup>

First, perceived fairness of the legal process was found to be significantly associated with participants' satisfaction with the contact time that they had with the state prosecutor. Thus, the more satisfied participants were with the amount of time they had in contact with the state prosecutor, the fairer they perceived the legal process to be.

Secondly, perceived fairness of the legal process was found to be significantly associated with participants' satisfaction with the treatment they received from their legal representative. Where participants had their own legal representative and where they reported being satisfied with the treatment they received from this lawyer, the fairer they perceived the legal process to be.

### ***Participants' views on whether justice was achieved in their case***

Six of the seventeen reported that they believed that justice had been achieved in their case. However, the majority of participants, eleven of the seventeen participants whose cases had proceeded to trial, did not believe that justice was achieved in their case. A number of participants

<sup>40</sup> See Table M in Appendix 2.

<sup>41</sup> See Table H in Appendix 2 for a tabular representation of this data.

referred to the injustice of the outcome of the trial or of the sentence passed down.

'I definitely don't think that justice was done, especially in the sentence, even though he had pleaded guilty, he was still given a suspended sentence. Also the fact that I didn't get to tell my side of what had happened.' **(Ireland 1)**

'The final verdict was that the accused was found not guilty, I was disgusted. It was a second rape, but this time a moral one, at the hands of the justice system.' **(France 3)**

Many participants were also critical of what seemed to them to be the partiality of the legal process. A number of participants reported that the treatment they received during the course of the trial proceedings led them to believe that the legal process was unduly balanced in favour of the accused and that made them feel that it was they who were on trial rather than the accused.

'I feel that I was treated as the guilty party and not the victim in all of this. I feel completely betrayed. I still have not accepted this, it is an injustice and I will never accept it.' **(France 4)**

'There were two character witnesses to support him to stand up for him, there was nobody to support me, to stand up for my character.' **(Ireland 1)**

'I couldn't see the Book of Evidence before the trial, this made me feel as if I was the one on trial.' **(Ireland 3)**

### **3.3 Participants' feelings in respect of their participation in the trial process**

Participants in this section were asked whether in their opinion they had in any way been denied participation in the trial and if so in what way. Participants were also asked if they would have preferred to have had a greater participatory role in the trial proceedings.

#### **Summary of findings in relation to satisfaction with the degree of participation in the trial process**

The majority of participants reported that they felt they had been denied participation in the trial process. In addition, a substantial minority of

participants reported that they would have preferred to have had a greater participatory role in the legal proceedings.

### **Detailed findings in relation to satisfaction with the degree of participation in the trial process**

While the minority of participants (n=4) stated that they felt they had been allowed to participate in the trial process, the majority of participants (n=10) reported that they felt they had been denied participation in the trial process.

‘I was completely denied participation in the trial. The whole emphasis was on him defending himself rather than on the state prosecuting him for what he had done. What angered me most was that he had “character” witnesses to say what he was like and yet I couldn’t call someone who would say what kind of a person I was.’ **(Ireland 6)**

One of the participants outlines her reasons why she had not felt she had been denied being able to participate in the trial process.

‘I was a joint accessory in the prosecution, and because of this I had some rights to take part in the trial, and for my lawyer to ask questions on my behalf.’ **(Germany 1)**

A substantial minority of participants (n=8) reported that they would have preferred to have had a greater participatory role in the legal proceedings.

‘Once he had pleaded guilty, my evidence was immaterial. All the way through I was under the impression that I had no right to be there. At the hearing, I wasn’t allowed to speak and I felt like I wasn’t to let anyone know that I was there at all.’ **(Ireland 4)**

### **3.4 Participants’ overall satisfaction with and general feelings in respect of having been involved in the legal process**

Participants were asked to rate how satisfied they were overall with the legal process and to describe how they felt generally about their experience of having gone through the legal process. Participants were also asked to give the reasons for their satisfaction or dissatisfaction with the legal process.

### **Summary of findings of participants' overall satisfaction with and general feelings in respect of having been involved in the legal process**

On average, participants reported having somewhat negative feelings in respect of their involvement with the legal process. Irish participants reported feeling significantly more negative about having been involved in the legal process when compared to participants from the other four selected member states. Participants' feelings in relation to their overall involvement in the legal process was found to be associated with their overall experience of contact with the police, their satisfaction with the treatment received from their legal representative and from the trial judge, their understanding of their own role in trial process and how fair they perceived the legal process to be.

Participants reported, on average, that they were somewhat dissatisfied with the legal process overall. Participants reported experiencing feelings of marginalisation and dehumanisation. Participants, in the main, were dissatisfied with the lack of information about developments in the case and the inordinate delays from the time of reporting to when the case came to trial. Irish participants reported being significantly less satisfied with the legal process when compared to participants from the other four selected member states. Irish participants were very critical of the legal process and expressed a strong sense of disillusionment with the legal system generally.

### **Detailed findings of participants' overall satisfaction with and general feelings in respect of having been involved in the legal process**

#### ***General feelings in respect of having been involved in the legal process***

Participants' general feelings about their involvement in the legal process were measured on the seven-point 'Negative-Positive' scale with a score of 1 representing 'Extremely Negative' and a score of 7 representing 'Extremely Positive'. Thus, the higher the rating the more positive participants felt in relation to their involvement in the legal process. The mean rating for description of general feelings was 3.03. Thus, on average, participants reported having somewhat negative feelings in respect of their involvement with the legal process.

Irish participants reported feeling significantly more negative about having been involved in the legal process when compared to participants from the other four selected member states.<sup>42</sup> All six Irish participants reported having negative feelings. Additional statistical analyses were conducted to ascertain which, if any, factors were associated with participants' feelings in relation to having been involved in the legal process.<sup>43</sup> Five factors emerged as significant. Participants' feelings in relation to their overall involvement in the legal process were found to be associated with:

- (i) their overall experience of contact with the police,
- (ii) their satisfaction with the treatment received from their legal representative,
- (iii) their satisfaction with the treatment they received from the trial judge,
- (iv) their understanding of their own role in the trial process,
- (v) how fair they perceived the legal process to be.

Thus, the more positive their experience of contact with the police, the more satisfied they reported being with the treatment they received from both their legal representative and the trial judge, the better they understood their role in the proceedings and finally the fairer they perceived the legal process to be, the more positive their feelings in respect of their overall involvement in the legal process.

### **Participants' overall satisfaction with the legal process**

Here again, participants rated their overall satisfaction with the legal process on the five-point 'Satisfaction Scale' with a rating of 1 representing a feeling of being 'Very Dissatisfied' and a rating of 5 representing a feeling of being 'Very Satisfied' with the legal process. Therefore, the higher the rating the more satisfied participants reported feeling with the legal process overall. The mean overall satisfaction rating with the legal process was 1.83, thus participants reported on average that they were somewhat dissatisfied with the legal process overall.

<sup>42</sup> See Table M in Appendix 2.

<sup>43</sup> See Tables J in Appendix 2.

Irish participants reported being significantly less satisfied with the legal process when compared to participants from the other four selected member states.<sup>44</sup> All six Irish participants reported being very dissatisfied with the legal process overall.

Once again, additional statistical analyses were conducted to ascertain which, if any, factors were associated with participants' ratings of their overall satisfaction with the legal process.<sup>45</sup> Five factors emerged as significant. Participants' ratings of their overall satisfaction with the legal process was found to be associated with:

- (i) their satisfaction with the contact time they had with the prosecutor,
- (ii) their satisfaction with the treatment received from the prosecutor,
- (iii) their satisfaction with the treatment they received from the trial judge,
- (iv) their understanding of their own role in the trial process,
- (v) how fair they perceived the legal process to be.

Thus, the more contact time they had with the prosecutor, the more satisfied they reported being with the treatment they received from both the prosecutor and the trial judge, the better they understood their role in the proceedings and the fairer they perceived the legal process to be, then the more satisfied they were overall with the legal process.

Participants were also asked to give the reasons for their satisfaction or dissatisfaction with the legal process. The minority of participants who stated that they were satisfied with the legal process reported that being involved in the legal process was a positive experience for them.

'I feel very positive about having gone to court.' **(Denmark 1)**

'I feel very grateful to the justice system and I would wish that all victims would share my experience.' **(Belgium 1)**

It should be noted, however, that both of these participants had legal representatives and strong support teams either in the form of their own personal network or of professional support services.

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<sup>44</sup> See Table M in Appendix 2.

<sup>45</sup> See Tables K in Appendix 2.

In contrast, the majority of participants reported feeling dissatisfied with the legal process. A number of themes did arise in the participants' testimonies; namely, participants reported feelings of marginalisation and dehumanisation, that is, of being objectified by and of not being treated as a person by those individuals who work within the legal system.

### **Feelings of marginalisation**

'I would have liked to have been shown more respect, at times I felt as if there was no-one on my side, apart from my lawyer. In fact I felt that some of the legal personnel were in a league against me, particularly the prosecutor.' **(France 3)**

'You are like a non-entity in the process, from every point of view and at every stage.' **(Ireland 3)**

'I felt like I wasn't important for them. Maybe they were interested in the case, but they were not interested in me.' **(Germany 1)**

'I think it (the legal process) was very much about his (the accused's) rights, I felt as if I had no rights. I was just a witness in everybody's eyes — not anyone important in the trial, just one of a number of witnesses really.' **(Ireland 5)**

### **Feelings of dehumanisation**

'There was no recognition of me in the courtroom except for the time that I was giving evidence. There is no recognition of you as a human being.' **(Ireland 2)**

'You really just become an object in the whole process. Victims are not being treated in a very human way from my point of view. Nobody seemed to be concerned with how I was feeling through the whole experience.' **(Belgium 3)**

Irish participants, in particular, were very critical of the legal process and they expressed a strong sense of disillusionment with the legal system generally.

'It was the worst experience of my life and much worse than the rape itself. The justice system is a game, the truth is not the issue.' **(Ireland 2)**

‘The legal system as it stands now abuses victims.’ **(Ireland 5)**

‘I had put my trust and faith in the legal system; afterwards I felt like I had been abused again but this time by the legal system itself.’ **(Ireland 6)**

### **Participants’ reasons for overall satisfaction/dissatisfaction with the legal process**

The reasons for such dissatisfaction were wide-ranging. However, two reasons stood out in that they were commented on by many participants: lack of information about developments in the case, and the inordinate delays from the time of reporting to when the case came to trial.

‘I was most dissatisfied by the total lack of information, not knowing where to seek advice, an awful lot can be put into place to deal with the system as it stands.’ **(Ireland 2)**

‘I was satisfied with the overall outcome of the process but very dissatisfied with the length of time that the whole process took.’ **(Ireland 3)**

### **3.5 The aftermath of the legal process for the participant**

This was not a distinct section of the interview, but many participants reported on how they felt after the trial process was concluded. For some participants, after the trial was also a very difficult period in their lives in terms of their overall adjustment to what had happened to them.

‘I did find that the time after the trial was difficult for me, I had no identity after the trial, it was difficult to start a day. If I hadn’t received support from others I would not have survived.’ **(Germany 1)**

‘At the beginning I was not humiliated by what had happened. It was actually all the people around me and their attitudes which made me feel humiliated and somehow to blame.’ **(France 5)**

‘I would of course be happier if all this had not happened. My trust in others was broken. My experience very much has an impact on my future relationships, I find it very difficult to trust people. Sometimes I think that this is an insurmountable barrier.’ **(Germany 4)**

'I believe that being involved in the criminal justice system is one of the main reasons why I have not yet reconstructed my life.' (France 5)

### 3.6 The impact of having a victim's lawyer

Once again this was not a distinct section of the interview. The findings presented in this section are based on statistical analyses which were conducted to examine the effect that having a victim's lawyer had on the participants' experience of the both the pretrial and the trial process.

#### **Findings in relation to the impact of having a victim's lawyer**<sup>46</sup>

Having a victim lawyer was found to be related significantly to the following factors:

- (i) with participants experiencing significantly fewer difficulties in obtaining information about case developments,
- (ii) with participants having a significantly clearer understanding in relation to their role at trial,
- (iii) with participants reporting higher levels of confidence and articulateness when testifying,
- (iv) with participants rating the attitude of the accused's lawyer as significantly less hostile,
- (v) with participants being more dissatisfied with treatment they received from the state prosecutor.
- (vi) with the impact of the trial process on participant's family being significantly less negatively effected,
- (vii) with participants being overall significantly more satisfied with the legal process than were participants who did not have their own legal representative during the trial process.

In addition, where participants had their own legal representative then it was typically he or she who acted as the source of information regarding the detention decision and in respect of more general information about developments in the case.

<sup>46</sup> See Table L in Appendix 2.

## **SECTION FOUR: RECOMMENDATIONS FOR REFORM**

### **4.1 Whether the participants, given their experience, would report/be involved in a prosecution again**

Participants were asked whether, given their experience of the legal process, they would report a sexual offence again and whether, if they chose to report, they would participate in the trial process.

#### **Findings in relation to whether the participants, given their experience, would report/be involved in a prosecution again**

The majority of participants, that is sixteen out of the twenty participants in the total sample, stated that they would report a rape or sexual violence again and would, once again, participate in a criminal prosecution.

### **4.2 The advice the participant would give to other victims of rape or sexual violence**

Participants asked what their advice might be to another person who was the victim of rape or sexual violence.

#### **Findings in relation to the advice the participant would give to other victims of rape or sexual violence**

Eleven participants stated that they would advise another person to make a report to the relevant authorities.

'I would tell another person who came to me for advice, to report and to report with no hesitancy.' (**Germany 2**)

Three participants reported that they would tell another person who had been sexually victimised to seek professional psychological support before deciding what they should do.

'I would provide another person with the names and addresses of the support services that I found useful and I would accompany them to the centres.' (**Germany 1**)

One participant stated that she would advise another person to engage in civil proceedings but only after they had sought professional psychological support.

'I would advise someone to go through the legal process, especially in a civil case because then you have more of a say, but only if you were mentally prepared for what was going to happen.' **(Ireland 5)**

While two of the participants reported that they would advise someone else not to report.

'If someone came to me for advice I would tell them never to report.'  
**(Germany 3)**

'I wouldn't advise someone to report unless they were severely physically injured.'  
**(Ireland 3)**

### **4.3 Participants' recommendations for reform of the legal process based on their experience**

Participants provided their assessment of the needs of victims of rape and how in their view those needs could and should be met. These recommendations will be presented under the following headings; participants' recommendations regarding the pretrial process, the trial process and the post-trial stage. Participants' recommendations on general issues, on social issues and finally on specific legal issues will also be presented.

#### **Participants' recommendations for the pre-trial process**

##### ***Reporting: police environment and attitude***

Participants called on women and men who had been raped and sexually victimised to report so that the true incidence of rape and sexual violence in our society would become known. One participant recommends that 'If they don't want to make a formal report, they should write down their experiences and submit them anonymously.'  
**(Germany 4)**

Participants asked that police take a complaint of rape very seriously. 'Rape is a very serious crime and they should investigate it as much as a murder.'  
**(France 2)**

Participants recommended that the police communicate with victims to a greater degree than they had done in their cases. One participant stated that she would have been more satisfied 'If they would have just phoned me before they came to visit and not just shown up at my door.' (**Denmark 1**)

A number of participants called for the general environment in police stations to be improved, with increased emphasis on sensitivity and privacy. 'A special room should be put aside for interviewing victims in police stations. If this is not possible then there should be special units in larger stations, a police officer from your station could accompany you to this special unit.' (**Belgium 4**)

Finally one participant asked that measures which have been introduced for children, such as the videotaping of the first report, to be applied to all victims. (**France 5**)

### ***Medical examination: environment and attitude***

Participants' recommendations in respect of the forensic medical examination were twofold. First, the need for specialised training: 'Those doctors conducting the medical examination should be trained and practising gynaecologists.' (**Denmark 1**).

And secondly, that ' . . . conditions in hospitals or wherever the medical examination takes place be improved and made more accommodating for victims.' (**France 2**)

### ***Support services***

The general recommendation was that more psychological support should be available for victims of rape and sexual violence. Participants asked that the police at the time of reporting should provide information about services which the victim can contact. Alternatively, participants suggested that there could be 'some kind of service which the victim can contact, the service would be kept up to date by the police. Not everyone can access the information that they want or need. This service could send you information, give you phone numbers, addresses of associations' (**France 2**). In addition, participants asked that ' . . . a

support person, either a counsellor or a social worker, should be available or be on call when you report. Counselling for victims should be state-funded and should be available as soon as possible. Participants reported that 'it was difficult being put on a waiting list, because it meant that you don't get the help you need when you actually need it.' **(Ireland 3)**. Participants also called for '. . . better support systems to be put into action and preparation for victims who are going through the legal process.' **(Ireland 4)**

There should be also be an emphasis on post-trial counselling. 'Things don't automatically improve after the legal process has ended.' **(France 4)** Finally, participants called for 'psychological support to be made available for the people who surround the victim, her family and her friends, as they need help also.' **(Belgium 3)**

### *Availability of information*

The majority of participants recommended that information need to be more readily available in respect of any developments in the case and out of a sense of consideration and respect for the victim. 'Victims should receive regular information about the progress of the case. This should be provided automatically and not only at the victim's requests for such information.' **(Belgium 4)**. Participants called for access to the 'Book of Evidence' or the 'Dossier'. They asked for sufficient notice of hearing and trial dates.

### *Preparation for the trial*

A number of participants called for a simple handbook/leaflet 'which would contain the basic legal terms and procedures and information about being a witness.' **(Ireland 2)**. One participant recommends that victim/witnesses should have the opportunity to meet with whoever is presenting the case, at least on one occasion before the trial itself. 'Then they would have known me and my situation and I would have known them, I would have felt then as if they had been arguing on my behalf. I would have liked to have been better prepared for the case' **(Ireland 1)**.

### *The role of the victim's lawyer*

Participants stated that ' . . . there is a great need for victims to have a lawyer or legal adviser representing them when they are making their statement' (**France 2**). There should be a mediator between victims, the law enforcement agency and the prosecuting authorities. 'Something such as a victim's lawyer who can mediate on the victim's behalf' (**Ireland 2**). Participants request ' . . . A lawyer to represent you, someone that you could contact, would go a long way in ensuring that you feel involved in the case' (**Ireland 4**). I would have liked to have someone to represent me, someone who knew me as a person. Then I wouldn't have been as afraid as I was' (**Ireland 1**). Participants also recommend that ' . . . there should be more dialogue between victims and their lawyer' (**France 4**).

### *Length of process*

Participants called for ' . . . delays in cases coming to trial to be reduced' (**Ireland 3**). One participant recommends that ' . . .the process should take six months maximum' (**Germany 4**).

### *Inclusion of the victim*

'Victims need to be included from the beginning to the end. It is not an event outside your life, it is your life and you are consumed by it' (**Ireland 4**). Participants also recommended that ' . . . victims should have more of a decision-making role in the whole process' (**Ireland 5**). Participants asked that contact with legal personnel could be on a more personal level taking into account the experience that victims have gone through. ' . . .There should be more contact with the prosecution especially, so that at least they would understand who I am and what has happened to me' (**Germany 1**).

## **Participants' recommendations for the trial process**

### *Presence of the accused*

Participants recommend that there should be ' . . . Increased sensitivity to the needs of victims by providing separate facilities for victims in the courthouse.' (**Ireland 2**). Participants also ask that they ' . . . would not have to meet the accused before the trial begins' (**Denmark 1**). In respect of the presence of the accused in the courtroom, participants

have noted that ‘. . . it would be a good idea to use a screen in the courtroom’ (**Denmark 1**). In addition, participants request that in the courtroom ‘. . . sufficient physical distance should be left between the victim and the accused’ (**Belgium 1**).

### *Issues raised during trial*

Participants asked that there should be ‘. . . more focus on the impact that the crime has on the victim’s life,’ (**Ireland 6**), and there ‘. . . should be less focus on the accused’s character both during the investigation and at the trial’ (**Ireland 6**). Participants called for ‘. . . more control over the questions that the defence lawyer is allowed to ask you’ (**Germany 2**). One participant stated that ‘. . . even if the woman was to blame in some way, judges and lawyers should behave and react more objectively, they do this for the accused so they should do this for the victim also’ (**Germany 3**). A number of participants recommend that ‘. . . victims should not be put in the position of the accused’ (**Germany 3**).

### *Support personnel*

Participants recommend that ‘. . . victims need to receive more protection from the police and also be allowed to have a support person in the courtroom while they are testifying’ (**Germany 3**).

### *Court arrangements*

Participants also request that there be ‘. . . better space arrangements in the courtroom’ (**Belgium 1**) and that there should be ‘. . . tighter restrictions on who is present when the victim is testifying’ (**Ireland 3**).

## **Participants’ recommendations in relation to the post-trial stage**

### *Sentencing and treatment of the accused*

Participants request that ‘. . . in sentencing, if someone has committed a second offence, then that should be given huge consideration. The accused’s previous record should be a much bigger issue than it is at the present’ (**Ireland 5**). In addition, participants make the recommendation that the ‘. . . sentences which are given should be served, as very often the offenders don’t serve the full sentence’ (**Belgium 3**). Participants call for ‘. . . Follow-up treatment with sex offenders after

sentencing (**Belgium 3**), and that such ‘ . . . treatment for offenders should start at the earliest possible time, and it is of questionable efficacy. The question is what do you do with high risk offenders. There is no solution really — except perhaps a life sentence’ (**France 5**).

### **Participants’ recommendations in respect of general issues**

#### *Training of legal personnel*

Participants ask that ‘ . . . everyone from the police to the court personnel who are dealing with these cases should have training. We need to raise consciousness for how it is that victims feel and that victims must be treated humanely’ (**Ireland 4**). ‘The professions who work in this area such as the police should be specially trained to work with victims of sexual crimes and only those with special qualifications should work with these cases’ (**France 1**). Participants recommend also that ‘ . . . training should be made available for all those who take reports, carry out examinations and assessments on cases involving rape and sexual offences’ (**France 5**). ‘All the legal personnel should be properly trained to listen to and to decode the victim’s account. Not every court or judge has a real understanding of what it is like for the victim’ (**Belgium 1**). Participants request that ‘ . . . judges and lawyers should also think very much about their judgment and about what they say during the trial before saying it’ (**Germany 1**).

### **Participants’ recommendations in respect of social issues**

‘Society’s attitude to and stereotypes of women need to change. Women should be shown differently in the media, it should not be acceptable to use a woman’s body to sell things’ (**France 5**). Participants recommend that ‘ . . . the law should be harder against those who commit sexual assault. People do not realise that it is a very difficult experience, it can be very negative and can sometimes break the life of the person. It is a violence against the person’ (**France 1**). ‘In general, victims should be better listened to and better consideration taken of their experiences, what it is they have been through’ (**France 5**). Participants request that ‘ . . . more information should be available about the circumstances of victims generally, that is real information should be available, not the myths’ (**Germany 1**). And finally one participant

recommends that ‘ . . . there should be much greater protection for the children of victims of sexual violence who can also suffer greatly’ (**Germany 4**).

### **Participants’ recommendations in respect of specific legal issues**

Participants recommend that ‘ . . .there should be no statute of limitations for the prosecution of child abuse and incest cases’ (**Belgium 2**). Finally, participants recommend that ‘ . . . rape in marriage should be treated the same as rape outside of marriage’ (**Germany 2**).

## **4.4 A summary of the experiences of Irish participants when compared to the experiences of participants from the other four selected member states**

### *Summary of findings*

When compared with participants from the other four selected member states, Irish participants

- (i) rated the attitude of the chief police interviewer significantly more positively,
- (ii) reported feeling significantly less confident when testifying,
- (iii) reported feeling less articulate when testifying,
- (iv) rated the defence lawyer as more hostile,
- (v) rated the trial judge as having a more positive attitude towards them,
- (vi) reported that involvement in the legal process had a significantly more negative effect on their family life when compared to the reported effect on the family life of participants from the other four selected member states,
- (vii) perceived the legal process as significantly less fair,
- (viii) reported feeling significantly more negative about having been involved in the legal process and finally,
- (ix) reported being significantly less satisfied overall with the legal process.

## Chapter Five

# Study of the Legal Process: Methodology and Definitions

### 1. Methodology of study

#### How the study was conducted

This study proposed to examine the different laws and procedures on rape in each of the 15 member states of the EU. It was proposed to conduct a detailed examination of the laws in five selected states; Belgium, Denmark, France, Germany and Ireland. These are also the five states in which interviews were conducted with victims of rape (see chapters three and four). For the remaining 10 states, it was proposed to provide only an overview of the relevant laws and procedures.

A legal questionnaire was drawn up addressing the following areas within the legal process: (1) the law on rape; (2) pre-trial procedures; (3) the trial itself; (4) separate legal representation; (5) post-trial; (6) statistics; and (7) reform. This questionnaire is reproduced in appendix three. It was circulated to legal experts in each member state. A postal response was sought from the experts in 10 countries; the questionnaires, however, were completed during interviews with the legal experts in the five selected countries.

The legal experts in each of the 15 countries were carefully identified, and personal contact was established with each of them before the questionnaire was sent to them. Two experts were selected for each country: one legal academic, and one representative of the Ministry for Justice. This was done to ensure that both an independent academic view and an official state perspective would be gained from each country. A total of 30 legal questionnaires were therefore sent to legal experts. There was follow-up communication with all the experts, and where questionnaires had not been returned within a given time, communication was again made with them. In total, a full set of responses was received to 25 out of 30 questionnaires.

All of the 10 questionnaires sent to experts in the five selected countries were completed during interviews conducted with the experts. The 20 respondents selected from the other 10 countries were asked to return a set of responses by post or e-mail, and a total of 15 full responses were received in this way. At least one completed questionnaire was returned from each country except Greece, although some information on relevant Greek law was provided by the legal academic in Greece, through the Ministry for Justice. All the responses were received in English, except for those from Greece and Spain which were translated. A full list of the legal experts who participated in the study is presented in appendix four.

In chapter 11 of this report, an overview is presented of the laws and procedures pertaining to rape in 10 countries, based on the information gathered from the responses received from the 15 participants. While it is useful to see at a glance what the basic position is in each of those countries, more detailed information on the practical implementation of the law was sought from the five selected countries.

It was, therefore, considered important to conduct interviews with the legal experts in each of the five selected countries, in order to gain a better understanding of the operation of each legal process. These interviews were conducted during face-to-face meetings with the experts. At the meetings with the Ministries for Justice in France and Ireland, a number of legal experts were present from the Ministry. The meetings were all conducted by the same interviewer through English, except for the meeting with the Ministry for Justice in France, which was conducted by the same interviewer through French. Assistance was provided with translation at that meeting.

Additional interviews were then conducted with legal practitioners and other professionals in each of the five selected countries. Representatives of the police and the prosecution authority, members of the judiciary, victims' lawyers and defence counsel were questioned as to their perception and experience of the legal process relating to rape. These interviews were conducted by a number of interviewers, either through English, French or German. Given the differences between the legal systems studied, these interviews were not conducted with exactly corresponding personnel in each legal system. For example, although

victims' lawyers were interviewed in the other four systems, there is no equivalent of the victims' lawyer in Ireland.

The detailed information received on each of the five selected countries is presented in chapters six to 10 of this report, with a separate chapter provided for each country.

### **Rationale of methodology**

This study is not intended to provide simply an overview of the law on rape in different EU member states. Rather, it is intended as a qualitative investigation of the operation of the legal processes in practice. For this reason, it was considered important to ascertain the views of professionals working within the system, as well as those concerned with devising and analysing laws. There is clearly a danger inherent in this approach, that subjective opinions will be presented as objective truths.

It is not intended that the information provided should necessarily be regarded in this way. However, feminist methodology within legal scholarship has questioned traditional assumptions about universality, objectivity and neutrality, and has prioritised the experience of the individual within the process as worthy of study. This method, adopted by MacKinnon (1982, 1983), has been described as the experiential/epistemological approach in criminology. Smart (1995: 171) sees it as being based upon the claim that women's experience must be revealed and communicated, in order to transform the form and content of the law.

Through the use of this methodology, Hahn-Rafter and Heidensohn (1995: 7) describe how feminist perspectives on crime have achieved the development of new theories about, and policies for, women both as offenders and as victims. Duncan (1994) argues that the analysis of laws on rape and sexuality, in particular, has been assisted greatly through the challenge which feminist methodology poses to the dominance of male discourse and the male legal subject within the law. She asserts that rape law has traditionally denied subjectivity to the individual female victim. Thus, analysis based on women's experiences of the legal process as victims can provide a different approach to law reform, based on a victim-centred model.

For these reasons, the experience of different actors within the legal process in each member state was examined, and an attempt was made to fuse the perspectives of the professionals with the responses received from legal experts as to the laws and procedures on rape. In this way, a more comprehensive picture was developed of the operation of the legal processes on rape in each of the five selected countries studied.

However, a number of different themes emerge from the individual jurisdictions. First, some obvious distinctions may be identified between those systems with an adversarial mode of trial, and those with trials based upon an inquisitorial model. These distinctions are discussed in part two of this chapter, below. Further, in all of the jurisdictions, issues arise around the definition of rape. It is therefore proposed to make some observations about the development of the definition of rape in part three of this chapter.

## **2. Different legal systems: comparative study**

Most EU jurisdictions, such as Belgium, France and Germany, may be described as possessing legal systems based on an inquisitorial model (usually associated with a codified system of laws). By contrast, the common law legal systems of England and Ireland are based upon an adversarial model. Denmark, unusually, possesses a hybrid legal system, based on codified law, but with a trial process which retains features of the adversarial system.

It is difficult to present a comparison of adversarial and inquisitorial legal systems, especially as there are many differences even among those jurisdictions which are said to possess the same system (the US system, for example, differs substantially from that of Ireland, although both are based on the adversarial model). The adversarial system may be characterised in its classical form as a contest between two equal parties, seeking to resolve a dispute before a passive and impartial judge, with a jury pronouncing one version of events to be the truth, whereas the inquisitorial system may be described as the investigation of an event and the persons involved in that event by the state with a view to establishing the truth. In this system, the state is doubly present in the

'fact-collecting' prosecutor on the one hand and, on the other, an impartial judge actively involved in truth-finding.

Within the adversarial system, it is the duty of the prosecutor to bring a case to court and prove the defendant's guilt. At trial, the judge acts as umpire, listening to the evidence presented by the prosecution and defence through their examination of witnesses. The judge is bound to ensure that proceedings are conducted according to the law, and that the jury announce their decision on the facts at the conclusion of the case. A 'complex web of rules of evidence' (Sanders and Young, 1994: 9; McEwan, 1992) applies in adversarial trials which, while it protects the rights of an accused, may sometimes hamper the search for the truth (Sanders and Young, 1994: 9).

While there is some disparity between the different jurisdictions which use the inquisitorial model, the initial investigative function is generally carried out by the police and public prosecutor. However, the preparation of the *dossier* (pre-trial book of evidence) is carried out by the *juge d'instruction*, an examining magistrate who possesses wide investigative powers, and for whom no equivalent exists in the adversarial system (Sanders and Young, 1994: 7). The duty of the *juge* is to conduct a search for the truth; he or she must investigate facts favourable both to the prosecution and the accused. However, while the presumption of innocence is viewed as inherent in the French Declaration of the Rights of Man and the Citizen (Radin, 1948: 99) the investigative powers of the *juge d'instruction* have been described as being so broad that they encroach upon this presumption.

In inquisitorial trials, the key principles which apply in relation to evidence are that of *intime conviction* (the judge and/or jury must be convinced of the truth) and free evaluation of evidence (strict evidential rules do not apply, but all the relevant evidence must be considered). The system of examination of witnesses is also very different, since questions are usually asked of witnesses through the trial judge.

The role of the victim is regarded very differently in the two systems. In inquisitorial systems, the victim has a well-established right to legal representation where she becomes a party to the case (this is known as the *partie civile* procedure in Belgium and France). The victim's lawyer

provides her with information on the progress of her case and may intervene on her behalf at trial. Once she becomes a party, the victim is no longer required to give evidence as a witness at trial. By contrast, victims within the adversarial process have no entitlement to direct involvement with the proceedings, other than through giving testimony as a prosecution witness, or through input at the sentencing stage by means of the victim impact statement.

The difference in approach to the role of the victim in the two types of system is particularly interesting to examine from a comparative perspective. The norm of victims' entitlement to legal representation in the inquisitorial system can provide a useful model for the increased participation of victims in the legal process within adversarial systems.

### **3. Definitions of rape in different legal systems**

While some common law jurisdictions use a codified system of law, and judges' decisions can create precedent within inquisitorial systems, the adversarial mode of trial is generally associated with common law systems, in which the doctrine of precedent applies (i.e. judges' decisions in individual cases create legally binding principles). The inquisitorial trial model is associated with a codified system of law, within which the judge lacks the same level of lawmaking power. Judges in the adversarial/common law model are appointed from among the ranks of senior practising lawyers, whereas law graduates train to be career judges in inquisitorial/codified systems.

In common law systems, the definition of rape is contained in legislation, and judges' decisions continue to play an important role in developing and refining it. By contrast, in codified systems, more detailed definitions of rape and other sexual offences are provided in the criminal or penal code, and amendments to the code may only be inserted by the legislature, although of course the code is open to interpretation by judges.

#### **Definition of act of rape**

In both types of system, the definition of rape has evolved historically in a similar way. Rape was originally seen as a crime against property,

or a crime against the man who 'owned' the victim. The word derives from the Latin 'rapere' (to seize) and 'raptus', the term used to describe the seizure of persons or property. Rape was traditionally seen to have the effect of depriving a father of a valuable property right in the successful marriage of his daughter, and of depriving a husband of the exclusive sexual enjoyment of his wife's body (O'Malley, 1996: 3). Originally, Adler (1987) writes that laws prohibiting rape were concerned primarily with the rape of virgins. Rape was only deemed to have occurred where there had been full penile-vaginal penetration, and emission of semen. This requirement was abolished in most jurisdictions in the nineteenth century, although the need to prove some penile penetration of the vagina still persisted until recently in most European legal systems. This preoccupation with penile-vaginal penetration has been seen as representative of a phallocentric or male perspective on law (Smart 1990: 201-2).

Alternative definitions of sexual offences, based on a 'continuum of harm' approach, have been proposed or adopted in some jurisdictions. McColgan (1996) and Temkin (1986) discuss the possibility of introducing a graded series of sexual assaults with a sliding scale of punishment, like that introduced in the US by the Michigan Criminal Sexual Conduct Act, 1974. The four degrees of gravity of sexual offences were differentiated in the Michigan statute according to the amount of coercion used, whether or not penetration had taken place, the extent of physical injury inflicted, and the age and incapacitation of the victim (Temkin 1986: 28).

The Michigan reform did not result in increased reporting levels, but the rate of arrests and convictions increased, and the treatment of victims within the legal process was also improved (Temkin 1986: 29). A similar scheme was introduced in Canada in 1982, replacing the crime of rape and creating in its place three offences of sexual assault. No distinction was drawn between penetration and other sexual acts; the grades were distinguishable purely in terms of the level of violence involved. Punishment, likewise, was graduated and ranged from six months to life imprisonment, based on the aggravating factors present (*ibid.*).

The 'continuum of harm' approach has also been adopted recently in the German criminal code (see chapter nine). The distinction between rape and sexual assault has been abolished, and one offence of 'sexual coercion; rape' has been created, defined to include a graded series of aggravating factors. However, this approach has been criticised strongly by practitioners, who argue that prosecutors will always charge under the less serious end of the scale, and so the number of convictions for rape will be reduced.

The approach which is favoured in most European jurisdictions is to maintain the distinction between acts involving sexual penetration, and other types of sexual assault; but to broaden the definition of 'penetration' to include, for example, anal or vaginal penetration with an object. Thus, the injury caused to victims by different types of penetration is recognised as being equivalent to the injury traditionally seen to flow from penile penetration, within the historical definition of rape.

### **Consent**

Historically, rape could not be proved unless there was evidence of the physical resistance by the victim to the assault on her body. There is no longer any need for the prosecution to prove physical resistance in any EU jurisdiction, but absence of consent must still be proved in other ways. In England and Ireland, the definition of rape is expressly premised on an absence of consent but 'consent' itself is not defined. In other European countries, the absence of consent must be proved according to the definition in the Code, usually through establishing the existence of force, coercion, violence or threats.

The attitude appears to persist in all jurisdictions that there should be proof of some resistance by the victim, in order to establish the absence of her consent. The emphasis in consent-based definitions of rape places the focus of the legal process almost entirely on the victim, and almost incidentally on the defendant. Estrich writes that the question of non-consent, the *sine qua non* of the offence, is focused upon the response of the victim (1986: 1094).

Some attempts have been made in other non-EU countries to find alternative definitions of rape which do not require that the prosecution prove absence of consent. For example, the Canadian Code, as

amended in 1992, provides that the *accused* must show that consent was given, either through words or conduct, by the victim (Coates *et al.*, 1994).

Alternative definitions may also be adopted which focus less on the circumstances within which the crime was committed, and more on its consequence for the victim; Rush and Young (1997) suggest a model definition, based on voluntary sexual penetration of the victim causing injury. The focus of this offence is on the injury or harm caused to the victim by the defendant's voluntary act, rather than on whether or not she consented to the act. However, it may sometimes be difficult to establish the existence of injury, other than in terms of the absence of consent.

In those European jurisdictions based upon a codified system of law, the definition of rape includes within it a list of the circumstances in which the sexual act is deemed to have been committed forcibly (i.e. without the victim's consent). The advantage with this approach is that the law on consent has greater clarity, but difficulties arise when the list is not sufficiently exhaustive. Moreover, the focus of the legal process is still directed at the circumstances in which the act is committed, and the response of the victim, rather than at the conduct of the defendant.

### ***Mens rea* for rape**

The focus of the legal process is, however, directed at establishing the mental culpability of the defendant. In common law/adversarial jurisdictions, strict rules apply to the tests whereby the *mens rea* of the defendant may be established. By contrast, within inquisitorial systems, the general principle of free evaluation of evidence applies, so that there is less debate about the exact test for *mens rea*.

In England and Ireland, the defendant is guilty if he intended to rape, or was reckless as to whether or not the victim was consenting. A subjective test is used to establish recklessness in both jurisdictions, based upon the House of Lords' judgment in the English case of *DPP v. Morgan [1976] AC 182*, in which it was held that an honest but unreasonable belief by the defendant in the victim's consent constitutes a defence. This is often referred to as the 'mistaken belief' defence,

which has been described by some as a 'rapists' charter (see O'Malley, 1996: 56).

The subjective *Morgan* test still applies to *mens rea* in England and Ireland, although legislation in both countries now provides that the jury should have regard to the reasonableness of the defendant's belief, in assessing whether or not it was genuinely held. However, in other common law jurisdictions an objective standard has been adopted in rape cases. For example, Estrich writes that: 'American courts have altogether eschewed the *mens rea* or mistake enquiry as to consent, opting instead for a definition of the crime of rape that is so limited that it leaves little room for men to be mistaken, reasonably or unreasonably, as to consent.' (1987: 1096). In Canada, too, the defence of mistaken belief has been limited, so that the defendant cannot argue it where he has failed to take reasonable steps to ascertain that the victim was consenting (section 273.2(b), Criminal Code).

Even in jurisdictions which have retained a subjective test for the offence of rape, the creation of an alternative, less serious offence of 'negligent rape' has been suggested, which could be applied in cases where the belief of the accused was genuine but unreasonable (O'Malley 1996). This option has not been pursued by legislators in England or Ireland, although it has been proposed in a number of other common law or adversarial jurisdictions. For example, the creation of a new offence of 'unlawful sexual penetration by negligence' was recommended in the 1996 Model Criminal Code proposed for Australia in 1996 (Attorney General's Office, 1996). In Denmark, the introduction of an offence of negligent rape has also been proposed by victims' groups.

Although there is less debate on the relevant test for *mens rea* in inquisitorial systems, significant definitional issues arise in all of the jurisdictions studied. Indeed, in most EU countries, the definition of rape has either been recently reformed, or its reform is currently under review.

In the chapters which follow, a detailed account is provided of the definition of rape, and other laws and procedures pertaining to rape, in individual EU member states, and the themes which have been raised in this chapter and in chapter two are addressed in relation to each jurisdiction. A summary of the findings and recommendations based on this study may be found in chapter one.

## Chapter Six

# The Legal Process: Belgium

### SECTION ONE: THE LAW ON RAPE

#### 1.1 Definition of rape (*viol / verkrachting*)

In Belgium there are two types of sexual offences, contained in Articles 372 -375 of the *Code pénal* : rape and sexual or indecent assault (*attentat à la pudeur*). Rape is defined in Article 375 of the *Code pénal* as any act of sexual penetration committed on a person over 16 who does not consent; consent is deemed to be absent when the act is imposed by means of violence, force or by a trick, or if the victim is suffering from a physical or mental disability. This definition was introduced on July 4, 1989, after several years of debate, and it now provides that men can also be victims of rape. Sexual intercourse with a child under 14 years is statutory rape.

Sexual assault on an adult is a *délit* (minor offence or misdemeanour), carrying a penalty of six months to five years' imprisonment, but rape is a *crime* (felony) which carries a maximum penalty of 10 years' imprisonment. Both men and women can be convicted of rape.

#### 1.5 – 1.6 Minors as offenders

Those offences committed by minors (under 18 years of age) are not regarded as convictable offences, under the Youth Code. Instead, the perpetrators are dealt with in the Juvenile Court and are not held responsible for their actions, but 'protective measures' may be imposed, where they are shown to have committed an act which would be criminal if committed by an adult. Those between the ages of 16 and 18 can be transferred to adult courts in exceptional cases, where a judge says that protective detention is insufficient.

#### 1.9 – 1.10 Marital rape

The 1989 *Code pénal* also introduced the concept of rape within marriage; while changes had been introduced in 1979 it was only in 1989

that an actual definition was inserted in the *Code*. Prior to this judge's used the term 'non-acceptable intercourse'.

### 1.11 – 1.12 Categories of rape

There are distinctions made between categories of rape under Article 377 of the *Code*: between ordinary and statutory rape; rape with violence and rape without violence; and rape which is committed with abuse of authority and rape which is not. The *Code* gives an exclusive list of aggravating factors, although a broad interpretation can be given by judges to those factors listed in the *Code*. The sanctions may alter depending on what aggravating factors are present. There is, however, no list of mitigating circumstances; these are left to the judge's discretion.

### 1.13 – 1.14 Time limits

In relation to time limits, a distinction is drawn between *délits* and *crimes*. A *crime* comes within the competence of the *Cour d'assises*, which is a jury court, whereas *délits* are tried before the *Tribunal Correctionnel*. The limitation period for prosecution of a *crime* is 10 years, but for *délits* the limitation period is five years. In cases of child sexual abuse, time begins to run from when the victim reaches the age of 18 (*Code d'instruction criminelle*, Art. 21 bis). However, where an investigation has been commenced but no charge has been brought within five years from the date of an alleged offence, the judge may then agree to extend the limitation period for another five years, so even in the case of a lesser offence the time limit can be extended to 10 years.

A particular problem exists in relation to limitation periods in rape cases. Where the accused has no criminal record, the prosecutor or judge may decide, after the investigation, to remit the rape charge to a lower court, the *Tribunal Correctionnel*, through a process known as *correctionnalisation*. Because of the change in jurisdiction entailed, the rape is effectively downgraded to a *délit* and the limitation period thereby reduced from 10 to five years.

The unfortunate result is that the investigation may then be abandoned, if the offence happened more than five years previously. There is an

ongoing debate about extending the time limits for the prosecution of offences in Belgium. This is a very topical issue since the high profile *Dutroux* case (see the Report of the *Enquête Parlementaire: Commission Dutroux*). The parents of the victims of *Marc Dutroux* have been quoted as saying that 'The victims will have life-long consequences; so should the perpetrator'. Indeed, Belgium may be in breach of the European Convention of Human Rights because of the very strict limitation periods which apply for the prosecution of criminal offences.

## SECTION TWO: PRE-TRIAL

### 2.1 – 2.3 Reporting of rape

The police have responsibility for receiving reports of rape. There are three different police forces in Belgium: the *Gendarmerie* who are the national police; the *Police communale* who have local jurisdiction only; and the *Police judiciaire* who deal only with prosecution of crimes. Apart from the police, a victim can also report to the *procureur* (prosecutor) at the *parquet* (public ministry), or if she wishes to become a *partie civile* she can make a complaint directly to the *juge d'instruction* (examining magistrate).

Most of the time the victim will report to the *Police communale* or the *Gendarmerie* because they are more accessible. Where a victim reports to *SOS Viol*, the rape crisis centre, then there is the possibility that she will be personally referred to an officer of the *police judiciaire*, who are located in the *Palais de justice* in the same building as the *procureur* (prosecutor), or more likely a personal referral will be made to a unit of the *gendarmes*. The advantage of having several reporting options is that the victim can choose to whom she reports. However, problems may occur where one police force attempts to keep control of the investigation and not pass on information.

Problems occurred in the past over the recording of complaints by the police, but changes appear to have been made to ensure that all complaints are now treated seriously; there is a legal requirement that the police report all complaints to the *juge d'instruction*. Also, since the introduction of the specialist training programme within the *Gendarmerie* (see

below), hospitals will encourage victims to get in touch with named persons within the *Gendarmerie*.

Those factors which discourage the reporting of rape in Belgium include the small number of women police officers within the *Gendarmerie*. Delay in prosecution can also discourage reporting; the average time for a case to come to court is six months to one year. If the offender is detained in custody, the case is speeded up, but if he is not, it can take one to two years for a case to come to court. The delay is especially difficult for victims where the case involves sexual abuse within the family.

Where a rape is reported by a child (under 16), a special system is being introduced to interview the child on video, with a psychologist or other specialist present. Interviews with child victims are conducted at a special unit known as *Le local 'Serge Creuz'*. Older victims could also be interviewed there, but the system is not yet fully available for adults.

In the case of those children under 16, the *Procureur* (Chief Prosecutor) always decides whether a video recording of the interview will be conducted to ensure that the child need only be interviewed once. This pilot project was started one year ago, again with the assistance of psychologists. There are varying opinions as to whether the psychologist's report should be presented at the trial, although this report does go into the *dossier*. The police can sometimes be antagonistic towards psychologists, because if the victim goes to the psychologist first, this can cause delay in her reporting of the crime to the police, which can hamper the investigation and the prosecution.

Finally, there is a particular problem in the reporting of rape in Belgium, due to language policy. The two official languages of Belgium are French and Flemish, and German is also used in some parts of Belgium. If the victim speaks Flemish she can report the rape in Flemish and be interviewed in Flemish, but the language of the trial is determined by the language spoken by the accused; the victim must choose a lawyer who can speak the language of the trial. If the victim is questioned during the trial, it will be in her own language and a translator will be provided automatically by the court.

## 2.4 – 2.7 Police training

The police schools are beginning to provide specialist training for all three police forces on victim assistance, the interrogation of minors and dealing with victims of assault, although courses on sexual assault are not made mandatory, but are only available on request. There is one school in Brussels which has been in existence just over a year, and training is also available in Ghent and Bruges.

As the police have only started providing specialised training, a victim may be lucky if there has been an initiative taken by the police chief of a specific force. However, as the specialist training is optional, those members who need it most are unlikely to receive it. The *Gendarmerie* tend to be better trained, and have taken more initiatives in this area. For example, the *Groupe de travail agression physique et sexuelle / Werkgroep fysieke en seksuele agressies* is a group of 35 *gendarmes*, both men and women, who organise training on how to talk to children and other victims of rape and violence within the family. This Group has been highly influential in the development of training programmes in Belgium and elsewhere, specifically on dealing with child sexual abuse.

The *Franchimon Commission*, a Commission established by the government to initiate general reform of the criminal justice system, is currently drawing up procedures on the reorganisation of the police forces, and the concept of a unitary force has been mooted. Policy is also being developed to address the needs of victims of physical and sexual violence, although many changes, such as those initiated within the *Gendarmerie*, are being made from the bottom up rather than from the top down.

## 2.8 – 2.11 Medical facilities

There is no special rape/sexual assault medical unit which conducts a medical examination of the victim when a rape is reported, but instead all doctors are provided by the Ministry for Justice with a special *set* (or kit), called the *set d'agression sexuelle*. This is a box with special instructions which any doctor may use; it was developed in order to ensure that a standard procedure is used for examining all victims of rape.

There are, however, no specialised doctors dealing with rape, although all doctors are supposed to be able to work with the *set*. Revised instructions were issued in March 1998 to assist doctors further in using the *set*, but research is required to determine whether or not the *set* is working in practice. It is thought that some doctors may not use it because they feel it is unnecessary, or because they see it as Ministerial interference with their profession.

In theory, the prosecutor decides to which doctor the woman must go. She may go to her own doctor but this would not be suitable for evidential purposes; for this she must go to a doctor assigned by the prosecutor or *juge d'instruction*. Women doctors are not always available.

### 2.12 – 2.13 Legal advice at reporting stage

The victim can bring a lawyer of her choice with her when she goes to report the rape, but the State will not pay for this. However, if she cannot afford to pay a lawyer, she can go to a *pro deo* lawyer. These are young lawyers who have only had five years' training (which would include three years of *pupillage*). During the three years they are paid by the State for all sorts of cases. The system is means-tested. Even at the reporting stage the victim can get a *pro deo* lawyer, but she must take the initiative to do so. The lawyer cannot interfere in the investigation stage, although this may change after the recommendations of the *Franchimon Commission*. For the moment, at the pre-trial stage, the prosecutor can be asked by the victim for information but is under no duty to give it to her.

Another way for a victim to obtain pre-trial legal advice is to join the criminal case as a *partie civile*; this procedure is also used in France. As a *partie civile* to the criminal action, the victim is entitled to legal representation both before and during the trial, and through her lawyer may seek and be awarded compensation at trial. Further, if the prosecution should drop the case, the victim, as a *partie civile*, may request the *juge d'instruction* to continue with the investigation.

## 2.14 – 2.15 Other pre-trial support

Since 1989, a minor who is a victim of rape or sexual assault may be assisted during questioning by an adult whom they trust. The judge or prosecution must accept that support person once there is no undue influence in their relationship with the minor. In contrast, adult victims cannot have the *pro deo* lawyer present during questioning. A defendant or victim cannot generally have a lawyer present during questioning because of the principle of secrecy and non-contradiction (though this may change in the wake of the *Franchimon Commission*). Support is available from the 'Accueil des Victimes' scheme nationwide.

## 2.16 – 2.25 Prosecution

The prosecutor's office takes the decision to prosecute, and a specialist prosecutor may sometimes be assigned in practice. The *Collège of the Procureur Général* is an organisation holding the highest legal powers in the prosecution service. However, these *procureurs généraux* are responsible for the overview of policy on rape, not for individual cases. Specialist rape units in the prosecution service are not widely available and are confined generally to Brussels and Antwerp; they do not exist in the smaller regions of Belgium.

The prosecutor has the discretion to drop the case, even where the victim wishes to proceed. However, as previously mentioned, a victim who is a *partie civile* may appeal this decision to the *juge d'instruction*. Although this may be costly for the victim, it means that the *juge* must examine the case. The prosecutor also has discretion to reduce a charge of rape to one of sexual or physical assault.

A victim may withdraw her complaint of rape, but the prosecution has discretion to pursue the case, and indeed an investigation may commence even if no complaint has been made. A *partie civile* can restart an investigation even if the prosecution decides to drop it; however, if the defendant is acquitted the *partie civile* may be liable for costs. There is also a penalty for making a false complaint.

Only in exceptional cases (the *citation directe* procedure) can a victim take a private prosecution for rape. This is a procedure peculiar to Belgium and France, whereby the case is heard before a criminal court

but only the question of compensation is addressed. The victim is entitled to a *pro deo* lawyer on a means-tested basis.

### **2.26 – 2.29 Plea bargaining**

Although plea bargaining may occur in practice, there is no formal system.

### **2.30 – 2.36 Investigation**

The police investigate complaints of rape under the authority of the prosecutor or the *juge d'instruction*. Once a suspect has been identified and arrested he is entitled to be released on bail. The police may hold a suspect under arrest for a maximum of 24 hours before bringing him before a *juge d'instruction* who alone may determine whether the period of detention should be extended. The *juge* may grant the suspect his liberty and since 1990 may impose certain conditions such as money bail; that he stay away from the victim; or from a particular area. The victim has no say in the bail decision and her only pre-trial protection from the suspect is provided by the conditions of bail which the *juge* may impose at his discretion. The suspect is entitled to legal aid on a means-tested basis.

The central role of the *juge d'instruction* is to prepare the *dossier* which must represent evidence on both sides of the case. The process of *instruction* is described as a search for the truth. This process of seeking the truth was described by one *juge d'instruction*, who specialises in child sexual abuse cases, as being like unwinding spaghetti.

### **2.37 – 2.38 Pre-trial procedures**

There is a pre-trial procedure before the *Chambre des Conseils*, which decides whether the case should go to trial. A victim is not compelled to give evidence at any stage before the trial, although she has the right to give evidence if she so wishes. The prosecutor or the *juge d'instruction* must present the evidence formally to the *Chambre*, and the victim must make a statement to the police which is used as evidence by the prosecution, but she can never be compelled to give direct evidence, and

the *juge d'instruction* has no duty to interrogate the victim or the defendant because s/he is not required to prepare the *dossier* in any particular way.

## 2.39 – 2.47 Representation and information

The victim has a right to pre-trial legal representation. She can have a lawyer, but the lawyer cannot intervene, either during the investigation or before the *juge d'instruction*, although s/he may assist and advise the victim, and may intervene before the *Chambre des Conseils*.

There is no legal obligation to inform the victim of the pre-trial progress of the case, because the investigation is conducted in secrecy. It was acknowledged that this presents a problem. Some *parquets* (i.e. District Prosecutors' offices) will permit the victim to see the *dossier* while others will not, which gives rise to inconsistency. In contrast, a victim who is a *partie civile* has a right of access to the *dossier*.

The secretive investigation rule means that there is no obligation to inform the victim of developments in the case after the *instruction* process unless the victim is a *partie civile*. Before the *Chambre des Conseils*, the *partie civile* and her lawyer are permitted to inspect the *dossier*. However, where a case has been dropped the prosecutor is not obliged to give clear reasons why such action has been taken. The victim has no formal opportunity to meet the prosecutor before the case and has no formal right to meet with the *juge d'instruction*.

Information on the trial procedures is available to victims before the trial, but it is not always provided. It will often depend on the police or prosecutor; although there is a new practice whereby the police send a letter with information to the victim. The Ministry for Justice has brought out four different information brochures for victims.

## SECTION THREE: TRIAL

### 3.1 – 3.3 General procedures

Rape trials may be held before the *Cour d'assises* (three judges and 12 jurors), or if *correctionnalisation* has occurred, before the *Tribunal Correctionnel* (three professional judges only).

In practice, rape is more often tried in the *Tribunal Correctionnel*. In one study of 1,000 rape cases, conducted by the University of Leuven (forthcoming, 1998), only four of these were heard before the *Cour d'assises*. Until 1995 certain rapes, for example rape of a child under 10 years of age, had to be heard by the *Cour d'assises* and there was no leave to remit them to the *Tribunal Correctionnel*.

In practice, because of the added trauma for the child, some prosecutors would deliberately let the case lapse or reclassify it as a sexual assault. The Ministry for Justice has requested that rape cases should only be referred to the *Cour d'assises* if they involve complicated issues or aggravating features, such as gang rape. Although the punishment is less severe before the three-judge court, the procedure is regarded as less traumatic for the victim, and this use of non-jury courts is therefore not criticised by victims' groups in Belgium.

The *Cour d'assises* has twelve jurors, and the defendant, prosecutor and victim have the right to object to any of them. The victim can only object if she is a *partie civile*. Jurors are chosen at random from the electoral register.

### **3.4 – 3.5 Training for legal personnel**

Special training in the conduct of rape trials is not provided, either for lawyers or judges. There is one programme for lawyers which is very new and which is under review. No special training is provided where the victim is a child, but again this is under review.

### **3.6 – 3.7 Special procedures for minor defendants**

Special procedures exist where the perpetrator of any criminal offence is a child. If the child is under 16, the case will go to the juvenile court. If the child is between 16 and 18, the case can be referred to the juvenile court, depending on the circumstances.

### **3.8 – 3.9 Special procedures for victims**

The victim is not separated from the defendant in the court in which rape is tried, nor are there separate waiting rooms, bathroom facilities or dining areas for the victim.

### **3.10 – 3.19 Anonymity and protective measures**

The victim is entitled to anonymity throughout the trial. Trials are held in public pursuant to the Code of Criminal Procedure, but since 1989 the *juge d'instruction* can order that no details which could identify the victim may be published without her permission. The victim also has the right to anonymity after the verdict, on the same basis. Further, the judge may direct that the trial or some parts of the trial are held *in camera*, which means that all those except the parties directly involved are excluded from the court room; this is at the discretion of the trial judge. If it is ordered no member of the public may be present in court, even a non-lawyer support person for the victim (although since 1989 victims who are minors have the right to have an adult with them throughout the trial even when it is heard *in camera*). Thus a victim has no power to decide on who may be present in the courtroom, but she can request that persons be excluded. If the hearing is held entirely in public, then anyone may be present including the media. Restrictions do exist on how the media report rape trials; for example, they may not publish photographs of the victim. However, the extent to which restrictions are imposed upon the media is a matter for the judge's discretion.

### **3.20 – 3.26 Examination in court**

The defence lawyer does not cross-examine the victim; s/he may put questions through the judge, but the victim is not compelled to answer, even as a prosecution witness. If the victim has joined as a *partie civile* to the action, then she is present in the capacity of a party to the trial, and not a witness, so again she will not be cross-examined in court. Where the defendant is not legally represented, although this never happens in practice, he may direct his questioning of the victim through the judge; thus he may technically be permitted to cross-examine the victim (if she is not a *partie civile*).

The victim is not entitled to give evidence behind a screen or on video, although the question of admitting video evidence in rape cases is under review. Children's evidence may be presented on video, and special procedures have been introduced for victims who are minors; these

procedures are only at a pilot stage and do not operate throughout the country.

### **3.27 – 3.35 Evidence**

Although the prosecutor must prove lack of consent, there is no formal need to show that the victim resisted physically in order to prove that she did not consent, though in practice lack of consent is difficult to prove unless there is evidence of physical resistance.

The prosecutor does not have to prove that the defendant used physical force. It is a defence that the defendant genuinely believed the victim was consenting; this is the question of silent consent. In Belgium there is a 'free' system of evidence; that is, it is up to the judge to decide if something constitutes evidence of a defence. An honest but unreasonable belief by the defendant in the victim's consent may thus be a defence, but there is no strict definition. The more unreasonable the defendant's belief, the less likely this defence is to work. The defendant can in theory be convicted on the evidence given by the victim alone, and no special rules apply to the use of that evidence.

### **3.36 – 3.39 Victim's prior sexual experience**

Evidence of the victim's prior sexual experience with the defendant can be used by the defendant in court, and again there are no special rules which apply. Evidence of the victim's sexual experience with others can also be used by the defendant in court, on the same basis.

### **3.40 – 3.44 Verdict**

There are two possible verdicts; guilty or not guilty, and the verdict is given by the judge and jury in the *Cour d'assises*, or by the three judges alone if the case is before the *Tribunal Correctionnel*. If the verdict is given by the jury, it does not have to be unanimous; in the *Cour d'assises* a seven to five decision is sufficient to convict. In the *Tribunal Correctionnel*, where there are three judges, one decision is given and the breakdown is not made public.

The defendant can be found guilty of an alternative charge to rape; in the *Cour d'assises* the sanction is for the jury and judge to decide, but in the *Tribunal Correctionnel* the three judges can change the charge from rape to sexual assault; the judges can always decide on the definition or classification of the crime.

## **SECTION FOUR: SEPARATE LEGAL REPRESENTATION**

### **4.1 – 4.3 Separate legal representation for victims**

The victim is entitled to have her own lawyer during the trial, and this has always been the case for victims of crime in Belgium, under the *partie civile* procedure. The victim can appoint the lawyer of her choice, and there is no formal rule as to the relationship between the prosecutor and the victim's lawyer.

### **4.4 Rights of the victim's lawyer**

If the victim is a *partie civile*, then her lawyer has the right of access to the *dossier* of evidence at the end of the pre-trial investigation, and also has the right to be present in court throughout the trial, to speak on the victim's behalf in court, to call witnesses on behalf of the victim (subject to the judge's discretion); to object to questions put to the victim by the defence or prosecutor; to cross-examine the defendant; to make submissions to the court on the law, and to address the court as to the guilt or innocence of the defendant (in theory the victim's lawyer does not have this right, but in practice they may do so, because this is related to the compensation question, and because there are no strict rules of evidence).

The victim's lawyer may not, however, address the court as to the sentence, but may address the court as to compensation for the victim; indeed, this is the main function of the victim's lawyer. The issue of compensation must be their focus. However, the facts of the rape must be proved in order for the victim to get compensation, and so the victim's lawyer has a role throughout the trial.

## SECTION FIVE: POST-TRIAL

### 5.1 – 5.10 Sentencing

Sentence is given by the three judges in the *Tribunal Correctionnel*, but in the *Cour d'assises* the judge and jury vote together on sentence. Judges are not given training in sentencing for rape; the maximum sentence of imprisonment for rape is usually five to ten years' imprisonment (depending on which category of rape is at issue), but if there are aggravating factors a sentence of life imprisonment may be imposed. There are no guidelines or tariffs available to assist in sentencing, although there are informal guidelines; judges will discuss sentence among themselves. The average sentence for rape is two to three years' imprisonment.

A guilty plea by the defendant does not reduce the sentence; it might be more accurate to say that a consistent denial of the rape can have a negative impact on sentence. However, the impact of the rape on the victim can affect the sentence, and normally the victim's lawyer will present evidence of the impact of the rape on the victim before the verdict is given. In the *Cour d'assises* the decision on guilt is given first, and then the sentencing decision; but the aggravating circumstances will determine into which category the rape falls. In the *Tribunal Correctionnel*, both verdict and sentence are announced together.

### 5.11 – 5.13 Appeal

It is possible for both the prosecution and defence to appeal verdict and sentence. An appeal may be taken on a point of law from the *Tribunal Correctionnel* to the *Cour de Cassation*. Where the verdict is given by the jury, it cannot be overturned on appeal by the prosecution or the defendant, or by the trial judge. However it can be overturned by the *Cour de Cassation* on a technical or procedural point.

### 5.14 – 5.21 Criminal injury compensation

The trial court is entitled to award compensation for victims of rape, but only when this is sought under the *partie civile* system. In other words, the victim has to take the initiative to recover compensation, which in theory is paid by the defendant; but if he cannot pay or is

unknown, a state-funded Commission pays compensation, up to a maximum amount of 2.5 million Belgian Francs; this applies to all victims of intentional violent crime.

However, where compensation is ordered by the court there is no upper limit, although it will only order compensation for quantifiable or material loss. The judge may also give money for 'moral damage', if it is quantifiable, according to earlier decisions. Where the Commission decides on compensation they make an objective assessment, and apply principles of equity. For example, they will reduce the damages for a victim who is rich. The *partie civile* has to prove, before the court, the extent of damage, in order to be awarded compensation.

### **5.22 – 5.25 Civil & constitutional remedies**

There are also civil remedies available to victims of rape; the victim can sue through the civil courts after a criminal conviction, but cannot sue a defendant who has been acquitted.

The European Convention on Human Rights is incorporated into Belgian domestic law; it is superior to domestic law but only specific rights enforceable against the state may be actionable by individuals, and it has had no effect for victims of rape.

## **SECTION SIX: STATISTICS**

Statistics on reported rape are kept by the police and the National Institute of Statistics, but a systematic procedure has only been in operation since 1991, and statistics were not available from the Ministry for Justice. A major statistical study tracking the progress of rape cases is due to be published by the University of Leuven in 1998, but was not available at the time of publication.

## **SECTION SEVEN: REFORM**

There are many reforms currently ongoing in Belgian criminal law, mainly as a result of the *Dutroux* case. For example, major reform projects have been initiated by the Ministry for Justice, and also by the

Ministry for Equality; also of particular importance are the forthcoming reform proposals due from the *Franchimon Commission*.

Many changes have been made already within the Ministry for Justice. A Victim Division was created in September 1996, to deal specifically with victims of crime, and to focus on four main areas: a Commission to pay compensation to victims of violent crimes (set up in 1995); a working group on the questioning of child victims; the introduction of the *set d'agression sexuelle*; and proposed changes in the law, for example to ensure that the victim is informed when a convicted offender is about to be released from prison. Judicial delay was a big problem in the past, because there were insufficient *juges d'instruction*; the Ministry for Justice is presently seeking to increase the number of *juges d'instruction*.

In relation to structural changes, the Victim Division is trying to generate better collaboration between the police and the community, and to reduce the overlapping of functions between the three police forces. Structural reform of the police is ongoing; a unitary police force may be created. The '*Accueil des Victimes*' scheme has also been set up to provide information and support to victims nationally.

In summary, the debate around reform of Belgian rape law is centred on deep-rooted structural change within the criminal justice system. It is recognised that reform of the law on rape alone is not sufficient to improve the position of victims in Belgium; rather, change needs to be made at a fundamental level, in order to restore the confidence of victims in the system. However, reforms of police training and of the compensation system for victims give cause for hope, and generally a willingness appears to exist, among legal professionals and others, to adopt new approaches in order to assist victims of sexual crime.

## Chapter Seven

# The Legal Process: Denmark

### SECTION ONE: THE LAW ON RAPE

#### 1.1 Definition of rape (*voldtaegt*)

The legal definition of rape is contained in section 216 of the Danish Criminal Code: '*any person who enforces sexual intercourse by violence or under threat of violence, shall be guilty of rape*' (Hoyer, Spencer and Greve, 1997: 65). This definition was introduced on May 27, 1981, on the basis of a 1980 expert committee Report on Criminal Law. Sections 217- 218 provide for other types of forced sexual intercourse, for example, if the victim is mentally ill or drunk. Rape can be committed against men or women, and women can be convicted of rape as accomplices; in 1981 the distinction between accomplice and principal was abolished in Danish law.

#### 1.5 – 1.6 Minors as offenders

No person below the age of 15 can be convicted of any crime in Danish law.

#### 1.9 – 1.10 Marital rape

Rape within marriage is recognised and treated in the same way, but the penalty for rape may be remitted if the parties have since married each other.

#### 1.11 – 1.12 Categories of rape

There are no distinct categories of rape in Danish law. However, in practice it would appear that distinctions are made between two types of rape; assault rape, where there is additional violence involved, or where the rape is committed by a stranger; and contact or acquaintance rape, where there has been some previous contact between the victim and the defendant. This latter type is harder to prove in practice.

## **1.13 – 1.14 Time limits**

Rape has to be prosecuted within ten years of its occurrence.

## **SECTION TWO: PRE-TRIAL**

### **2.1 – 2.3 Reporting of rape**

The police have responsibility for receiving reports of rape, but there is no special rape unit within the police, although in bigger towns specialists do exist. A 1987 Ministry of Justice Report (see bibliography under 'Betaenkning') was critical of the police response to rape, and some criticisms have since been made alleging police failure to record all complaints of rape made to them.

### **2.4 – 2.7 Police training**

Since the 1987 Report was published, training for police has been introduced on how to deal with rape. This training is provided by the National Police Academy, both during initial training of police recruits, and as part of an in-service programme. There is still concern among those working with victims about how little training the police get in dealing with rape, but sometimes rape victim support groups or victim's lawyers are called in to provide the training, and this is seen as a positive step.

### **2.8 – 2.11 Medical facilities**

Two special medical/forensic institutions exist for dealing with rape, one in the University of Copenhagen, and the other in Jutland. There is also a network of official public doctors throughout the country, but in practice the police tend to choose one of the two forensic institutions to conduct the medical examination. However, this can involve a long and traumatic journey for the victim of rape, who may be taken a long distance in a police car in order to get to the forensic institution quickly after reporting a rape. There has recently been strong criticism of this practice, although there is also concern that the official public doctors who have been designated to deal with rape do not have sufficient experience to conduct the examination themselves, since they are more

used to doing paperwork. It has been suggested that more local doctors (GPs) should be used instead, although they might require special training.

### **2.12 – 2.13 Legal advice at reporting stage**

The victim is entitled to state-funded legal advice at the reporting stage. Moreover, the police must inform the victim of the right to a lawyer before she is first questioned, after making a report of rape. She is entitled to have the lawyer present before questioning under the Administration of Procedure Act (APA), sections 741A-741E. However, the police may sometimes discourage the use of a lawyer at this stage, often because they think it would be better for the victim to have the questioning over with at once, rather than waiting for their lawyer to arrive. It is said that the police are improving in their questioning methods, and there are also more women police now, but victims' lawyers still think it is important for the victim's lawyer to be present with her client, in case the questioning is poorly conducted by the police. Following that initial contact, the victim's lawyer would usually invite the victim to a meeting to discuss the case with her, and might see her a number of times subsequently, before the trial itself.

### **2.14 – 2.15 Other pre-trial support**

The victim is entitled to ordinary psychological crisis assistance (counselling etc.). This is available under the general health system, and is means-tested, but has been criticised as insufficient, being both underfunded and overburdened. There is particular criticism of the level of funding; although women are entitled to receive ten counselling sessions, these are not always fully funded. Victims' lawyers say that they would always encourage a victim to seek counselling, but that sometimes the Courts prefer a victim not to have been to counselling, as her evidence is then thought to be more spontaneous, open and trustworthy.

Where the victim is a child, she may be examined on video in the police station. The defence counsel may view the questioning on a monitor, and can suggest questions but not interview the child directly. In many cases, this allows the examination of the child in court to be

curtailed or omitted, especially if the child is under ten or has a mental disability.

## **2.16 – 2.25 Prosecution**

The decision to prosecute a rape is taken by a Constable or Deputy Constable within the Danish police. Both ranks are made up of lawyers, who will appear in City Court cases. Lawyers in the police force take all the decisions in relation to City Court cases; they take on both investigative and prosecution functions. The local police take the decision on City or District Court prosecutions.

If the police decide not to prosecute, the victim may appeal to one of the six District Public Prosecutors, who take the initial decision in relation to High Court cases. An appeal to their decision is possible through the Director of Public Prosecution, and the only appeal then lies through the Minister for Justice. The criterion for when a rape should be dealt with in the High Court is whether the expected sentence is going to be four years or more, and that is a matter for the District Public Prosecutor to decide (in 'ordinary' rape cases, the standard sentence is only ten to 12 months).

A special prosecutor is not assigned to rape cases, although in bigger police districts there may be specialists. The prosecutor does have the discretion to drop the case, even where the victim wishes to proceed, but there is a right to appeal once to a higher level, under section 724 of the APA. The prosecutor has the discretion to reduce the charge from rape to a less serious charge. The police are obliged, however, to inform the victim of a decision to drop charges, and she has a right to appeal. There is no obligation on them to inform her if the charges are merely reduced, but under section 101(2) of the APA, it would appear that there is a right to appeal against the decision to reduce the charge.

The victim can, theoretically, withdraw her complaint at any stage. However, the police can continue to prosecute even if the victim wishes to withdraw her complaint; she would then be compellable as a witness. However, she is a hostile witness and, in practice, the police may decide to allow her to withdraw. According to one view, the

police sometimes put subtle pressure on victims to withdraw their complaints. Private prosecutions are only possible in libel cases.

### **2.26 – 2.29 Plea bargaining**

There is no formal plea bargaining procedure, but a confession can be taken into account when deciding on sentence, and the defence lawyer can suggest that the judge takes a guilty plea into account. However, the prosecutor cannot bind the judge in the Danish system. This is seen as a political issue, and has been debated at conferences of Nordic lawyers; it is not a settled area of Danish law.

### **2.30 – 2.36 Investigation and bail**

The police are in charge of investigating the reported rape. Once a suspect has been identified and arrested, he is entitled to be released on bail. He must be taken before a Court within 24 hours of his arrest, in order to make the decision to detain him or not. In practice, no financial bond is ever imposed, because Danish policy is against allowing privileges to somebody who can afford to pay to be released. Although there is a right to be released, a suspect will be detained if the offence could give rise to a sentence of more than six years; or if there is a fear that he may escape or re-offend, influence a witness, or damage the investigation.

These criteria, contained in section 762(1)(3) of the APA, mean that a suspect will normally be kept in custody pre-trial for rape. If he is released pre-trial, which is rare, the ordinary rules on witness protection apply, and the police can make a 'no contact' or 'keep away' order. Where he is detained, the trial will take place between eight to twelve weeks later, but if he is not detained, it can take up to six months. The victim has no say in the bail decision. The suspect is entitled to free legal aid; this depends on the nature of the case and the offender's own circumstances.

The victim is entitled to other pre-trial protection from the suspect. Under section 124 of the Criminal Code, introduced in 1992, a severe sentence may be imposed for interference with witnesses. At present an Expert Group is studying witness protection schemes generally.

## **2.37 – 2.38 Pre-trial procedures**

There is no pre-trial procedure where a judge can decide if there is enough evidence to proceed with the case, although the judge may strike out the case early if an acquittal is likely. Indeed, according to the Ministry of Justice, the prosecution wins 90% of cases in Denmark, since cases are filtered so carefully before they go to trial.

The victim does not have to give evidence at any stage before the trial, but she may give an in-court statement at an early stage; this is for her own protection. The statement is recorded by the Judge and she is then immune from any subsequent threats made by the defendant. This procedure is rarely used, although the DPP recommended in May 1997 that it be used more frequently. There used to be a preliminary hearing that was used as a filter by the prosecution, which went out of use but is still theoretically possible. If a victim refuses to talk to the police, the prosecution can in theory demand that she give an explanation in court, but she can refuse if the suspect is her husband or if other special reasons exist. Finally, when the suspect is first arrested and brought before a court, the court may at that stage decide they want to check the evidence by asking the victim to go through her statement, but in practice this is never done.

## **2.39 – 2.47 Representation and information**

The victim is entitled to State-funded pre-trial legal representation, under section 741A of the APA. She may choose her own lawyer, or one may be appointed from a list kept by the police and the court. While some lawyers do represent victims frequently, no lawyer would make a living solely from acting as a victim's lawyer.

The victim is kept informed of the progress of the case pre-trial, through her own lawyer. The police also have responsibility for keeping the victim informed, and her lawyer is given all the police evidence which s/he can discuss with the victim. However, following the arrest of a suspect by the police the victim's lawyer may only see the victim's statement. Only when the suspect is charged does the victim's lawyer get access to the police files.

The victim may have an opportunity to meet the prosecutor before the case, if she so requests. Prosecutors are employed by the state, and are part of the Ministry of Justice, although a number of private lawyers may be hired by the state to supplement them. Information on the trial procedures is also made available to victims before the trial, in the form of a general leaflet for witnesses available from the police. Otherwise, the rape victim will be kept informed by the police through her own lawyer.

## **SECTION THREE: TRIAL**

### **3.1 – 3.3 General procedures**

While the Danish system is not inquisitorial, the trial procedures are not so adversarial as in common law jurisdictions. The judge does not intervene in the examination of witnesses, except to prevent harsh questioning. There are three levels of courts; the District or City Court, which is a court of first instance; the High Court; and the Supreme Court.

There are two ways in which rape cases may be tried. The first is before the City or District Court, where the prosecutor believes the sentence is likely to be less than four years. If the defendant pleads guilty, then one judge will decide on sentence. If he pleads not guilty, his case will be heard before one legally qualified judge and two lay judges; all three decide both guilt and sentence and each has an equal vote; the votes are not identifiable except where the judge acquits but the lay judges say guilty, when it will go to appeal in the High Court before three legal judges and three lay judges. In practice, rape cases are almost always tried at District Court level.

A rape case may also be tried in the High Court, but this is much more unusual. Three judges and 12 jurors sit in this Court at first instance. A verdict of guilty can only be given by a majority of at least eight: four of the jury and at least two out of three judges. In other words, it requires a majority of both judges and jury for conviction. As to sentence, that too in the High Court is decided both by the judges and the jurors. In relation to sentence, the judges each have four votes and

the jury each have one. The sentence is decided by the judges and jurors together in the same chamber, whereas guilt is decided in separate chambers for the judges and the jurors. If there is no majority in favour of a particular sentence and the sides are evenly drawn, the defendant gets the more lenient sentence proposed.

In terms of jury selection, both sides can disqualify up to two jurors without cause, but after that they may only disqualify if a special reason exists. The victim has no right to object, but the Danish system is quite informal, so if she has some reason to object to a juror, the judge will usually agree to a disqualification. This is governed by section 81 of the APA.

Jurors are chosen according to procedures in sections 72-91 of the APA. First, all local Councils make a list of the most highly respected persons in their community. This list is sent to the High Court who send it to the police to check if any of them have a criminal record. Then a ballot is held and the names are called randomly from the ballot. Those called may be appointed either as lay judges or as jurors. They will be asked to serve at least four times per year, and every four years there will be a new list, although the Town Council can continue to put the same names on the list. Thus, the same process is used for the appointment of lay judges and for the appointment of jurors. Although Town Councillors are politically elected, jury selection must be balanced to reflect gender, class and political affiliation.

### **3.4 – 3.5 Training for legal personnel**

Special training in the conduct of rape trials is not provided, either for lawyers or for judges, although lay judges are told about the system generally. Special training may be provided where the victim is a child. Given the relatively small size of the country, even High Court judges do not tend to specialise in any one area of the law.

### **3.6 – 3.7 Special procedures for minor defendants**

There are special procedures where the defendant is a child. If he is under 18, then his evidence may be heard in court behind closed doors.

### **3.8 – 3.0 Special procedures for victims**

Where the victim is under age, a special scheme exists whereby she may be questioned through video-link, at the court's discretion; the defence counsel and prosecutor would be in another room. Use of video evidence depends on a minor's maturity and age; for a six to eight year old child, it would always be used, but a child of eleven might be required to give evidence live, since oral evidence is a key principle of the Danish legal system. However, the accused's right to be confronted with the witnesses is not so rigorously applied in Denmark as in common law or adversarial legal systems.

In the courts in which rape is tried, there are no separate facilities provided for the victim, but an expert committee on witness protection has been examining this. The victim is not protected from contact with the defendant during the trial, although she may ask for him to be absent when she is giving evidence.

### **3.10 – 3.19 Anonymity and protective measures**

The victim is entitled to anonymity throughout the trial and after the verdict; her identity must be revealed to the defendant, but she is entitled to anonymity from the media. Newspapers are not allowed to identify her in any way. Usually her evidence is given 'behind closed doors', so no one can report what she says.

The trial is held in public, but there are restrictions on how the media report rape trials, contained in section 1017B of the APA. It is an offence to identify the victim in any way. Section 29(6) of the APA states that if the victim or her lawyer so requests, it is mandatory to 'close the door' of the court during her evidence (i.e. *in camera*). Similarly, if the defendant is under 18, the doors will be closed. Under section 29(4)(1), it is also possible to close doors if not to do so would cause unnecessary harm, injury or violation. Section 29(2) allows doors to be closed in the interest of public decency or morality. The judge also has a wide discretion to close the door during certain evidence. Although this may be used to protect the victim, victims' lawyers say that it can sometimes be detrimental to her, because it means that the media do not report her side of the story, so she may be prejudiced in

the eyes of the public in a high-profile rape trial. Thus, victims' lawyers often try to get the defendant's evidence heard behind closed doors too.

There are restrictions on who may be present in the court, and the victim does have some power to decide on who may be present; under section 848 of the APA, she can have the defendant excluded from the court, again at the judge's discretion. Section 848 is widely used; in one view, in about 80% of rape cases. Thus, the defendant will be required to leave the courtroom and will be put in an adjoining room, where there may be a sound link so that he can hear the evidence. If there is no such link, the judge will give the defendant a summary of the victim's evidence when he returns to the court. Often the judge will watch the defendant's conduct in court, before making the decision to exclude him under section 848. The victim's lawyer may advise their client to let the defendant stay in the courtroom, so that she might have an opportunity to express her pain and anger in confronting him; but if the victim asks for the defendant to be removed, the judge will do so.

The victim also has the right to have a non-lawyer support person present in the court-room during the trial, at the judge's discretion, even where the doors are closed. The prosecutor has a duty to look after the victim's interests in court, but this is an informal system. The prosecutor or judge will act to protect the victim, and judges see their role generally as being protective of witnesses.

### **3.20 – 3.26 Examination in court**

The defence lawyer does cross-examine the victim, and it is possible for multiple cross-examination to take place where there is more than one defendant. However, where the defendant is not legally represented, he cannot cross-examine the victim. In the High Court, a defendant has to have a lawyer. Even in the District Court, the court can impose a lawyer even if the defendant asks to be unrepresented. In practice, however, the defendant is always legally represented. If he is not permitted to remain in court while the victim is giving evidence, then he must have a representative who will be present instead.

If the victim is under 18, her evidence may be given on video. The judge will ask her questions in his/her chamber, while the defendant's

lawyer watches the evidence on video in the courtroom. Also, she will be questioned in the police station on video.

### **3.27 – 3.35 Evidence**

The prosecutor has to prove in law that the victim was not consenting to sexual intercourse. There is no offence of 'statutory rape' in Denmark. There is a separate offence of sex with a minor (i.e. under 15); this applies to both sexes, and to heterosexual and homosexual sex, but it is separate from rape, so that a defendant may be tried for both offences, if he has sex with a minor under 15 who was not consenting. Where the victim is under twelve, there is a more severe penalty. The prosecutor does not have to prove that the victim resisted physically in order to show she did not consent. Nor does the prosecutor have to prove that the defendant used physical force. It is a defence to rape if the defendant genuinely believed the victim was consenting; an honest but unreasonable belief by the defendant in the victim's consent is a defence. Thus, the test of honesty is subjective. According to Temkin (1987), the Danish system focuses on the behaviour of the defendant, rather than the question of the victim's consent.

It has been proposed by the Joan Sisters (a women's group set up in 1975 to campaign for the rights of rape victims) that an offence of 'negligent rape' should be introduced, so that where the defendant *should* have known that the victim was not consenting, he may be found guilty of rape. The Department of Justice does not support this proposal, because they say that before 1980 a more minor form of rape did exist, and because it was easier to prove, prosecutors tended to use it more. The Department say that the lesser offence of negligent rape would be the easy option and would be used more frequently, so that sentences would become even lower than at present. The 1987 report discussed this option of negligent rape and rejected it. The Joan Sisters were represented on the 1987 Committee, but their proposal was opposed by some law experts on the grounds that the punishment for rape would then become too low. The Joan Sisters say in response that the level of punishment is less important to the victim than the fact that the defendant is convicted.

The defendant can be convicted on the evidence given by the victim alone, and in such cases, there are no special rules which apply to the use of that evidence, although in jury cases a judge may give instructions generally but will not give this legal rule. Three legal judges can overrule a jury conviction but not a jury acquittal, and this will lead to a re-trial.

### **3.36 – 3.39 Victim’s prior sexual experience**

Evidence of the victims prior sexual experience with the defendant, and with others, can be used by the defendant in court, but section 185(2) of the APA, which deals with the credibility of the victim, provides that evidence as to her earlier sexual behaviour may only be allowed if of special importance to the case (i.e. at the court’s discretion). The victim’s lawyer would often seek to stop evidence of the victim’s sexual history with others being admitted, and would also intervene if the questioning of the victim went too far or was too intimate, or if the defendant was trying to raise a sexual relationship that had stopped long before the rape. Sometimes it is not necessary for the victim’s lawyer to have to intervene, as the judge can use the section 185(2) discretion to exclude this evidence. In the experience of one victim’s lawyer, the victim’s prior sexual history with others is rarely raised in court, since it is assumed to be normal that women have a sex life. However, this evidence may be admitted where the defence says that it is relevant to the defendant’s belief in consent, or where there was a prior relationship between the victim and the defendant.

### **3.40 – 3.44 Verdict**

The only possible verdicts are guilty or not guilty. In a High Court trial, if the jury acquits a defendant, but the judges find him guilty, then the jury’s verdict stands and the defendant is acquitted. If the jury finds him guilty and the judges acquit him, then the prosecution can ask for a re-trial, and he will be acquitted if a hung verdict results again. In practice, the prosecution usually drops the case and does not go for a second attempt. In the City or District Court, the judges must find two:one for a guilty verdict. The defendant may appeal conviction to the High Court from a City or District Court. That appeal will be heard by three professional judges and three lay judges.

A defendant may be found not guilty but sentenced to indeterminate mental treatment. It is also possible to give indeterminate detention for someone regarded as a very dangerous criminal; this may sometimes be used e.g. for somebody with three previous convictions for rape. Also, in spring 1997, section 70 of the Criminal Code was introduced, which provides for a special facility for dangerous rapists, for example, who have been convicted three times running. They may be treated through a newly-developed chemical castration procedure, administered in one special medical institution. There has been great interest in the US in this new Danish development.

The verdict is given by the judge and two lay persons in the District Court, and by the jury and three judges in the High Court. The verdict does not have to be unanimous, but can be eight:four (jury) and two:one (judges). The issues of guilt and of sentence are dealt with together, so that the defence lawyer is in the awkward position of defending their client's innocence, and then pleading for a lenient sentence, by giving mitigation, before knowing what the verdict will be.

If it is a High Court case, the prosecution decides what formal questions will be put to the jury, and they can only convict of a lesser charge if those formal questions have disclosed a lesser crime than rape. The description of the crime in the indictment must cover both charges, and the jury must be told of the lesser charge. In the District Court, the court may infer a lesser charge on its own initiative.

## **SECTION FOUR: SEPARATE LEGAL REPRESENTATION**

### **4.1 – 4.3 Separate legal representation for victims**

Victims of rape are entitled to have their own state-funded lawyer during the trial. This right was introduced in 1980, specifically for rape victims, after feminist groups had been lobbying for its introduction for some years (see further Temkin, 1987: 163-177). It is possible for the state to impose a separate legal representative on the victim; even if she does not ask for it, the police can insist that she have such a representative during the investigation, under section 741A(2) of the APA. In a

very recent development, a right to legal representation has been extended in May 1997 to cover other victims of crime who request it.

The victim can appoint a lawyer of her choice, although most police stations have a list of lawyers pinned up from which she can also choose. Any lawyer can act as a victim's lawyer; often criminal defence lawyers are used. There is a memo to the original Bill introducing the concept of this separate legal representative or victim's lawyer, stating that they should not act as a separate prosecutor. In other words, they should not be concerned with the questions of guilt, innocence or sentence. They may only put questions to the victim and argue about compensation. The representative cannot ask for extra witnesses, although in practice she may suggest these to the prosecution. The role of the victim's lawyer is confined to helping the victim in court. Indeed, the name used to describe the victim's lawyer in Danish is *Bistands/Advokat*; literally it translates as 'assistance lawyer'. The victim's lawyer sits as a spectator in the court-room, and stands by the victim when she is giving her evidence. The presence of the victim's lawyer is seen to have impacted positively on the victim's experience, and on society's attitude to victims of rape; this is why the right to representation has recently been extended to other victims of crime.

#### **4.4 Rights of the victim's lawyer**

The victim's lawyer has the right of access to the evidence before the trial, as soon as the formal indictment is laid. She does not have the right to be present in Court throughout the trial, because technically she only has the right to be present during the questioning of the victim. This is a point which has been criticised, especially as a High Court case may last three or four days, but the victim's lawyer will only be paid to attend for the victim's evidence. However, in practice most rape cases are heard before the District Court, and last only a short time, so the victim's lawyer is paid for the whole case. But it may be particularly important in a High Court appeal, for example, that the victim's lawyer be there to explain the procedures to her.

The victim's lawyer may speak on the victim's behalf in court, but may not call witnesses on behalf of the victim. She may object to questions put to the victim by the defence and the prosecution, if it is necessary

to protect the victim, although no formal rule on this exists. She may not cross-examine the defendant, make submissions to the court on the law, or address the court as to the guilt or innocence of the defendant. She may not address the court as to the sentence; her main function is to address the court as to compensation for the victim. Thus, she can only call witnesses in relation to compensation or in relation to the effect of the crime upon the victim.

The victim's lawyer has the right to take other measures to protect the victim, such as asking that the victim's evidence be given behind closed doors, or that she be cross-examined without the defendant being present. However, the victim's lawyer may not affect the sentence of the defendant; the issues of sentence and compensation are kept very separate.

There is no formal rule about the effect of victim impact on sentence (although see below under sentencing). The victim's lawyer cannot question other witnesses, because she acts as a support only for the victim. She can adduce medical evidence (usually written) as to the extent of injury to the victim; and she can ask the victim to describe the effect of the rape.

In summary, the role of the victim's lawyer is normally left to the discretion of the Court, subject to the rule that she should not act as a second prosecutor. In practice, the three areas which the victim's lawyer deals with are: first, the issue of the evidence being heard behind closed doors; secondly, the absence of the defendant during the victim's evidence; and thirdly, the question of compensation.

## **SECTION FIVE: POST-TRIAL**

### **5.1 – 5.10 Sentencing**

The sentence is given by the Judge and jury in the High Court, and by the legal Judge and the two lay Judges in the District Court. Judges are not given training in sentencing for rape. The maximum sentence of imprisonment for rape is six years, or ten years if there are certain aggravating features. The sentence is usually increased by 50 per cent if there

is more than one rape. There is a mandatory minimum sentence of 30 days; this is a standard minimum for all offences carrying imprisonment as a possible sentence.

In practice, the defendant is always kept in pre-trial detention for more than 30 days, and the length of time the defendant has spent in pre-trial detention is always taken off the length of his prison sentence. There are no guidelines or tariffs available to assist in sentencing, although sentencing decisions are recorded by judges for each other's guidance. One victim's lawyer describes the average sentence for rape as being 18 months; more if the defendant is regarded as dangerous, while another estimates that the average sentence is between 10 to 18 months' imprisonment.

Usually, a defendant convicted of rape would receive at least nine months' imprisonment, although occasionally they receive a conditional suspension (e.g. a sentence of eight months, suspended for two years on condition of good behaviour). A defendant convicted of rape will go to an open prison unless their sentence is over five years, or they have a previous conviction for rape.

A guilty plea by the defendant does not reduce his sentence, although it can be taken into account under section 84(19) of the Criminal Code. The impact of the rape on the victim does affect the sentence; under section 80, the gravity of the offence must be taken into account, but there is no formal mechanism for this. If there is physical or psychological damage to the victim, then it will be seen as aggravating circumstances.

### **5.11 – 5.13 Appeal**

It is possible for the prosecution to appeal both an acquittal and a lenient sentence. An appeal may go from the District Court to the High Court. The prosecution cannot appeal an acquittal from the High Court. However, from the District Court the appeal goes to the High Court and there is a whole new trial. An expert committee is examining the possibility of allowing jury cases to be heard by the District Court, or allowing jurors and judges to deliberate together on the question of guilt. At present there is no appeal possible on the question of guilt,

because of the double guarantee whereby judges may strike out a conviction by the jury. Now there is only one strike-out appeal, i.e. the Supreme Court will only hear appeals on a point of legal procedure, or on the question of sentence.

It is also possible for the defendant to appeal both a conviction and a severe sentence, on the same basis. From the High Court, appeals are possible to the Supreme Court, which sits with five or seven judges, but will only hear appeals on points of law.

Where the verdict is given by the jury, it cannot be overturned on appeal by the prosecution or by the defendant, because a guilty verdict cannot be appealed. The double guarantee rule applies. Three High Court judges may over-rule a jury conviction at the High Court.

### **5.14 – 5.21 Criminal injury compensation**

The trial Court is entitled to award compensation for victims of rape, under the Victim Compensation Act. The Court will order the defendant to pay. If he cannot pay, the victim goes to the Criminal Compensation Board to claim the amount, and the Board can then reclaim it from the defendant. The Board is bound by the Court's recommendation as to the amount of compensation, although they can reduce this if the victim's claim for compensation was not initially contested by the defendant. There is no ceiling on the amount of compensation, but in practice the usual amount is DK15,000 for an attempted rape, and DK30,000 for a rape.

This is high compensation by Danish standards, as compensation is generally low, even in road traffic cases. Guidelines do exist; fixed amounts are given for physical damage, loss of earnings and so on. The Compensation Board can give compensation even where there has not been a conviction, once they believe that a crime has been committed; for example, if a rape has been reported but the defendant is not found. However, no compensation is possible after the defendant has been acquitted. There is a state-funded scheme for victims of crime generally, and this covers victims of rape.

## 5.22 – 5.25 Civil & constitutional remedies

There are civil procedures available to victims of rape, separate from the criminal trial for rape, but civil claims, although possible, are rare. This is because once a criminal case is taken, the state has a duty to act on the victim's behalf to obtain compensation. In a civil case, the same levels of compensation would apply.

The European Convention on Human Rights was incorporated into Danish domestic law in 1992, but has had no effect for rape victims.

## SECTION SIX: STATISTICS

Statistics are kept on reported rape, by the police and by '*Denmark Statistik*', an agency which covers all the statistics for Denmark including those relating to crime, welfare and employment. The most recent year for which statistics are available is 1995, although the police have records from 1996 available. The Joan Sisters are concerned about what they call the dark figure of rape; that is the number of rapes which are reported but not recorded by the police, although the Ministry of Justice has denied that the police ever fail to record any rapes reported to them. It should be noted that the conviction rate for rape is relatively high in Denmark.

### Rapes reported to the police:

1993	499
1994	481
1995	440

### Convictions recorded for rape\*:

1993	206
1994	185
1995	195

(\*Recorded in *Kriminalstatistik* as 'Persons against whom a decision has been made')

## SECTION SEVEN: REFORM

No reforms are currently proposed in Danish rape law, although the law has very recently been changed through the introduction of chemical castration and indeterminate sentences. When asked about future reform, the Ministry of Justice gave the view that it can only act on a political agenda, and at present there is no such agenda for further reform. The issue of changing the definition of rape to include negligence as a potential *mens rea* was raised in a 1987 Ministry of Justice Report, but the Ministry does not regard it as being on the political agenda at present.

However, the Joan Sisters have been seeking reform of the *mens rea* for rape for some time, and are campaigning for the introduction of an objective mental standard for the offence at present; their slogan for this campaign is (loosely translated): '*There should be a limit as to how stupid a man can be.*' In 1995, they wrote to the Ministry requesting that an offence of 'negligent rape' be introduced, but the Minister at the time said that this would be inadvisable.

Other commentators, however, also regard the introduction of a negligence standard as an essential reform of the present law. They refer to cases in which they say an outrageous result was reached, because any reasonable person would have known the victim was not consenting, yet the defendant was acquitted because the jury was not sure that he was aware of her lack of consent at the time.

This definitional issue was described as being the biggest problem with Danish rape law, especially as in Denmark negligence is a sufficient *mens rea* for many other crimes, such as fraud and perjury. If this reform was introduced, a distinction between 'rape' and 'negligent rape' could then be made in relation to sentence. At present, intentional killing or murder carries a minimum of five years' sentence, whereas for persons convicted of manslaughter, the minimum sentence is only 30 days. Some commentators, however, are more cautious about the introduction of an offence of negligent rape, believing that it would be better to focus on preventative measures such as improved sex education for children.

Leaving aside the issue of a new *mens rea* for rape, the procedures for victim support and assistance appear to be adequate in Denmark, and

the Danish model of legal representation for victims of rape is of particular interest in other jurisdictions where victim representation is not a legal tradition. Denmark differs from the other jurisdictions studied in detail, in that the victim's lawyers were introduced specifically for rape victims. Moreover, the rights of the victim's lawyer are more limited than in jurisdictions such as France or Belgium, and in practice they are seen as having the most impact for victims in three areas: in arguing for the exclusion of the defendant from the court-room while the victim is testifying; in ensuring that rape cases are heard *in camera*; and in seeking compensation for the victim.

The role of the victim's lawyer was originally intended to be confined to arguing for compensation for the victim, but it has gradually been expanded in practice. However, the victim's lawyers are never permitted to act as a 'second prosecutor'. Their role is thus seen as providing an effective means of support for victims which does not encroach unduly on the rights of the accused. Indeed, as a mark of the effectiveness of the victim's lawyers in rape cases, entitlement to legal representation was extended to victims of crimes other than rape in May, 1997.

## Chapter Eight

# The Legal Process: France

### SECTION ONE: THE LAW ON RAPE

#### 1.1 Definition of rape (*viol*)

The definition of rape is contained in Articles 222-23 to 222-26 of the new French Penal Code. Four laws were passed on July 22, 1992, amending the previous Code; a further law was passed on December 16, 1992, and the Code itself came into force on March 1, 1994. Before this, the definition in the Code had dated back to the eighteenth century. Rape is now defined as sexual penetration of any kind, carried out by means of violence, constraint, threat/menace or surprise (see below). Thus, lack of consent is defined broadly. Rape may be carried out on men or women. The *mens rea* element is also defined in the Penal Code.

Rape by 'surprise' may occur where there was no opportunity for the victim to give consent. In one such famous case, heard by the *Cour de Cassation* on June 25, 1857, a married woman was asleep when an intruder came in and had sex with her; she thought he was her husband. This was regarded as rape. Similar cases may occur with patients who are perhaps unconscious in hospital.

Children under 15 are presumed to be incapable of consenting to sex, so intercourse by an adult with a child under 15 is statutory rape.

Women may be convicted of rape, and there is extensive jurisprudence on this. A law of December 23, 1980 introduced the notion of *la personne d'autrui* in the definition of rape. This removes the gender-specific definition and allows a woman to be convicted of rape. Thus, a woman may be regarded as the principal in relation to rape, if for example, she helps to penetrate the victim with an object. More often women are convicted for being accomplices, and are now subject to the same punishment. The majority of decisions in this area concern inter-family rape. In such situations, mothers may also be prosecuted for another offence if they did nothing to help a child who was being abused or

raped. This is the general offence of *non assistance à personne en danger* (failure to assist an endangered person), under Article 223-6 of the Penal Code. Five years in prison is the penalty; the same penalty is applied for actively endangering another.

### **1.5 – 1.6 Minors as offenders**

Children are regarded as capable of committing rape at any age. However, under the Children *Ordonnance* of February 2, 1945, children of less than 13 years are not capable of being found guilty and are subject only to 'educational reform'. Between the ages of 13 and 18, children may be put in special prisons, but between 13 and 16 years their punishment may only be half the adult penalty. Between 16 and 18, the court can decide if the minor is sufficiently mature to receive the adult penalty. There are no special offences for minors, however, and they are charged in the same way as adults.

### **1.9 – 1.10 Marital rape**

There is nothing special in the text of the Code on marital rape, so the general definition covers conjugal rape. However, until recently a woman was presumed to consent to intercourse with her husband. On July 17, 1984, the *Cour de Cassation* interpreted the Code to include marital rape, in a case where the divorce process had already begun and sexual relations had been ended between the parties. Two cases before the *Cour de Cassation* in 1990 and 1992 fully recognised the existence of marital rape even when the marriage was still intact. The presumption of consent to sexual relations within the marital relationship may now be rebutted (*Cassation, June 11, 1992*). There are no special rules for rape within marriage although it is more difficult to prove in practice. According to the Ministry for Justice, there is no longer a taboo in complaining, but some courts may resist a complaint of rape by a wife.

### **1.11 – 1.12 Categories of rape**

Distinctions between categories of rape are made in Article 222-24 of the Penal Code, which give seven particular aggravating circumstances, such as torture, death of the victim, the age of the victim or any infirmity. According to one official of the Ministry for Justice, seven out of

ten cases of rape come under Article 222-24, i.e. where rape is committed by a person in authority (e.g. a teacher) or a relation of the victim (grandparents, step-parents or the lovers or the co-habitees of parents).

Cases of abuse by strangers on children are rare. While 70% of rapes are committed against children in France, many of these involve educators, sports coaches or priests abusing their authority over children. Prison guards and employers may also be included in this category of those with authority. Rape with a weapon is also an aggravating factor, even when the offender does not actually use the weapon.

### **1.13 – 1.14 Time limits**

Under the principle of *prescription*, all *crimes* must be prosecuted within ten years (with the exception of crimes against humanity which carry no time limit), and all *délits* must be prosecuted within three years. In 1989, a new law was introduced so that where rape is committed by an adult relative on a child, then the 10 years run from the age of majority of the victim (18). In 1995, this principle was extended to include all cases of rape committed by adults on children. It is increasingly thought that crimes against children should be seen as a general exception to *prescription*, although it is a fundamental philosophy since the French Revolution that all crimes should be prosecuted within a certain time. There are some rape cases, however, which are still open 20 – 30 years after they have occurred because the investigation was commenced within the 10-year period, but has not yet been completed.

## **SECTION TWO: PRE-TRIAL**

### **2.1 – 2.3 Reporting of rape**

There are two police forces in France; the *Gendarmerie* and the *Police Judiciaire*. They have responsibility for receiving reports of rape. It is possible for victims to write directly to the prosecutor to initiate an investigation, but it is estimated that 99% of victims report directly to the police. The *Procureur Général* (prosecutor) controls the police investigation, and the *juge d'instruction* also has responsibility for carrying out a preliminary investigation.

There is no special rape unit within the police, although some informal units do exist, and within the *Gendarmerie* there may be persons who just investigate certain crimes. Some police will be specialists in different crimes, such as those crimes committed by minors. However, in rural areas there are no specialists. A review of the *Gendarmerie* is presently being carried out, and this will address such issues. All those interviewed were agreed that there has been much improvement in police treatment of those who report rape.

## **2.4 – 2.7 Police training**

Recruits to the police are given approximately ten hours of training in how to deal with victims of rape and sexual assault. All recruits are also trained in how to take evidence and deal with witnesses generally. This training is provided by four main Police Training Schools, and *gendarmes* also get general training in victim support. Superintendents further receive 40 hours training on sexual assault cases.

There is a national centre for the *Police Judiciaire* at Fontainebleau which provides training for a series of specialist courses for non-commissioned officers. Police may choose to take specialist courses in dealing with rape cases. Police are also trained to deal with paedophilia and incest and the national centre has developed specific training in how to conduct interviews with minors. None of these special training courses are provided by women's organisations or rape crisis centres.

Since 1983, according to the Ministry for Justice, the French *Gendarmerie* have become 'feminised' and are more professional in dealing with rape cases. In the 1980s it would appear that rape victims preferred to deal with female police officers, but now it seems that this has changed, although the victim may still ask for a female police officer if she wishes. Sometimes victims may prefer to see a male police officer who is in uniform, as they are seen by some to possess more authority.

## **2.8 – 2.11 Medical facilities**

There is no special medical unit which conducts a medical examination of the victim when a rape is reported, nor are victims entitled to a

woman doctor, but an experimental special rape unit (*Urgence médico-légale*) for adult victims of rape and sexual assault was established in 1997 in the *Hôtel Dieu* in Paris. This unit will now conduct an immediate medical examination of the victim, which includes a psychological examination to assess the extent of any mental trauma she may have suffered.

Moreover, in seven different towns new facilities are being introduced for minors as a pilot project. These facilities combine all services and come into action when a minor is deemed to be a victim of abuse. This project started in 1994 and is directed by the *Gendarmerie*. The investigating *gendarme* is assisted by a psychologist who re-formulates police questions at an interview with the minor which is filmed on video.

This video then becomes part of the *dossier* of the *juge d'instruction*, and may be used as evidence at trial if it would be too traumatic for the minor to give evidence again. After the initial interview with the minor, an educator or psychologist will assist the minor by telling them about the trial procedures. It is proposed to extend this if it is successful. Another centre is being opened in April 1998. These centres were inspired by research in Quebec into the use of videos for minors giving evidence, and there have been good results despite the tensions between the Anglo-Canadian and French-Canadian systems of law.

These facilities are not yet available to all victims.

### **2.12 – 2.13 Legal advice at reporting stage**

The victim is entitled to legal advice at the reporting stage but the police do not have to inform her of this right. The lawyer does not generally accompany her to report the rape, because the lawyer is usually only consulted after the report has been made to the police. Legal aid is provided to all victims but it is means-tested and does not cover legal advice at the reporting stage.

### **2.14 – 2.15 Other pre-trial support**

The victim can be accompanied at the interview by an educator, a family member or a psychologist, and this is left to the discretion of the

police. The police also give the victim a list of victim support associations (there are 148 of these in France).

## 2.16 – 2.25 Prosecution

The police do not take the decision to prosecute. Once a rape has been reported to them, they go to the prosecutor who will decide whether to initiate the investigation. In larger centres such as Paris, there will be a specialist rape unit in each *parquet* (prosecutor's office), but this is not a formal legal requirement. It has been recommended that in each *Département* or area there would be at least one substitute *procureur* and one *juge d'instruction* who would specialise in the law on minors, both as offenders and as victims. However, judges' attitudes to minors have been changing recently; this is now a sought-after area of specialisation.

Even where the victim wishes to proceed with the case, the *procureur* may classify it as a *classement sans suite*, although this decision may be reviewed if new evidence is uncovered. The *procureur* is obliged to tell the victim the basis for this decision, and in such a case, the victim may constitute herself as a *partie civile* and can then apply directly to the *juge d'instruction* to initiate an investigation, thus bypassing the decision of the *procureur* to drop the case (*citation directe* procedure).

The *procureur* also has discretion to reduce the charge, but a *partie civile* may again seek to have this decision overturned by a *juge d'instruction*. A prosecutor will often seek to *correctionalise* a rape, that is, to re-classify it as a lesser offence, a *délit* (sexual assault or *attentat sexuel*) rather than a *crime*. Rape is a *crime*, and like all *crimes* may only be tried before the *Cour d'assises*. *Délits* are tried before the *Tribunal Correctionnel* and not before the *Cour d'assises*.

If the *partie civile* is opposed to this, she may apply to the *juge d'instruction* to overrule this decision. However, it is sometimes preferable for the victim not to go before the *Cour d'assises*, so *correctionnalisation* may also be requested by the victim. The agreement of the victim must be sought by the *procureur* before a decision is taken to re-classify an offence.

The *Tribunal Correctionnel* can only impose a maximum penalty of ten years' imprisonment, so this may be a disadvantage for the victim.

However, there is often a three-year wait before a case comes to the *Cour d'assises*, whereas it only takes six months for a case to be heard by the *Tribunal*. Thus, the victim, *procureur* and *juge d'instruction* may all agree that a case of rape should be re-classified as a *délit*. However, the principle of *prescription* is applied more strictly in such a case, since an investigation into a *délit* must be commenced within three years of its occurrence. Moreover, the victim will recover less compensation for sexual assault than for rape. Some lawyers believe that there is an increasing tendency not to *correctionnalise* cases, since juries are seen as becoming more ready to convict.

The victim can withdraw her complaint at any stage, but this should not matter, since the case can still be prosecuted even without a complaint by the victim. She may take a private prosecution for rape, using the *citation directe* procedure whereby she may apply directly to the *juge d'instruction*. Legal aid is provided to victims for this procedure, although a symbolic deposit of FF1,000 is required, in order to prevent an abusive or false complaint (the victim can recoup this unless the defendant is acquitted).

## **2.26 – 2.29 Plea bargaining**

There is no formal plea bargaining procedure, although in practice negotiations are conducted around the *correctionnalisation* of offences. The victim may have a role in this process.

## **2.30 – 2.36 Investigation and bail**

Since the nineteenth century, the *juge d'instruction* has been technically in charge of the investigation, but in practice this role is delegated largely to the police. For *crimes*, as opposed to *délits*, the process of *instruction* is obligatory, and the prosecutor will require the *juge* to commence this process. The *juge* then takes over control of the police and the investigation and will interview witnesses and collect evidence in order to compile a *dossier*.

Once a suspect has been arrested, he must be brought before a *Tribunal* within 24 or in some cases 48 hours. The *Tribunal* may detain him or release him on bail. He has a right to liberty under the CCP because

of the presumption of innocence, but in practice 98 per cent of suspects are detained pre-trial. For rape, in practice, in order to protect the victim, the suspect is almost never released pre-trial. The victim has no say in the bail decision, although she may make observations to the judge; but these do not have to be taken into account in the bail decision.

Although there are no formal protections available pre-trial for the victim, the *juge* can detain the defendant in prison and the police will protect the victim if it is necessary to ensure she testifies. Moreover, the *juge* may impose conditions of bail that the defendant must stay away from the victim or other named persons. This is known as *contrôle judiciaire*. The defendant is entitled to means-tested legal aid, and it is estimated that 90 per cent of defendants before the courts qualify for legal aid.

### **2.37 – 2.38 Pre-trial procedures**

There is a pre-trial procedure where a judge can decide if there is enough evidence to proceed with the case; this is called the *instruction préparatoire* and it is conducted by the *juge d'instruction*. However, there is a second pre-trial procedure for *crimes* as opposed to *délits*. First, the *juge d'instruction* conducts the investigation and then sends the *dossier* to the *procureur* for an opinion. Then, the *juge d'instruction* must decide on the basis of all the information whether there is enough evidence to refer the case to the next stage, which is the *Chambre d'accusation*, for a second examination. If the *juge* decides there is not enough evidence, the case is not referred to the *Chambre d'accusation*, but is discontinued. Both the *juge* and the *Chambre d'accusation* must be convinced that there is sufficient evidence for the case to be sent before the *Cour d'assises*. In practice, the victim may give evidence once or more before the *juge d'instruction* but does not usually have to do so before the *Chambre d'accusation*.

### **2.39 – 2.47 Representation and information**

Legal aid is available on a means-tested basis for the victim pre-trial, and her lawyer may accompany her to the *juge d'instruction* and be present when she gives her statement. Once the victim is constituted as a *partie*

*civile*, she is kept informed of the progress of the case pre-trial through her lawyer, who is given access to the *dossier* prepared by the *juge d'instruction*. The lawyer may consult the *dossier* and take copies of it upon payment of a minimal charge, and is also entitled to see the results of forensic tests, expert witness reports and the opinion of the *juge* on the case. But the *partie civile* herself has no right to see the *dossier*. However, the right to consult the *dossier* has recently been extended to a defendant who is representing himself in criminal proceedings before the *Tribunal*, by the *Cour de Cassation*, following a recent ruling of the European Court of Human Rights. In the view of some lawyers, access to the *dossier* is not of much practical value to a layperson, since both defendant and victim would have difficulty understanding the documents.

The victim may meet the prosecutor before the trial if she wishes. The association of rape crisis centres provides leaflets and other information on the trial process for victims.

## SECTION THREE: TRIAL

### 3.1 – 3.3 General procedures

Like all other *crimes*, rape cases are heard before the *Cour d'assises* which consists of three professional judges (the President of the *Cour* and his two colleagues) and nine lay jurors. In relation to the selection of lay jurors, the defence may object to five jurors and the prosecutor to four, but the victim has no right to object. Jurors are chosen under Article 254 of the CCP, and must be over 23 years old, literate and not convicted of serious crimes. There is one *Cour d'assises* and two or more *Tribunaux Correctionnels* for each *Département* in France. Most cases take two years to come before the *Cour d'assises*. The process is quicker if the defendant is in prison but it would still take between 18 months and two years for a straightforward rape case to get heard, and four to five years before more complex crimes will be heard. Thus, France is regularly taken before the European Court of Human Rights for keeping persons in custody for too long pre-trial.

Where an offence of rape has been *correctionnalisée* and re-classified as a *délit* of sexual assault, the trial will take place before the *Tribunal Correctionnel*, which is composed of three professional judges only.

### **3.4 – 3.5 Training for legal personnel**

No special training for rape trials is provided for lawyers or judges, although there is an *Ecole Nationale de la Magistrature* which organises specialist training for senior judges. Where the victim is a child, special training may also be provided by the *Ecole Nationale de la Magistrature*.

### **3.6 – 3.7 Special procedures for minor defendants**

Cases with minor defendants are heard before the *Cour d'assises des mineurs* (the special court for minors) which is made up of specialist judges.

### **3.8 – 3.9 Special procedures for victims**

There are no special facilities provided in the courts in which rape is tried, but for cases before the *Cour d'assises*, the defendant is always kept in prison during the trial, and thus the victim does not meet him, although she will sit with other witnesses in the waiting room. If she is a *partie civile*, she may stay in the courtroom throughout the trial but cannot testify as a witness. The same toilets are used for all those involved in the trial, although the defendant will always be accompanied by two *gendarmes*. There is not even a separate eating area for the jury, so the jurors eat with all the others.

### **3.10 – 3.19 Anonymity and protective measures**

The victim is entitled to anonymity throughout the trial and after the verdict, but the trial itself is held in public, although it may be heard behind closed doors if the *huis clos* rule in Article 306 of the CCP is applied (i.e. *in camera*). This will be applied at the discretion of the President of the Court, or where the victim or defendant is a minor, or where the victim requests that the rule be applied. She may ask for the trial to be heard in public or wholly *in camera*, or she can ask for her evidence alone to be heard *in camera*.

There are also restrictions on how rape trials are reported. The media cannot film or take photographs, although they can draw or take notes, under a special press law.

The President of the Court has full power over the direction of the trial, and may declare any person to be in contempt of court. Subject to this, the victim may have anyone she likes present, such as family members, her doctor or psychologist. Rape crisis centres are allowed to accompany the victim and they may become *parties civiles* themselves, if for example the victim's lawyer is not adequately representing the victim. Finally, the President of the Court (but not the prosecutor) has the duty to look after the interests of the victim.

### **3.20 – 3.26 Examination in court**

Because the French trial process is inquisitorial, examination of witnesses is always conducted through the President of the Court, so that questions may only be asked through the President, by the defence and prosecuting lawyers and the victim's lawyer. In practice, however, according to the Ministry for Justice, the questioning process is becoming more like the English system of cross-examination, since the President usually just repeats the questions verbatim to the witnesses.

Thus, the defendant may not ask the victim questions directly in court. He does have the right to defend himself, but is obliged to have a lawyer before the *Cour d'assises*.

The victim is not entitled to give evidence on video or behind a screen, although these practices are not forbidden either, and might be used by a court if they were considered to be more effective. There is also a pilot project allowing special procedures for minors, whose evidence may be given on video (see above).

### **3.27 – 3.35 Evidence**

The prosecutor must prove in law that the victim did not consent to sexual intercourse, but does not have to prove physical resistance by the victim or physical force by the defendant. Under Article 222-23 of the Penal Code, lack of consent may be proven by the existence of a trick, a threat, a menace or by surprise or blackmail.

The defendant's honest but unreasonable belief in the victim's consent in theory could be a defence, but in practice once the prosecutor has

shown there was an absence of consent, then the defendant's belief may only be relevant to sentence. Indeed, if the defendant's belief was unreasonable, then the judge and jurors are not likely to believe it was honest. The behaviour of the woman is the main criteria for the court to decide if there was an absence of consent. The defendant may be convicted on the victim's evidence alone.

In all matters of evidence, admissibility is at the discretion of the President of the Court, and the twin principles of *Intime Conviction* and *Liberté de la Preuve* apply. Taken together, these two principles mean that the judge and jury must be personally convinced by the evidence, and that there are no strict rules of evidence. The principle of *Intime Conviction* forms the basis for the only warning given to the jury. It was established by Napoleon, and is contained in Article 353 of the CCP.

### **3.36 – 3.39 Victim's prior sexual experience**

Evidence of the victims prior sexual experience with the defendant or with others may be used by the defendant in Court, and no special rules apply to this. Again, the principle of *Liberté de la Preuve* applies.

### **3.40 – 3.44 Verdict**

Once submissions have been made by the lawyer of the *partie civile*, the prosecutor and the defence counsel, the judges and jury must retire to consider their verdict. Two possible verdicts may be given; guilty (*coupable*) or not guilty. Both the judges and the jurors consider the question 'Is the defendant guilty?', and they consider the relevant sentence at the same time. A majority verdict of eight votes out of twelve is sufficient, and the votes of jurors carry the same weight as those of judges. The defendant cannot be found guilty of questions other than those put to the court, but two alternative charges such as rape and sexual assault may be put to the court at the same time. If the defendant is found to be insane, he is regarded as 'not guilty', but will be detained in a mental hospital by the executive rather than by the judiciary.

## SECTION FOUR: SEPARATE LEGAL REPRESENTATION

### 4.1 – 4.3 Separate legal representation for victims

In all criminal trials, there are two decisions to be made; the penal decision as to verdict and the civil decision as to compensation. The victim in all crimes is entitled to become a *partie civile*, and to be represented by a lawyer before the criminal court, in order to seek compensation from the court. This right has been in place in France since 1789, and the representation is state-funded on a means-tested basis. Even if the victim has to pay for her own lawyer, she may seek reimbursement from the defendant if he is convicted. If the victim is legally aided, then she must take a lawyer from a list drawn up by the French Bar Association (*bétonnier*), and usually made up of junior lawyers. There is no formal relationship between the prosecutor and the victim's lawyer. The victim herself, once she is constituted as a *partie civile*, does not have to attend the trial proceedings herself, but it would appear that it is rare for a victim to be absent.

### 4.4 Rights of the victim's lawyer

The victim's lawyer has the right of access to the evidence before the trial (see above) and also has the right to be present in court throughout the trial. S/he may speak on the victim's behalf in court, and can call witnesses on behalf of the victim. Although technically only the President of the Court calls witnesses, in practice these are generally chosen by the defence or prosecuting lawyer. The victim's lawyer may not object to questions put to the victim by the defence or prosecutor (since these are always asked through the President) but may cross-examine the defendant (through the President) and may also make submissions to the court on the law, and address the Court as to the guilt or innocence of the defendant. S/he is not supposed to address the Court as to the sentence. However, s/he must address the Court as to the amount of compensation payable to the victim. Finally, the victim's lawyer can also ask for the Court to rise so as to seek more investigation, if s/he considers that there has been inadequate investigation, but this request will only be granted in extreme cases.

## SECTION FIVE: POST-TRIAL

### 5.1 – 5.10 Sentencing

The sentencing decision is made by the judges and jurors together. They commence their deliberation by considering if the maximum sentence of 15 years is appropriate, and if they decide that it is not, they then seek to achieve a majority on a lower sentence. The President of the *Cour d'assises* tends to be very experienced and may influence the choice of sentence. No training in sentencing is given, nor does any tariff exist, but the President must explain the potential sentencing powers of the Court to the jury, and will often arrange a prison visit for the jury. This, too, may affect their decision.

It is possible for an indefinite sentence to be imposed for an offence of aggravated rape, but the general maximum is 15 years for non-aggravated rape. There is no mandatory minimum sentence, and the average sentence for rape in practice is now between 10 and 14 years, or between 10 and 20 years according to one view. Generally, 22 years is the longest determinate sentence imposed, and would constitute the term of a typical life sentence. However, under a new law, it is possible for a sentence of 30 years or even for an indefinite sentence to be imposed for child sexual abuse. This means that the defendant's case will not be re-examined until at least 30 years have passed.

In theory, a guilty plea is not meant to reduce the sentence, but in practice a defendant who confesses immediately and then apologises to the court will receive a reduced sentence. Technically there is no such thing as a guilty plea in French law; a defendant may confess to a crime, but it must still be investigated by the police before any conviction can be recorded.

The impact of the rape on the victim does affect the sentence, since the aggravating circumstances in the Code apply. If there is permanent injury to the victim, this is seen as an aggravating circumstance and the maximum sentence is increased to 20 years. Similarly, if the victim has been tortured or if one of the other aggravating circumstances listed in the Code is present, this will also affect the sentence. Also, if the victim is especially traumatised, sentence will be increased. Evidence of the

effect of the rape on the victim may be presented to the Court by the prosecutor to show the existence of aggravating factors, but the victim's lawyer may also present additional evidence, in particular expert medical or psychological evidence.

### **5.11 – 5.13 Appeal**

Strictly speaking, French Law does not recognise appeals from a verdict of the *Cour d'assises*. However, the *Cour de Cassation* can quash a conviction on a point of law. The defendant also has the right to seek the *Cour de Cassation* power of *Revision*, where new facts have come to light since the original trial. In such a case, the *Cour de Cassation* can return the case to the *Cour d'assises* for a re-trial by a new jury, but they cannot overturn the verdict of the original jury.

### **5.14 – 5.21 Criminal injury compensation**

The *partie civile* is entitled to receive compensation from the trial court if the defendant is convicted, unless she was not injured or traumatised in any way. Compensation must be paid by the defendant, or by the state if he cannot afford to pay. It is not subject to a maximum amount or ceiling, although it is normally set at around FF 400,000, or more if the victim suffered some permanent injury. Both general and special damage is recoverable. The compensation decision is made by the three judges sitting without the lay jurors, after verdict and sentence have been given.

Under Article 706 of the CCP, a *Commission d'Indemnisation des Victimes d'Infraction* has also been established which administers a special compensation fund for victims of serious crimes and of terrorism. Where the defendant cannot pay, the state will compensate the victim from this fund, and will then pursue the defendant under the *subrogation légale* procedure.

### **5.22 – 5.25 Civil & constitutional remedies**

The *partie civile* procedure exists for victims through the criminal courts, but the victim may also take a civil action through the civil courts after the criminal proceedings are over, although she cannot take a civil case if there has been an acquittal in the criminal case.

The European Convention on Human Rights is incorporated into French domestic law, but has no more effect for victims of rape than for victims of other offences.

## **SECTION SIX: STATISTICS**

Statistics on rape are published annually by the Ministry for the Interior, and 1996 is the most recent year for which they are available. According to the Ministry for Justice, there are roughly 2,000 convictions for rape every year, although the victims are counted rather than the crimes themselves. Thus, even if one woman was raped many times, it would just be counted as one crime.

Statistics show that the number of rapes reported to the police more than doubled between 1987 and 1996, but this is probably due to an increasing willingness by victims to report rapes. A slight decrease was recorded in the number of reported rapes between 1995 and 1996, but this was ascribed by various interviewees to a number of different factors.

Assessing the extent of unreported rape is hampered by cultural factors; in addition to the reluctance of victims to report on occasion for fear of their family and friends finding out about the attack, difficulties also exist within particular ethnic communities, and illegal immigration can also result in women failing to report rape to the police.

### **Number of reported rapes:**

1993	5,605
1994	6,526
1995	7,350
1996	7,191

### **Number of prosecutions commenced:**

1993	3,984
1994	4,810
1995	5,747
1996	5,856

**Number of convictions recorded (where penalty of imprisonment imposed):**

1993	1,997
1994	2,401
1995	2,651
1996	2,740

**SECTION SEVEN: REFORM**

The law on rape is regarded by most as being satisfactory, although rape crisis centres may still have some criticisms. More importantly, attitudes to rape have definitely changed. Ten years ago, the police were less inclined to believe women but police reforms have improved this dramatically. However, it was suggested that hospitals should provide special medical units for victims of rape.

The Ministry for Justice refer to a project presently under consideration on reform of the law on time limits, particularly for minors. Also, some reform of the *Cour d'assises* is expected following an April 1996 Report on its functioning.

Finally, a new Act was introduced on June 17, 1998, which provides for the monitoring and surveillance of convicted sex offenders after they have left prison. Such offenders may also be obliged to continue receiving treatment after leaving prison, and may be forbidden from taking up certain occupations. This appears to be the first legislative measure which has been introduced specifically to deal with the punishment of those convicted of offences of rape or sexual violence.

Apart from the parliamentary debate around the introduction of this new law, very little discussion appeared to be going on about rape law reform in France. This may be due to the fact that there is a strong traditional entitlement to victim representation within the criminal justice system, which applies to victims of all crimes; rape victims are not seen as meriting any special consideration. However, there is now increased awareness of the issue of sexual abuse of children, and this may have been the impetus for the new law providing for extended punishment for those convicted of rape and crimes of sexual violence.

# The Legal Process: Germany

## SECTION ONE: THE LAW ON RAPE

### 1.1 Definition of rape (*Vergewaltigung*)

The legal definition of rape is contained in paragraph 177 of the German Penal Code (*Strafgesetzbuch* or StGB). This paragraph contains a combined offence, entitled 'sexual coercion; rape', which was recently introduced after much political controversy, particularly around the issue of marital rape (see below).

While the previous distinction between rape and sexual assault has now been removed, paragraph 177 retains a number of distinct categories of 'sexual coercion'. The basic offence is committed where a person coerces another person into tolerating sexual acts, either by force, threat of immediate danger to life or limb, or through taking advantage of a situation where the victim is defenceless. This offence carries a mandatory minimum penalty of one year's imprisonment.

However, where aggravating circumstances are present, the mandatory minimum penalty for the offence will be increased. Paragraphs 177(2) to 177(5) contain a list of such aggravating factors, including: where full sexual intercourse takes place; where the victim is subjected to particularly degrading sexual acts; where the act is committed by a number of people; where a weapon is carried; or where the victim's life is endangered. Minimum penalties of two to five years are imposed, depending on the aggravating factor present. Further, paragraph 178 provides that where the victim's death is caused through the committal of a paragraph 177 offence, a mandatory minimum penalty of 10 years' imprisonment applies. Paragraph 179 deals with sexual abuse of persons incapable of resistance; and paragraph 176 imposes penalties for the sexual abuse of children.

Thus, the new combined offence of sexual coercion is broadly defined and carries a wide range of possible penalties. The new definition was

apparently introduced because the big political parties believed it would attract women's votes in the 1998 general election. However, all those interviewed were critical of the changed offence, and there have been various problems with its application in practice.

First, the definition of 'coercion' is problematic. In 1994, the Federal Constitutional Court ruled that a protestor against nuclear power, who was sitting in the road in front of a nuclear transport, could not be found guilty of the general offence of 'coercion' since there had to be some element of force involved. This decision provided a new interpretation of coercion, with very positive effects for nuclear protestors. However, in relation to rape law, this definition means that the prosecution may have to show there was some force in order to constitute coercion. In other words, moral pressure may not be enough to prove coercion.

Moreover, the practice is to prosecute the defendant under the mildest version of the offence; thus, even where penetration has occurred, he will be prosecuted for sexual coercion (sexual assault or *Sexuelle Nötigung*) rather than for rape. On January 20, 1998, the Berlin District Court convicted a defendant for sexual assault, even where the facts showed that rape had occurred. Although the sentence involved would have been the same, there is less social stigma for a defendant convicted of sexual assault.

Paragraph 179 of the Code, referred to above, provides for situations where the victim is unable to defend herself, i.e. where there is a lack of consent but no actual coercion present (for example, where the victim is too drunk to consent). The Federal Ministry of Justice is now considering whether to repeal paragraph 179 and, instead, broaden paragraph 177. Members of the Social Democratic Party are highly critical of the proposed changes to paragraph 179, since they wish to retain the maximum penalty of five years which previously applied to this offence.

Since 1975, women may be convicted of rape as accomplices, under the co-operative perpetration principle. A woman may also be liable as the principal, where she has for example held down another woman to enable a man to commit a rape.

## 1.5 – 1.6 Minors as offenders

The age of criminal responsibility is 14, and a child cannot be convicted of any criminal offence below that age. Between the ages of 14 and 18, a youth may be convicted of rape under the Youth Criminal Code if the judge deems him to be sufficiently mature.

## 1.9 – 1.10 Marital rape

Marital rape has been recognised in German law since 1997, and no special rules apply to it. According to the Ministry of Justice, there has already been one conviction for marital rape, in which the defendant received a sentence of three years' imprisonment. However, there has been much controversy over marital rape, because of the basic principle in German law that the criminal law should be the '*ultima ratio*' (last resort) in family relationships. Moreover, the CDU (Christian Democrat Party, the majority party in the present Federal Government coalition) opposed the introduction of an offence of marital rape, partly on the grounds of family privacy, and partly because Paragraph 218A of the Penal Code permits abortion where a woman is raped. The CDU view is that the state should not interfere in the bedrooms of married couples; and that a married woman should not be able to get an abortion where she has been raped by her husband.

Thus, during the 1996 debate on changing the definition of rape, the CDU/FDP Government proposed to create a special rule on marital rape, allowing a woman to prevent a prosecution from continuing by withdrawing a complaint of rape against her husband. However, they were overruled by a combined opposition made up of the Social Democrat Party, the Greens, the Socialist Party, and the women members of Government parties. This opposition group feared that the 'withdrawal' condition would put women under pressure from their husbands to withdraw complaints, and that it could also be used as a bargaining tool by women in divorce proceedings. As a result of this combined opposition, the special 'withdrawal' rule for marital rape was not incorporated into the Penal Code. Instead, a compromise definition of 'sexual coercion' (which includes marital rape) was introduced and became law on July 4, 1997. However, debate on other necessary changes continued. In particular, it was agreed to modify the definition of sexual

coercion by including more aggravating factors in paragraph 177 and 178. Finally, after much debate, the present versions of paragraphs 177 to 179 came into force on April 1, 1998.

### **1.11 – 1.12 Categories of rape**

Paragraphs 177 to 179 provide for different categories of sexual coercion, depending on the existence of listed aggravating criteria (see above). The circumstances in which the rape was committed would also have to be taken into account; for example, it is considered to be an aggravating factor if the rape took place outside at night, rather than indoors during the day. Further, in the recording of statistics, distinctions are drawn between stranger and contact rape.

### **1.13 – 1.14 Time limits**

Time limits of three to 30 years are prescribed for the prosecution of different criminal offences, under paragraph 78 of the Penal Code. The relevant time limit will depend on the maximum sentence for the offence. The crimes of genocide and murder carry no time limit, and there is a time limit of 30 years within which prosecutions must be brought for any offence which carries a maximum sentence of life imprisonment. Under paragraph 179, severe cases of sexual coercion carry a maximum penalty of 10 years' imprisonment, and thus a time limit of 20 years applies; but less serious cases of sexual coercion carry a maximum penalty of five years, and so must be prosecuted within ten years of their occurrence. However, where rape is committed on a child, time will run from when the child reaches 18.

## **SECTION TWO: PRE-TRIAL**

### **2.1 – 2.3 Reporting of rape**

The police have responsibility for receiving reports of rape, although the victim may also report directly to the prosecutor or, indeed, to the District Court under section 158 of the Code of Criminal Procedure (the *Strafprozessordnung* or StPO). However, 99 per cent of reports are made to the police.

In most states (*länder*), there is a specialist rape/sexual assault unit in the police force. This is especially so in cities or towns, but not in rural areas. The special units are organised by the state authorities, and are not co-ordinated at federal level. Thus, it depends on the finances of the individual state. Some states have special rape units made up of women officers. In other states, the victim has the right to see a woman police officer. Where a special police unit exists, once a rape is reported to the general police, they should inform the victim of the existence of the special unit; but in practice some victims are not told at the reporting stage.

## **2.4 – 2.7 Police training**

The police receive training for dealing with rape cases, but again this is the responsibility of the *länder*. Such training is usually provided by women experts, such as local women's groups or rape crisis centres, but the type of courses run will depend on different *länder*. Police are not formally obliged to receive such training. Members of the Feminist Lawyers' Association refer to problems which women have experienced in reporting rape to the police; as the police are not routinely trained to deal with rape victims, they may be prejudiced, and even where a specialist unit exists, other non-specialist police are often used on the investigation, in the gathering of forensic evidence, for example.

Specialist police are critical of the lack of training in how to deal with victims in a sensitive and patient way in the general police force. Only those in the special units receive psychological training; they are offered annual courses on abuse and sexual violence. Thus there is a great difference between the service offered to victims by the specialist units, compared to that available from other police.

## **2.8 – 2.11 Medical facilities**

Victims are told by the police to see a doctor as soon as possible, but there is no special medical unit for rape victims. There is no obligation on a victim to go to a police doctor, so she can go to a private doctor or to a medical centre. The police can provide her with the names and addresses of doctors, and official state doctors (*Amtsarzt*) are provided, but they are not on duty at the weekends, when many rapes occur.

Academics and women's groups have campaigned for a special medical pack to be provided to doctors by the police, but this has not been done by any state. In practice, the police provide doctors with information as to what to look for in the post-rape medical examination.

### **2.12 – 2.13 Legal advice at reporting stage**

Since 1984, state-funded legal advice is provided on a means-tested basis for every victim of serious crime, under the 'adhesion procedure', which allows the victim to join the trial as a third party in order to seek compensation for her injuries from the defendant. The defendant must also pay the costs of her lawyer, if he is convicted. This procedure is rarely used in practice.

Alternatively, and more usually, the victim can appoint a lawyer under paragraph 406G of the StPO. A victim who has used this procedure is known as a *Nebenkläger* (literally, a party who is proximate to the prosecutor).

However, neither procedure is necessary for the prosecution of offences, because the prosecutor is obliged to collect all the evidence whether or not the victim is a party to the proceedings.

A bill is due to be introduced in November 1998 which will improve the position of victims. It will amend paragraph 397A of the StPO, by giving the victim the right to a lawyer, which will be funded by the state on a non-means-tested basis, to represent her both pre-trial and in court.

At present, victims are not entitled to state-funded legal representation at the initial stage when they report a rape, although they have the right to have their own private lawyer present during police questioning if they wish. This is often the stage at which most obstacles are encountered by women; there have been many problems around the police questioning of victims, and many *Notruf* (rape crisis centres) advise women to bring their complaint directly before the prosecutor, since they will have to make a statement to the prosecutor at a later stage anyway.

The victim may also seek support from private organisations known as *Weisser Ring* (White Ring or Victim Support), which work voluntarily to help victims. Finally, there is a network of *Notruf* and *Wildwasser* (rape crisis centres) all over Germany, which provide counselling and support to victims of rape and child sexual abuse. These generally receive funding from their local city or state authority, and they also work politically, seeking to influence state policy by highlighting issues of violence against women. *Notruf* personnel may accompany victims to report rapes to the police and may be present during interviews with the victim, in order to prevent hostile police questioning. They may also accompany the victim to court to provide psychological support, but cannot intervene at trial. In theory, where they have counselled the victim after the rape, they may be ordered to give evidence at the trial as a witness; even where the victim does not wish them to give evidence. In practice, however, they are not asked to give evidence against their will.

## 2.16 – 2.25 Prosecution

The police do not take the decision to prosecute. They are obliged to investigate any reported crime, and under sections 160-163 of the StPO may not decide to drop any case. The prosecutor alone takes the decision to proceed with the prosecution, and may decide to drop a case under section 170(2) if there is insufficient substance to the charge.

The principle that prosecutors should control the process dates back to the nineteenth century, when it was believed that the police should be kept under legal control at all times (Enlightenment philosophy). In practice, however, the police run the investigation; the prosecutors are legally trained civil servants and are not skilled to investigate, and experienced prosecutors do not interfere with the police at this stage. When the police have completed their investigation, they must pass the file to the prosecutor. However, some investigative measures, such as the issue of search warrants, do require the authority of the prosecutor, and the prosecutor can direct the police to take further witness statements or collect extra evidence where it is believed necessary. Indeed, police and prosecutors in many *länder* work very closely together, with the police passing on any information which they receive directly to the prosecutor. In some *länder*, judges and prosecutors take the same

qualifying exams and may alternate between both positions every few years.

A special prosecutor may be assigned to rape cases, but again, this depends on the size of the administrative area. There are special prosecutors, who are mainly women, in bigger areas, but they are not used in rural areas. The prosecutor has a discretion to drop cases under section 170, and may do so even against the wishes of the victim, although this would be unusual in relation to serious offences such as rape. Similarly, the prosecutor may initiate an investigation even where no rape has been reported.

The prosecutor has no discretion to reduce the charge from rape to a less serious charge, because under section 442 of the StPO, the court must review all the evidence, and can increase the charge even if the prosecutor recommends a reduced charge. However, the prosecutor does have the power to define which crime the defendant is charged with initially; but this issue does not arise under the new paragraph 177, since all offences previously known as rape and sexual assault are now referred to as offences of sexual coercion.

The victim of rape or any serious offence is not entitled to withdraw her complaint at any stage; nor can she take a private prosecution for rape. Under section 374 of the StPO, only minor crimes may be privately prosecuted.

## **2.26 – 2.29 Plea bargaining**

There is no official system of plea bargaining; but in practice both the charge and the penalty may be negotiated informally, between the prosecutor and the defence counsel, who will come to a private agreement in the judge's private chamber. The defendant will then make a public admission, the prosecutor will discharge the witnesses and all parties will go through the motions of debating the sentence which has been agreed in advance. The Supreme Court has approved this practice, and has ruled that the judge must adhere to the promised sentence. The victim's lawyer is not involved in this process and will not be invited to attend the judge's private chamber.

## 2.30 – 2.36 Investigation and bail

The police are obliged to investigate whenever a crime is reported to them. Once a suspect has been identified and arrested by them, he is entitled to be released on bail under section 116 of the StPO. Bail may only be denied if it is thought that the defendant will abscond, interfere with the investigation, or is likely to re-offend. In rape cases, bail will typically be granted if the defendant has a family, a job and a permanent address; and the defendant is also entitled to legal aid on a means-tested basis under section 140 of the StPO (he must be assigned a lawyer as he has no right to defend himself without the aid of legal representation, since rape is a crime and not a misdemeanour). The victim has no say in the bail decision, but bail conditions, protective of the victim, may be imposed by the judge under section 116. It has also been proposed that the victim's name should not be disclosed to the defendant at this stage, as a way of protecting her.

## 2.37 – 2.38 Pre-trial procedures

There is a pre-trial procedure, known as the *Zwischenverfahren*, where a judge decides if there is enough evidence to proceed with the trial, under section 199 of the StPO. The victim does not have to give evidence at any stage before the trial, since normally the prosecutor will already have interviewed her during the investigation. However, when a woman reports a rape she may be taken immediately to an investigating judge who can take a statement from the witness, so that if she subsequently withdraws her complaint, the judge can give evidence to the trial court as to the content of her statement. This procedure is frequently used if there is a fear that a witness will be intimidated pre-trial.

## 2.39 – 2.47 Representation and information

The victim is entitled to pre-trial legal representation under the 'adhesion procedure', and legal aid is available for her pre-trial. She is kept informed of the progress of the case pre-trial; since 1986, section 406d(1) of the StPO gives the victim the right to be kept informed, if she asks for this *expressis verbis* (expressly and formally). The prosecutor has the duty to inform victims of these rights, and may approach the

victim directly, or through her lawyer. Since most reports of rape are made to the police, this duty to inform might more logically be made the responsibility of the police. Sometimes the police do provide the victim with information forms giving the phone number of the prosecutor and the address of the court, and in big towns, *länder* Ministries produce similar information leaflets.

The victim does have an opportunity to meet the prosecutor before the case, although this depends on the different prosecution policy in each *länder*. The victim may contact the prosecutor directly, although normally she has no need to do so, since her lawyer will be kept informed of the progress of the case. Under section 406e(1) of the StPO, the victim's lawyer has access to the prosecution file during the investigation, although not if this would conflict with the interests of the defendant or of others. The prosecutor has the discretion as to whether or not the victim's lawyer sees the file; and if the prosecutor refuses access, the victim may appeal this decision to the judge. The decision of the judge on this matter cannot be appealed. The defendant also has the right to see the file, although only when the investigation is complete.

## SECTION THREE: TRIAL

### 3.1 – 3.3 General procedures

The jurisdiction of the criminal courts depends on the nature of the offence; very minor cases are heard before a local court (the *Amstgericht*) with a single professional judge. More major cases, such as minor sexual assaults, are also heard before the *Amstgericht*, but in those cases it will sit with one professional judge and two lay judges or magistrates, and may impose a maximum penalty of four years' imprisonment. When the court sits with one judge alone, it is known as *Strafrichter*; but when one judge and two lay magistrates are sitting, it is known as *Schoffengericht*. The most serious cases, such as rape or aggravated sexual coercion, are heard before the District Court or *Landgericht*, before three professional judges and two lay magistrates.

Professional judges are legally trained and appointed by the Minister for Justice, once they have passed two state exams. However, the lay magistrates are elected by their local community, and once elected are randomly distributed to different local courts. The process of choosing magistrates can take two to three months, but once elected, they serve for a term of four years. Under sections 22 – 27 of the StPO, any of the parties (the *nebenkläger*, prosecutor or defendant) may object to any of the professional or lay judges on the grounds of bias, or on the grounds that the election process was not conducted in a fair manner.

High Courts and Federal Courts also exist, but have no original jurisdiction. They may hear cases only on revision (a review of the case on a point of law, such as a misinterpretation of the Code) or on appeal (appeal on the facts, where new evidence may be introduced). Cases go to the next highest level of court on appeal, and after that may only be reviewed on revision if leave is granted. A case may also be referred directly to the regional supreme court, the *Oberlandesgericht*, on a point of law.

### **3.4 – 3.5 Training for legal personnel**

There is a Judges' Academy in Trier at which judges may receive optional training in dealing with specific types of case. However there is no obligation for lawyers or judges to receive training in the conduct of rape trials, nor is any special training provided for cases where the victim is a child.

### **3.6 – 3.7 Special procedures for minor defendants**

Where the defendant is aged between 14 and 16, section 241A of the StPO provides that he may only be questioned through the judge. Moreover, where the defendant is under 18, or is between 18 and 21 but immature, the case will be heard *in camera* before the Juvenile Court.

### **3.8 – 3.9 Special procedures for victims**

In the courts in which rape is tried, separate facilities may be provided for the victim, but this will depend on the policy of individual *länder*. In Bavaria, for example, a project to provide help and assistance for witnesses was set up in 1994 and is in operation in nine out of the 22

Bavarian courts. Under this project, a special waiting room is set aside for witnesses, with refreshment facilities and reading material, and an official from the court is available to inform witnesses about their role at court, and the legal procedures which will apply.

### **3.10 – 3.19 Anonymity and protective measures**

The victim has no legal right to anonymity, since this is provided at the discretion of the judge. Under section 68, a new provision of the StPO, a victim who fears for her life has a right not to have her name published. Under section 169 of the *Gerichts Verfahrensgesetz* (GVG; the Code on court procedures), the trial is held in public, although the victim has the right to ask the judge to send the public away, and the judge has a discretion in this regard, either where the trial will involve discussion of ‘intimate matters’, or for reasons of state security. The judge may also impose restrictions as to how the trial is reported in the media, and may decide to hold the trial *in camera* either wholly or in part. In most rape cases, the judge will exclude the public, at least from some of the trial, but the defendant may use their exclusion as a ground to seek revision of the case later. If the trial is held in public, this point cannot be used by the defendant on revision.

The judge may also exclude certain specified persons from the courtroom for misbehaviour or making threats to witnesses. Section 247 of the StPO (‘removal of accused from courtroom’) now provides that, during the victims evidence, other witnesses or the defendant can be asked to leave the room, for the protection of the victim, but in practice, the exclusion of the defendant does not happen very often because again, it can be a ground for revision of the case. It is always applied at the discretion of the judge and the victim has no right to demand the exclusion of any person from the courtroom.

### **3.20 – 3.26 Examination in court**

The German trial process is not adversarial. Under section 244 of the StPO, the primary duty of the trial court is to establish the ‘real truth’ of the matter before it. Thus, the trial judge controls the examination of witnesses, and all questions must be asked through the judge where a witness is under 16. Cross-examination is therefore not as hostile as

in the common law system. Multiple cross-examination of witnesses is theoretically possible, and indeed even if there is only one accused he is entitled to have a maximum of three lawyers, all of whom may examine the prosecution witnesses. However, the judge is obliged to intervene and stop the questioning of a witness if it is too aggressive. Under section 241A of the StPO, the judge may forbid all direct questioning of a particular witness, so that all questions are put through him, and if necessary re-formulated by him.

For all serious crimes, the defendant must have a lawyer, whether or not he wants one. However, even where he is legally represented, he can still question witnesses directly, and this has happened in some rape cases.

In 1986, the *Opferschutzgesetz* (Victim Protection Act) was passed, which provides greater protections to the victims of all crimes, including the right of child victims to give evidence on video. Videotaping of child witnesses' evidence has to date only been introduced on a pilot basis. Two models are used: one is the Mainz model, whereby the judge leaves the courtroom to interview the child witness in a separate room, and the interview is transmitted to the court by video-link. Thus, any questions which the defence or prosecutor wish to put to the child will be re-worded and put through the judge. Under the other (British) model, a psychologist leaves the room with the child, and the judge remains in the courtroom and asks the child questions over the video link, so that the judge can observe the defendant's reaction to the child's evidence. A new law as to the giving of evidence on video will be introduced in November 1998.

### 3.27 – 3.35 Evidence

The prosecutor must prove that the victim did not consent to sexual intercourse, but does not have to show that she resisted physically or that the defendant used physical force. However, some element of coercion by the defendant must be proved under paragraph 177 of the Penal Code. An honest but unreasonable belief by the defendant in the victim's consent may constitute a defence; all tests for intention or *mens rea* are subjective, following the French tradition. However, the general overriding principle in all trials is that of 'free evaluation of the evidence' (*berzeugung*) under section 261 of the StPO. The defendant may

thus be convicted on the victim's evidence alone, and no special rules apply to this evidence. It will be evaluated by the judges and jurors in the same way as any other evidence.

### **3.36 – 3.39 Victim's prior sexual experience**

Similarly, evidence as to the victim's prior sexual history with the defendant or with others is admissible, and no special rules apply. The court must decide if it is relevant to the question of the defendant's belief in the victim's consent.

### **3.40 – 3.44 Verdict**

The decision as to both verdict and sentence is given at the same time, by the judges and magistrates acting together. The verdict may be 'guilty', 'not guilty' or 'insane'. Where a defendant is found to be insane, he is not formally regarded as receiving a penalty. Instead, he may be detained for the protection of society.

The verdict does not have to be unanimous; a two-thirds majority is sufficient i.e. four out of five must be in favour of the verdict. In the District Court, the three professional judges therefore cannot give a verdict without persuading one of the lay magistrates to vote with them. Negotiations between the professional and lay judges are held in secret, and the majority is never disclosed. It is the duty of the presiding judge to ensure that a sufficient majority is reached.

Previously, the defendant in a rape trial could be found guilty of the alternative, lesser charge of sexual assault; but now under paragraph 177 of the Penal Code, both offences have been subsumed into one general offence of 'sexual coercion; rape' (see above).

## **SECTION FOUR: SEPARATE LEGAL REPRESENTATION**

### **4.1 – 4.3 Separate legal representation for victims**

The victim of rape or other serious crime is entitled to have her own lawyer represent her during the trial under the *Nebenkläger* procedure.

In its present form, this entitlement was introduced in 1984, although some such entitlement has existed since 1924. The victim's lawyer is funded by the state (the means test for this funding will be removed from November 1998), although the defendant may be ordered to pay the costs if he is convicted. Even where her lawyer is state-funded, the victim may propose a lawyer of her choice, and the court will accept her choice.

There is some controversy over the effectiveness of the victim's lawyer. An opinion expressed by some state officials and prosecutors, was that the victim's lawyer serves no useful purpose, and simply duplicates the role of the prosecution. Thus, although all those interviewed agreed that it could be psychologically helpful for the victim to have her own lawyer present during the trial, this was not necessary either to ensure a conviction or to provide legal protection for the victim, since there is already a duty on both the prosecutor and the judge to protect her interests.

Those victims' lawyers interviewed expressed the view that the most important role for the victim's lawyer is to advise the victim pre-trial; to give her all the information she needs on the progress of the case and its likely outcome. At this stage, the victim's lawyer seeks to ensure that all the relevant evidence is gathered, and that the victim is fully prepared for the trial itself. The victim has access to the prosecution file through her lawyer, and this puts her in a stronger position at the trial.

There is no official relationship between the prosecutor and the victim's lawyer. Although both wish to secure a conviction, the prosecutor also has a responsibility towards the defendant, and has a duty to seek out both aggravating and mitigating factors.

#### **4.4 Rights of the victim's lawyer**

The victim's lawyer generally has the same rights of participation at the trial as the prosecutor and defence lawyer. S/he is given access to the evidence before the trial, may be present in Court throughout the trial, speak on the victims behalf in Court, call witnesses on behalf of the victim, object to questions put to the victim by the defence and object to questions put to the victim by the prosecutor. S/he may also ask

questions of the defendant, make legal submissions to the court, address the court as to the guilt or innocence of the defendant and as to his sentence, and may address the court as to the suitable level of compensation for the victim, although this last right only applies where the victim has adopted the 'adhesion procedure'. This procedure is less frequently used than the *Nebenkläger* procedure, because criminal judges are reluctant to deal with what are seen as issues of civil law.

It is estimated that 50 per cent of victims would engage the services of a victim lawyer or *Nebenkläger-Vertreter* through this procedure, and while some of these lawyers would not take an active role in the trial proceedings, others might typically ask the court for a direction as to the anonymity of the victim, or that the defendant be excluded during the victim's testimony. They may also request that certain witnesses be called, or that certain questions are not asked of the victim. They will also try to ensure that there is no hostile questioning of the victim.

Victims' lawyers who were interviewed stated that their presence at trial alone has a positive influence on the conduct of the trial. The impact of the rape on the victim can be seen as an aggravating factor in determining sentence, and so the victim's lawyer has an important role in ensuring that medical reports are put before the court as evidence of the effect of the rape on the victim.

## **SECTION FIVE: POST-TRIAL**

### **5.1 – 5.10 Sentencing**

The sentencing decision is made by the judges and magistrates together, at the same time as the verdict is decided. Judges are given no specific training in rape cases. The maximum sentence for rape is 15 years' imprisonment (or life imprisonment if the victim dies as a result of the rape), and there is a mandatory minimum sentence of one year. The average sentence for rape, according to the Ministry of Justice, would be three to four years (other interviewees estimated between one and five years as an average). There are no guidelines or tariffs available to assist in sentencing, but judges do discuss sentence informally among themselves.

It would be rare for a defendant convicted of rape to receive a sentence of over six years; but this is in keeping with general sentencing practice, whereby 80 per cent of convicted defendants receive sentences in the lower one-third of the permitted sentence. For recidivist offenders, there is now a provision allowing indefinite detention, whereby the court must review the detention every three years to determine if the offender is still dangerous.

A guilty plea by the defendant may have an informal effect upon the level of sentence. Paragraph 46 of the Penal Code provides that the effect upon the victim must be taken into account in the sentencing decision, and the judge will therefore observe the impact of the rape upon the victim, and may give a harsher sentence if the impact has been severe. There is no formal method for presenting evidence to the court as to the effect upon the victim, although in practice this is often done by the victim's lawyer.

### **5.11 – 5.13 Appeal**

Appeal and Revision are two different procedures in the German system. An appeal on the facts of the case may be taken to the next highest level of court, and an appeal on a point of law may be taken to the *Oberlandesgericht*, but it is also possible to refer a case directly on a point of law, under a special revision procedure, to the Federal Court or *Bundesgericht*. If the victim is constituted as a *Nebenkläger*, she also has the right to initiate an appeal.

### **5.14 – 5.21 Criminal injury compensation**

The trial court is not empowered to grant compensation to the victim unless she has used the 'adhesion procedure', which is rarely used. However, since 1969 victims may claim compensation under the Victim Compensation Act (*Opferentschädigungsgesetz*) from a State Compensation Board which sets very tough conditions on the awarding of compensation, and will only compensate victims for special or material damages, and not for general pain and suffering, although there is no maximum amount which may be awarded. Victims may apply to this Board even if no conviction has been obtained, and the perpetrator of

the crime is unknown; but the Board must be convinced that the crime has occurred (it has no specified standard of proof).

Finally, on March 4, 1998 a new law was introduced, the *Opferanspruchsgesetz*, which gives the victim the right to recover damages directly out of any money which the defendant may have earned as a result of the criminal case (in particular, where he has sold his story to a newspaper).

### **5.22 – 5.25 Civil & constitutional remedies**

Like any other victims of crime, victims of rape may sue the defendant for damages, including general damages, through the civil courts. Usually, the defendant has no money, so this procedure is not followed; but where the defendant has paid damages to the victim through a civil settlement, he may use evidence of this in the criminal trial in order to show remorse and thereby reduce his sentence.

## **SECTION SIX: STATISTICS**

Statistics are kept on reported rape by the Ministry of Justice, and are also published in the Police Register. The most recent year for which statistics are available is 1996.

### **Rapes reported to the police:**

1993	6,376
1994	6,095
1995	6,175
1996	6,228

### **Convictions recorded for rape:**

1993	1,053
1994	1,124
1995	1,021
1996	1,010

## SECTION SEVEN: REFORM

The main reform presently proposed is the Draft Bill to amend the Code on Criminal Procedures and improve the protection of victims, drafted by the Ministry of Justice and due to come into force in November 1998. According to the Ministry, it is too early to evaluate the other reforms, since the new version of paragraph 177 of the Penal Code only came into force in April 1998. The Ministry views the present definition of rape as satisfactory, but Ministry officials did express the view that sexual harassment should be codified as a criminal offence.

Apart from the Ministry view, other commentators were highly critical of the new paragraph 177 definition of sexual coercion. In particular, it was strongly recommended by some experts that the distinction between rape and sexual assault should be re-introduced. According to another view, however, most problems in the prosecution of rape in Germany relate not to the legal definitions, but to the competence of practitioners. Many of those interviewed saw a clear need for education and training, particularly for the police and for prosecutors and judges. The police have already begun a reform process by recruiting more women, but it would appear that the legal profession still requires much reform. In general, since most rape and sexual assault cases happen within well-defined social relations, it was also averred that children who are only advised to be careful of strangers are getting misleading advice. Parents should be educated and made aware that children are generally abused by people that they know, as are adult victims of sexual abuse and rape.

The German Federal Women Lawyers' Association is highly critical of the present law, and has recently produced a comprehensive reform proposal, which is to be discussed by the German Lawyers' Association in September 1998. This would radically change the position of the victim in criminal proceedings, by making her a party to the proceedings, and thus giving her a say both in the bail decision, and the decision on sentence (at present, the victim cannot appeal a lenient sentence). The Feminist Lawyers' Association was also highly critical of the present law, expressing their disapproval of the recent reforms at their annual conference on April 30, 1998.

The victims' lawyers who were interviewed recommended that once an offender is released from prison, the courts should have the power to

impose a 'buffer zone' to prevent him from approaching his victim again, and should have the power to provide the victim with financial assistance if necessary to get away from the offender, where he was previously in a relationship with the victim. While the victim's lawyers welcomed the introduction of video-evidence reform for children, they expressed the view that it is often positive for an adult victim to give evidence in front of the defendant, because this challenges the passive status of 'victim'; but they asserted that women should have the choice of giving evidence by video-link if they wish. Finally, they argued that police training and better education of lawyers and judges is required, in order to enable them to understand better the experiences of rape victims.

Thus, commentators generally were critical of the present law, and expressed particular concern about the problematic interpretation of 'coercion', since it was felt that this could have a detrimental effect for women with disabilities, who need better protection under the law. Similarly, women who are abused by their teachers or carers are not seen as being sufficiently protected under the present law, because their abusers do not need to use actual 'coercion' to ensure their compliance. Although the Penal Code does contain a special provision penalising abuse of specific vulnerable persons, such as children, there is no provision penalising abuse of a dominant position in the workplace.

In summary, the law on rape in Germany has undergone very recent substantial change. The introduction of a 'combined' offence of 'sexual coercion, rape' is an interesting development, and its future application deserves monitoring by other jurisdictions in which reform of the law is under consideration. Indeed, in some common law jurisdictions such an approach has already been adopted (see further Chapter 5). However, in Germany, flaws in the new definition were identified by many commentators, and it was questioned whether its introduction would bring about any improvement in the position of victims of rape. A more useful change for victims in practice may be brought about by the proposed law to increase victims' access to legal representation. Moreover, it was said that victims often experience problems in their encounters with police and professionals involved in the process, and it was suggested that the provision of training to those dealing with victims of rape might be the most practically effective way to improve the trial of rape cases in Germany.

# The Legal Process: Ireland

## SECTION ONE: THE LAW ON RAPE

### 1.1 Definition of rape

There are two separate offences of rape in Irish law. The offence known as common law rape is given statutory definition in section 1 of the Criminal Law (Rape) Act 1981 (as amended). Under this section, a man commits rape if he has sexual intercourse with a woman who does not consent, and at the time he either knows that she does not consent, or is reckless as to whether or not she consents.

A second offence known as 'rape under section 4' was created by section 4 of the Criminal Law (Rape) (Amendment) Act 1990. This is defined as a sexual assault which includes penetration (however slight) of the anus or mouth by the penis, or penetration (however slight) of the vagina by any object held or manipulated by another person.

There are a number of other related offences. For example, sections 1 and 2 of the Criminal Law Amendment Act 1935 (the 'statutory rape' provisions) criminalise 'unlawful carnal knowledge' of girls under 15 and 17 years of age respectively. The presence of consent is not a defence, nor is it a defence where the accused believed the girl to be over 17. Section 3 of the Criminal Law (Sexual Offences) Act 1993 criminalises buggery with a person under the age of 17 years (other than a person to whom the accused is married or to whom he believes with reasonable cause he is married).

Section 1 of the Punishment of Incest Act 1908, as amended, provides that any man who has sexual intercourse with his granddaughter, daughter, sister, or mother; shall be guilty of incest; consent is not an issue for this crime. Section 2 of the same Act provides that any female of or above the age of 17 years, who permits her grandfather, father, brother or son to have sexual intercourse with her, shall also be guilty of incest.

Common law rape may only be committed by a man against a woman; however, the 'section 4 rape' offence is gender-neutral. Thus, a woman may be convicted of section 4 rape upon another woman or upon a man. A woman can only be found guilty of common law rape as an accessory (or a co-conspirator).

### **1.5 – 1.6 Minors as offenders**

A child (under 18) may be convicted of rape. In Irish law, children under the age of seven may not be found liable for any crime. Between the ages of seven and 14, there is a presumption that they are incapable of crime, but this presumption can be rebutted. Over the age of 14, full responsibility attaches although minors under 18 are tried in special courts with some different procedural rules to those applying in adult courts. Until 1990, a common law rule existed that a boy under 14 was incapable of rape; this was abolished by the 1990 Act.

The law on children and criminal responsibility is due to change shortly, with the introduction of a Children Bill which will raise the age of criminal responsibility from seven to ten, and ultimately to 12, years of age.

### **1.9 – 1.10 Marital rape**

Rape within marriage has been recognised as an offence since 1990. One special rule still applies to marital rape; the consent of the Director of Public Prosecutions (DPP) is required in order to bring a prosecution. However, in practical terms, the consent of the DPP is required in order to prosecute any indictable crime, and so this 'special rule' is somewhat meaningless.

### **1.11 – 1.12 Categories of rape**

No distinctions are made in law between categories of rape, although separate offences do exist for rape of minors, and for intra-familial sexual intercourse (see above).

### **1.13 – 1.14 Time limits**

There is no formal time limit within which prosecutions for rape have to be brought. However, prosecutions for statutory rape (of a girl between 15 and 17 years of age) must be brought within 12 months of the offence (no such time limit applies to the offence of buggery under the 1993 Act). Moreover, in some cases, the courts prohibit the trial of an accused in respect of rapes alleged to have taken place many years ago on the basis of delay. This is done on a case by case basis with reference to the individual features of the case, involving the relationship between the parties, the length of the delay, and the reasons offered for the delay in reporting the case. The DPP also has discretion not to bring a prosecution in cases where there has been a long delay in reporting the crime.

## **SECTION TWO: PRE-TRIAL**

### **2.1 – 2.3 Reporting of rape**

The police (gardaí) have responsibility for receiving reports of rape, and there is a specialist rape/sexual assault unit within the police. This is the Domestic Violence and Sexual Assault Investigation Unit, set up in March 1993 and based in Garda Headquarters, Harcourt Square, Dublin (see Murray, 1996, for a fuller account of the activities of the Unit). The Unit overviews crimes of domestic violence, rape, sexual assault and child abuse/neglect nationwide. There are equal numbers of male and female gardaí in the Unit, but in most cases women will deal with reports of rape or sexual assault.

Most reports of rape are made to the victim's local garda station, but if a report is made to a hospital, then the hospital would contact the Unit directly. Once a rape is reported, no matter how long after it occurred, the police would proceed with an investigation. There is a special liaison officer within the gardaí who deals with women who work as prostitutes, to make it easier for them to report rapes.

Once a report of rape has been made, an attempt is made to minimise the number of times the victim is interviewed. The garda officer to whom the report is made, usually a woman officer, is assigned to the

case and will conduct the interview; if the victim is traumatised, the interview process may take a number of days. According to garda policy, the victim is given a choice of a male or female garda, and generally a bond will develop between the investigating garda and the victim. The investigating garda or a nominee will maintain contact with the victim and provide her with names of agencies which she may wish to contact, such as the local rape crisis centre. Garda Headquarters has also published a leaflet entitled 'Violence Against Women' which includes the names and addresses of different agencies.

## **2.4 – 2.7 Police training**

Training is provided for gardaí in dealing with rape by the following bodies: the Garda College, Templemore, which provides recruits with such training, and the Garda In-Service Training Schools, which provide in-service training. Also, Supervisory Sergeants provide training to student gardaí while they are on probation.

The training consists of lectures on law and policing procedures, case studies and practical exercises dealing with rape cases, forensic science lectures, and lectures from relevant outside agencies such as the rape crisis centres, Women's Aid (a voluntary agency dealing with domestic violence), the Irish Society for the Protection of Children, etc. Student gardaí do a two-year training course, during which they study procedures for dealing with reports of rape. Students also receive practical experience, which consists of one week in the Sexual Assault Unit, and a placement with a hospital casualty department or with a voluntary agency such as Women's Aid. Ongoing training is also provided in the in-service schools around the country which provide 'core-training' for all members, for example when legislative changes are introduced.

In training, gardaí are taught to deal with the victim's trauma, and will be sensitive to the signs and symptoms of stress which the victim may exhibit. With the vast number of victims, the veracity of their report is not doubted.

Generally, the main focus of the training is on improving the communication skills of police; the philosophy has changed from 'command and

control' to 'guidance and support'. It was suggested that the establishment of specialised units within the gardaí is not necessarily the best approach; rather, all members of the force should receive training since a case of sexual assault or child sexual abuse might well arise in the course of an investigation into another quite separate matter.

## **2.8 – 2.11 Medical facilities**

A special rape/sexual assault medical unit which conducts a medical examination of an adult victim when a rape is reported is provided at the Sexual Assault Treatment Unit, Rotunda Hospital, in Dublin. This facility provides a medical examination by a qualified female doctor in a private wing of the hospital, and is available for adults and persons 16 years or older. For victims outside of Dublin, there are different hospitals designated to provide this facility.

St. Louise's Unit, Crumlin Hospital for Sick Children, Dublin, also provides an Assessment Unit for children who are victims of sexual abuse, and there are facilities in this Unit for the physical examination of children who are the victims of rape or sexual assault. This Unit deals with all cases in South Dublin. St. Clare's Unit, Temple Street Children's Hospital, Dublin provides the same facilities for children in North Dublin.

When a rape is reported to the gardaí directly after it has occurred, the victim is taken immediately to a doctor or hospital; victims in Dublin would be taken to the Rotunda Unit. The police officer who accompanies her would 'dress down' (for example, by putting on a sweater over her uniform) so that the victim would not be obviously accompanied by a uniformed garda, and thus identifiable as a crime victim.

A forensic kit has been available for some time, and is prepared in the garda forensic science laboratory and kept in all garda stations, and in the Rotunda Unit. Where a rape is reported to a rural garda station, the garda would take the kit and accompany the victim to the nearest hospital for the medical examination, and a female garda would always be present with the victim during the examination. The kit consists of swabs, a comb, items for collecting forensic evidence and for taking

blood samples. It is sealed both before opening and on closing, and it contains guidelines for all doctors to use. Forensic bags for clothing are also kept at all garda stations.

### **2.12 – 2.13 Legal advice at reporting stage**

Under a new provision, section 26(3) of the Civil Legal Aid Act, 1995, victims of rape are entitled to free means-tested legal advice from the reporting stage. However, most victims are unaware of this provision since there is no clear duty imposed on garda to inform victims of this right when they report a rape. Gardai have confirmed that in practice they would not advise a victim of this right to a solicitor.

### **2.14 – 2.15 Other pre-trial support**

No other support is provided as of right to the victim, although voluntary organisations such as Victim Support and Rape Crisis Centres do provide support and counselling to victims. Garda policy is to refer victims to Victim Support or other relevant agencies. Counselling is provided free, on a means-tested basis, through the Health Boards.

### **2.16 – 2.25 Prosecution**

Once a rape has been reported to the gardaí, the decision to prosecute is then taken by the Director of Public Prosecutions (DPP), on the recommendation of the gardaí. A special prosecutor is not assigned to rape cases, although in practice the same personnel in the DPP's office may be assigned to such cases on a regular basis. Also, a different prosecution counsel will be assigned to each case, chosen by the DPP's office from a panel of independent barristers.

Since the DPP decides whether to prosecute and what charges are to be preferred, his office can decide to withdraw a prosecution or to accept a plea of guilty to a lesser charge. Prosecution counsel are not members of the DPP's office and do not have the right to make such decisions. Rather, they must take instructions from the DPP's office, although prosecution counsel is usually asked for his or her opinion. However, before prosecution counsel make any decisions they must refer to the DPP's office for instructions so that the DPP maintains control of the case.

The victim can withdraw her complaint prior to the trial stage by indicating this to the police. This will be communicated to the DPP who in such circumstances would probably drop the case. This is a slightly different situation from one where the victim may feel apprehensive about giving evidence and indicates shortly before the trial or even during it that she does not wish to give evidence. In such a case, it is theoretically possible to subpoena the witness to come to court, or if the witness is already there, to treat her as hostile and cross-examine her as to the making of her original statement. However, in practical terms the DPP is more likely to review the case and decide not to proceed as the evidence of a hostile witness is, in evidential terms, valueless. So, while the victim has no actual right to discontinue the proceedings, in practical terms if the victim does not wish to pursue the case there is little likelihood of its proceeding.

A victim can theoretically take a private prosecution for rape, commencing in the District Court. However, once the matter is sent on to a higher court for trial, under the Constitution and legislation, only the DPP is entitled to have carriage of the proceedings and if he decides to drop the charges, the victim cannot take the matter any further. The decision of the DPP is not reviewable by the courts unless it can be shown that there was bad faith in the decision-making process. The victim is not entitled to know the reasons for the dropping of the prosecution, in accordance with the DPP's general policy of not issuing reasons for his decisions on the basis that this might interfere with accused person's right to be presumed innocent. Legislation also prevents persons such as victims from communicating with the DPP with a view to influencing their decisions, although in practice victims may seek direct contact with DPP personnel. Therefore, in theory, while a victim can bring a private prosecution up to a certain point, this is not done in practice.

## **2.26 – 2.29 Plea bargaining**

Although there is no formal system of plea bargaining in place, the defendant may in practice ask the prosecution to consider whether they would drop a more serious charge were he to plead guilty to a lesser charge (for example, a charge of rape might be reduced to one of sexual

assault). As sentencing is strictly a matter for the trial judge, the prosecution are not in a position to offer a particular sentence to the accused in return for a plea of guilty.

However, the prosecution counsel in such a situation may review the evidence, ask the victim for her views, consult with the DPP and decide whether or not to drop the more serious charge. The victim has no formal role in this process, but it is common practice for the DPP to ascertain her views prior to making a decision of this nature. Sometimes, although the evidence is strong, a victim may be extremely anxious not to go through a trial and may prefer that the lesser charge be accepted to save her from having to testify and be cross-examined as to the offence. If a victim indicates this preference in a case where the evidence is generally weak, the DPP is more likely to change the plea to a lesser charge.

### **2.30 – 2.36 Investigation and bail**

The gardaí are in charge of investigating the reported rape. Sometimes they will charge a suspect at the commencement of an investigation; however, it is also common for the gardaí to complete an investigation first, and then seek the DPP's advice as to which charge to bring. In any case, once an investigation is completed and the garda file has been sent to the DPP, his office has discretion and may alter or amend any charges already brought against the accused, add new charges or decide not to proceed with the prosecution.

Once a suspect has been identified, arrested and charged, he is entitled to be released on bail, either by the gardaí or by the District Court (the lowest level of criminal court, before which all those charged with a criminal offence must be brought initially), unless there are specific reasons offered by the prosecution as to why he should not be granted bail. Until recently, these reasons were limited to (a) the likelihood that he would not attend for trial, and (b) the likelihood that he might interfere with the witnesses or evidence. In practice, the seriousness of the offence is also taken into consideration by the court in making the bail decision. More recently, as a result of an amendment to the Constitution, another ground is to be introduced for refusing bail, namely whether the accused is likely to commit further serious offences

during the bail period. Legislation on this has not yet been brought into force, due to the lack of prison spaces to accommodate this change. This would be relevant in rape cases where there is reason to believe that the accused is a persistent offender.

The victim has no say in the bail decision. However, a period of time generally elapses between the submission of the garda file to the DPP's office and the issuing by that office of a direction to prosecute. Also, there is a period of time, prior to that, between the interviewing of the suspect and the completion of the garda file. This means that there can often be a lengthy period of time when the suspect has yet not been charged, so that the question of bail does not arise and the accused is at liberty. This can obviously cause distress to victims, particularly if the accused has admitted his involvement in the offence but is not formally charged until some time later. Even when the bail decision is made, the victim is not formally entitled to any pre-trial protection from the accused, although the courts will typically impose conditions of bail, for example that the accused not approach the victim.

### **2.37- 2.38 Pre-trial procedures**

There is a pre-trial procedure, known as 'preliminary examination', whereby the judge of the District Court must be satisfied there is a *prima facie* case against the accused, and it is sometimes required that the victim should give evidence at this stage, by way of deposition, before the District Court. The law will change with the enactment of the Criminal Justice (No.2) Bill, 1997, which provides that this procedure will be abolished, although depositions may still be requested in certain cases. Although the prosecution may seek depositions in order to 'test' the evidence of the witness, they are more usually sought by the defence; this can be a very distressing procedure for the victim.

### **2.39 – 2.47 Representation and information**

Section 26(3) of the Civil Legal Aid Act 1995 provides that victims of rape have access to free legal advice. However, in practice this provision is not used, and victims are generally unaware of its existence.

Thus, whether the victim is kept informed of the progress of the case pre-trial will depend on the individual police officer in charge of the investigation. No one has responsibility officially to inform the victim, but the investigating officer will do so in practice.

Similarly, the victim has no formal opportunity to meet the prosecutor before the case, and whether a meeting is arranged will depend on the attitude of the individual prosecution counsel. The DPP has instructed that victims should be informed that a pre-trial meeting with the prosecution counsel will be arranged if they so request. However, such meetings are more likely to occur where the case is being heard in the High Court, rather than the Circuit Court. The victim does not have an opportunity to meet with anyone from the DPP's office. Even where the victim does meet with prosecution counsel, given the strict rules of evidence pertaining in the common law system, they may not discuss the evidence at this meeting.

Information on the trial procedures is theoretically available to victims before the trial, in the form of brochures produced by the Department of Justice, but these are not widely available, and were drawn up without reference to prosecution and defence counsel. Indeed, some defence counsel object to aspects of the information in some of these brochures. Moreover, this information, if provided, is given shortly before the trial, and this can often be many months after the initial report of rape was made (at least some of this delay is often attributable to the need to obtain the results of forensic testing or relevant DNA evidence).

Thus, the victim will often not receive any information on the progress of the investigation or about the trial itself, for perhaps 18 months after making a report. Victim Support do provide information, but they rely upon volunteers and do not have a fully nationwide network. In summary, the provision of information to the victim is not formalised at any stage, despite the length of time it may take between the initial report of rape and the trial itself.

## SECTION THREE: TRIAL

### 3.1 – 3.3 General procedures

Rape, rape under section 4 and aggravated sexual assault are all tried by a judge and jury before the Central Criminal Court (the highest level of first instance criminal court, it is the High Court exercising a criminal jurisdiction). Section 10 of the Criminal Law (Rape) (Amendment) Act 1990 conferred exclusive jurisdiction on the Central Criminal Court over these three offences. Other sexual offences, such as sexual assault, are tried before a judge and jury in the Circuit Criminal Court. Prior to 1990, rape was also tried before the Circuit Criminal Court, but this was changed following the recommendation of the Law Reform Commission (LRC 24-1988: 19) that a wider criminal jurisdiction should be returned to the High Court. The rules and procedures relating to the trial are identical in each court, but the Central Criminal Court is reserved for trial of the most serious criminal offences in Irish law (treason, piracy, genocide and murder-related offences).

However, some commentators now query the need to retain the jurisdiction of the Central Criminal Court for rape cases. It has led to the anomaly whereby a defendant charged with numerous counts of sexual assault against one or more victim, arising over the course of many years, may only be tried in the Circuit Criminal Court, whereas a defendant charged with one count of rape, section 4 rape or aggravated sexual assault, arising out of even one incident, will be tried before the Central Criminal Court. It is suggested, in order to avoid this anomaly, that cases involving multiple charges of sexual assault could also be tried before the Central Criminal Court.

The jury in both the Circuit and Central Criminal Courts is made up of 12 members, chosen randomly from the electoral register. The prosecution and defence may challenge up to seven jurors each without cause; the victim has no say in jury selection.

Finally, in sexual assault cases of a minor nature, where the DPP consents and the trial judge is willing to accept jurisdiction, the case may be heard before the District Court (the lowest court in the criminal

justice system), in which no jury is used, but cases are heard by a professional judge sitting alone. The maximum sentence which the District Court may award is 12 months' imprisonment.

### **3.4 – 3.5 Training for legal personnel**

No special training in the conduct of rape trials is provided for lawyers or judges, nor is there any special training provided where the victim is a child.

### **3.6 – 3.7 Special procedures for minor defendants**

Where the defendant is a minor (under 18), his name may not be reported even if he is convicted, and his interview by the garda must be conducted in the presence of an adult (usually his parent or guardian). Any witness, including a defendant, who is under 14, may be examined without giving an oath. Proceedings involving a minor are also heard *in camera*.

### **3.8 – 3.9 Special procedures for victims**

Where the victim is under 18, special procedures also apply. First, her evidence may be given by video-link (where she is under 17) so that she is in a separate room, apart from the courtroom, accompanied only by a nominated person. When video-link is used, wigs and gowns are not worn by counsel.

In the courts in which rape is tried, there are no special facilities provided to separate the victim from the defendant, nor is she protected from contact with the defendant during the trial.

### **3.10 – 3.19 Anonymity and protective measures**

Rape trials are held 'otherwise than in public', under section 11 of the Criminal Law (Rape)(Amendment) Act, 1990, which provides that in rape cases, the judge shall exclude from the court during the hearing 'all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the Press, and such other persons (if any) as the judge .. may in his .. discretion permit to remain.' It is also provided that this is without prejudice to the right of a parent,

relative or friend of the complainant or, where the accused is not of full age, of the accused, to remain in court.

However, the verdict and sentence will be pronounced in open court, and if he is convicted the defendant's name may be published if to do so will not identify the victim; the identity of the victim is still protected under section 7 of the Criminal Law (Rape) Act, 1981 as amended, which provides as a general rule that no matter likely to lead members of the public to identify a person as a complainant in a sexual offence may be published or broadcast.

The prosecution has no duty to look after the victim's interests in court, except to the extent that they are compatible with the interests of the prosecution.

### **3.20 – 3.26 Examination in court**

Cross-examination of the victim is conducted by the defence counsel, and there is the possibility of multiple cross-examination where there is more than one defendant. Where the defendant is not legally represented, he may cross-examine the victim in person. However, the victim is entitled to give evidence by way of video-link from a different room if she is under 17 years of age.

### **3.27 – 3.35 Evidence**

In a trial of common law rape, the prosecutor must prove that there was penetration of the vagina by the penis, however slight, and must also prove that the victim was not consenting to sexual intercourse, but it does not have to be proved that the victim resisted physically in order to show that she did not consent; nor does it have to be proved that the defendant used physical force (indeed, section 9 of the Criminal Law (Rape) (Amendment) Act 1990 provides expressly that a failure to offer resistance does not constitute consent). However, the prosecutor must prove beyond reasonable doubt that the defendant either knew the victim was not consenting or was reckless as to whether or not she did consent to the intercourse.

It is a defence that the defendant genuinely believed the victim was consenting, no matter how unreasonable his belief; but section 2(2) of

the 1981 Act provides that the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters (this provision is almost identical to that contained in section 1(1) of the English Sexual Offences (Amendment) Act 1976). A number of convictions in Ireland have been appealed on the basis that the trial judge failed to explain adequately the meaning of section 2(2) to the jury, but the Supreme Court has held that it is not necessary for a detailed explanation to be given in every case, although it should be given in cases where the defence of 'mistaken belief' is relied upon by the accused (*People (DPP) v. McDonagh, SC, July 11, 1996*).

Despite the section 2(2) requirement that the jury take into account the reasonable basis for the accused's belief in consent, concern has been expressed about the difficulty of proving the requisite *mens rea* for rape, since the test of intention remains a subjective one, as it does in England following the House of Lords decision in *DPP v. Morgan [1975] 2 All ER 347*. In some other common law jurisdictions, the test used is objective (for example, in New Zealand, under section 128(3) of the Crimes Act 1961 (as amended), the test is whether the accused believed on reasonable grounds that the other person consented). The possible creation of a lesser offence of 'negligent rape' to cover cases of unreasonable but genuine belief in consent has also been raised; see, for example, the consideration by O'Malley (1996: 57-8).

The Law Reform Commission in their Report on Rape (LRC 24-1988: 9-10) considered replacing section 2(2) with a purely objective test, but rejected this approach, recommending instead that the subjective test be retained, but that a statutory definition of consent be provided, modelled on the definitions contained in the Canadian Criminal Code and in legislation in New South Wales, Western Australia and New Zealand. The Commission took the view that such a definition would clarify the meaning of consent for juries, and would put beyond doubt that consent obtained by force or fraud is not true consent. In taking this view, the Commission departed from the conclusion they had earlier reached in their Consultation Paper on Rape (1987), that no such definition was necessary.

The defendant can be convicted on the evidence given by the victim alone, but a special rule applies to the use of such evidence; until 1990, it was mandatory for the trial judge to issue a warning to the jury (the 'corroboration warning') about the dangers of relying upon such evidence. Under section 7 of the 1990 Act, this warning may still be given at the discretion of the trial judge. In practice, trial judges continue to give the warning; judgments of the Court of Criminal Appeal support this practice, notwithstanding the change in the law; see especially the judgment of the Court of Criminal Appeal in *People (DPP) v. Molloy*, July 28, 1995, in which the Court held that 'it is a prudent practice for the trial judge to warn the jury that unless they are very very satisfied with the testimony of the complainant they should be careful not to convict in the absence of corroborative evidence.' Concerns about this decision were expressed by several commentators, on the grounds that the warning should not be given so often by judges; but this practice confirms Fennell's prediction (1993: 165) that the discretion would 'be exercised in accordance with those judicial attitudes and beliefs which fostered the requirement in the first place.'

### **3.36 – 3.39 Victim's prior sexual experience**

Evidence of the victim's prior sexual experience with the defendant or with others can be used by the defendant in Court, although special rules apply to this evidence; under section 3 of the 1981 Act (as amended by section 13 of the 1990 Act), the leave of the trial judge to admit such evidence is now required. Thus, if evidence is to be given or questions asked relating to the past sexual history of the complainant, whether with the accused or with any other person, an application must be made to the trial judge in the absence of the jury. The test for the trial judge is 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 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.'

While doubts have been expressed (for example by Fennell, 1993) about the need to adduce evidence as to the victim's prior sexual history, the discretion to retain it was upheld by one commentator on the grounds that it should be admissible in order to show unreliability or lack of credibility. Another view expressed was that it might be unconstitutional to disallow it altogether.

### **3.40 – 3.44 Verdict**

The possible verdicts which may be given are: guilty; not guilty; and guilty but insane. The jury may also disagree and fail to reach a verdict. The verdict is given by the jury alone, through their foreperson, but it does not have to be unanimous; after the jury have deliberated for at least two hours, a majority of 10-2, or 11-1, will be sufficient to convict.

The defendant can be found guilty of an alternative charge to rape; he may be found guilty of sexual assault or attempted rape if the jury are not satisfied that penetration took place, but that there was still an attack of a sexual nature.

## **SECTION FOUR: SEPARATE LEGAL REPRESENTATION**

### **4.1 – 4.3 Separate legal representation for victims**

Section 26(3) of the Civil Legal Aid Act 1995, referred to above, provides that 'a complainant in a prosecution for [rape or a number of other serious sexual offences] ... shall qualify for legal advice free of any contribution'. While this provision was introduced in order to improve the position of the victim, and would arguably allow her to consult a solicitor who could then accompany her into court, in practice this provision has not been used and is regarded by rape crisis centres as inadequate. Indeed, during an interview with representatives of the Department of Justice, the view was expressed that the Act confers a right to advice but not to representation in court.

The concept of separate legal representation for the victim has, indeed, been rather contentious in Ireland. The Law Reform Commission in

their Report on Rape (LRC 24-1988: 17) recommended that there should not be any provision for such representation. They expressed doubts, both in their Consultation Paper (1987: 70) and in the Report, about the constitutional propriety of such representation, since it could lead to the 'coaching' of the complainant before giving evidence, and in their view would 'tilt the balance of the criminal process significantly in favour of the prosecution ... by permitting a dual representation hostile to the interests of the accused, thereby depriving him of one of the long standing benefits of a criminal trial conducted "in due course of law" as that phrase was plainly understood at the time of the enactment of the Constitution'.

Moreover, the Commission took the view that such representation might so complicate the hearing and alienate the jury as to result in unjustified acquittals. Instead, the Commission recommended a number of other measures which they submitted would adequately address the difficulties faced by complainants in rape cases. They submitted that the complainant should be kept fully informed by the gardaí of developments, and be afforded access to the solicitor and counsel acting for the prosecution before the trial. Further, they recommended that a standard booklet should be prepared and provided to all complainants, explaining the circumstances attending the investigation and prosecution of sexual offences, and the role of the complainant as a witness.

However, since the publication of the Law Reform Commission views, other commentators have adopted a different approach. For example, Connolly (1993) reviewed the operation of separate legal representation for the victim in Norway and Denmark, and concluded that such a system could work in Ireland without undue interference with the rights of the accused. Further, the Report of the Working Party on the Legal and Judicial Process (October 1996: 87) for victims of sexual and other crimes of violence against women and children also recommended that such representation should be introduced, and asserted that it might contribute significantly to bringing about an increase in the reporting of rape.

Most recently, the Discussion Paper on the law on sexual offences produced by the Department of Justice, Equality and Law Reform (May, 1998: 42) has suggested that a separate legal representative for the victim

might have a role in making an argument to the judge in the absence of the jury, in any defence application to adduce evidence about the complainant's past sexual history. The Department has invited further views on this matter.

When the issue of separate legal representation for victims was raised, some commentators took the view that while it might work effectively for victims within an inquisitorial trial framework, it could not be transplanted so easily into the common law adversarial system, with its strict rules of evidence. In this regard, a number of practical problems were raised. First, if the victim were entitled through her lawyer to have access to the Book of Evidence (the evidential file prepared by the prosecution upon which the case is sent forward from the District Court for trial), she could therefore see all the statements of other prosecution witnesses, and the results of any forensic tests or medical examinations, and there might be a danger that this would 'taint' her evidence at trial.

Secondly, even if the role of the victim's lawyer in court were to be limited to addressing the judge in the absence of the jury on a *voir-dire* (as was suggested in the Department of Justice Discussion Paper), for example on the issue of admissibility of evidence of the victim's prior sexual history, this would still indirectly impact on the guilt or innocence of the defendant, since his counsel could only seek to justify the inclusion of such evidence on the basis that it was helpful to show that his client was innocent.

Finally, there would be a potential for conflict between the prosecution counsel and the victim's lawyer, for example if the victim wished to have the evidence heard in a particular way. For all of these reasons, and out of a concern about the defendant's right to trial in due course of law under Article 38.1 of the Constitution, the notion of introducing a lawyer for the victim who would have more than a morally supportive role was opposed by several commentators, and actively endorsed by none. At the same time, commentators were agreed on the need to ensure that victims are kept fully informed throughout the pre-trial process, and made aware of their role at trial. Different views were expressed as to who should be made responsible for keeping the victim so informed.

## SECTION FIVE: POST-TRIAL

### 5.1 – 5.10 Sentencing

The sentence is given by the judge alone, where the jury have returned a verdict of guilty. Judges are not given training in sentencing for rape, nor are there any guidelines or tariffs available in sentencing; the Irish courts have expressed reluctance to set any bench-mark sentence for rape, although guidance is offered through case law. The maximum sentence for rape is life imprisonment, and there is no mandatory minimum sentence.

Given the absence of any comprehensive set of sentencing statistics, it is difficult to ascertain what the 'average' sentence for rape is in Ireland. However, a recent study of sentences imposed for rape conducted by O'Malley (1996: 364) does give some indication as to sentencing patterns in rape. O'Malley examined the prison statistics on those committed to prison or juvenile detention for rape between the years 1986-1992 inclusive. He found that out of a total of 126 committals to prison for rape, 59 or 47% had received sentences of between 5 – 10 years' imprisonment. This confirms the approach taken in a recent case in which a tariff sentence of seven years' imprisonment was referred to by the trial judge (*People (DPP) v. McCurdy*, *Irish Times*, May 26, 1995). However, suspended sentences are also occasionally imposed by the courts, and there is no publicly accessible information source on the use of suspended sentences.

A guilty plea by the defendant has a reductive effect upon sentence; the Supreme Court has held in *People (DPP) v. Tieman [1988] IR250* that this should have a significantly mitigating effect in rape cases. However, the Criminal Justice Bill, 1997 will change the law by providing that even where there is a guilty plea the court is not precluded from imposing the maximum sentence where it is satisfied that the circumstances of the offence warrant the maximum.

The impact of the rape on the victim also affects the sentence. Section 5 of the Criminal Justice Act, 1993 provides that the court must take into account in sentencing the impact of the offence on the victim, in the case of a violent or sexual offence. The court may receive evidence

or submissions concerning the impact of the crime on the victim. Also, the victim has a right to address the court directly in relation to the impact of the crime on her.

In practice, a report is prepared for the Court by a psychiatrist or psychologist giving their assessment of the impact of the crime upon the victim (the 'victim impact report'). The legislation does not specify who should prepare this report, and the gardaí usually prepare a report based on their own dealings with the victim, but the courts prefer the reports of a professional expert in the area of psychiatry or psychology. These reports are ordered by the court at the stage of conviction or guilty plea, in advance of the sentence hearing which is then fixed for a separate date. The practice is to disclose these reports to the defence in advance of the sentence hearing, to facilitate a plea in mitigation being made by defence counsel.

Problems can arise if the health experts inadvertently use the wrong terms to describe the offence e.g. rape rather than sexual assault, particularly in a case where the accused pleads guilty to the lesser offence only. Professionals can also be very reluctant to come to court to give evidence on the basis that they feel this would not be in the interests of the victim; yet the accused is entitled, on the basis of fair procedures, to cross-examine a prosecution witness if necessary. This rarely happens in practice, but the potential for problems is there. Victims are also sometimes distressed to learn that some of their intimate details, unrelated to the offence, are contained in a report which is then disclosed to the defence. Medical experts are also sometimes unaware that the reports go to the defence, or that they may be called to give evidence. This is an area in which practice is evolving slowly.

### **5.11 – 5.13 Appeal**

It is not possible for the prosecution to appeal an acquittal, but under section 2 of the Criminal Justice Act, 1993, as amended, the DPP may apply to the Supreme Court (previously the Court of Criminal Appeal) for review of a sentence which he considers to be unduly lenient. The Court of Criminal Appeal has held (*People (DPP) v. Byrne [1995] 1ILRM 279*) that in such a case, 'nothing but a substantial departure

from what would be regarded as the appropriate sentence would justify the intervention of the Court’.

It is possible for the defendant to appeal both conviction and sentence. All appeals from the Central Criminal Court against conviction, sentence or both, now lie directly to the Supreme Court. Previously, appeals were heard by the Court of Criminal Appeal, but the abolition of this court was provided for by the Courts and Court Officers Act, 1995. However, it can be presumed that the same procedures and principles will continue to be applied by the Supreme Court in hearing appeals.

### **5.14 – 5.21 Criminal injury compensation**

Under sections 6 to 9 of the Criminal Justice Act 1993, the trial court is entitled to award compensation to victims of rape and other offences, to be paid by the defendant as part of his penalty (the ‘compensation order’). However, in practice this is not done in rape cases, because only rarely would a defendant be able to pay any worthwhile compensation. There is no ceiling on the amount of compensation which a court could theoretically award, but under section 6(5) of the Act, the court must have regard to the defendant’s means in making any such order.

A state-funded scheme exists for victims of violent crime; the Criminal Injuries Compensation Tribunal. Since April 1, 1986, however, it has only had power to award compensation for special damages (i.e. material or quantifiable loss). Previously, it also had the power to award compensation in respect of general injury, pain and suffering. Further, the Tribunal cannot award compensation where the victim and the assailant were living together as part of the same household at the time of the assault. This rules out compensation in many instances, for example in cases of marital rape or of incestuous rape of minors.

Compensation may be awarded even where a conviction has not been obtained. However, the victim must apply within three months of the offence, and must show either that the offence is the subject of criminal proceedings, or that it was reported to the gardaí without delay. In appearing before the Tribunal, the victim may be accompanied by a

legal advisor, although the tribunal will not pay their legal costs. The lack of funding for the Tribunal has been criticised, and in practice very few victims apply for compensation; the Tribunal only makes about 220 awards per year.

### **5.22 – 5.25 Civil & constitutional remedies**

It is theoretically possible, although very rare in practice, for victims of rape or any criminal assault to take civil proceedings against the defendant.

The European Convention on Human Rights is not incorporated into Irish domestic law.

## **SECTION SIX: STATISTICS**

Statistics are kept on reported rape, in the Annual Garda (police) Reports. However these do not give any indication as to sentence.

### **Rapes reported to the police:**

1993	143
1994	184
1995	191
1996	180

### **Number of prosecutions for rape commenced:**

1993	40
1994	78
1995	66
1996	67

### **Convictions for rape recorded:**

1993	7
1994	4
1995	2
1996	2

The number of convictions recorded should be treated with caution, since it refers only to convictions recorded in the year in which the offences were recorded, and the trial of an offence reported in one year may not take place until at least the following year. However, a study of attrition rates in rape cases conducted by O'Malley (1996: 376) shows that between the years 1980 and 1993, the maximum number of convictions recorded in any one year was 12 (in 1983). Thus, even allowing for the delay in cases coming to trial, there is clearly a very significant attrition rate.

A more detailed research study would be required in order to discover at what point cases are dropping out of the system. It is perhaps surprising, and certainly worth noting, that a high number of offences are recorded each year under the heading 'offences/perpetrator detected and where no proceedings are shown'. In 1994, 78 cases of reported rape were listed under this heading; in 1996, 80 cases. This figure may account for a large number of the reported rapes for which convictions are never recorded, but it remains unknown why proceedings are not commenced in relation to more of these 'detected' offences.

Numerous academic commentators have stressed the need for the state to release comprehensive and accessible statistics on the criminal justice system; until such statistics are available, the reasons why no further action is recorded for so many reported rapes will remain unknown. For the first time, the DPP's office will be producing an annual report in 1998 and this may go some way towards providing information currently lacking on the criminal justice system.

## **SECTION SEVEN: REFORM**

A number of legal reforms are presently in contemplation; for example the Children Bill, 1997, which will increase the age of criminal responsibility from seven to 10. The Department of Justice, Equality and Law Reform Discussion Paper on the law on sexual offences also identifies certain areas, such as separate legal representation, in relation to which further views are sought as to how the law may be changed. Further, the National Steering Committee on Violence against Women is due to give its views on legal change.

Codification or consolidation of the law relating to sexual offences was suggested by some commentators, in order to clarify the law and to remove some of the discrepancies which still exist (for example, the 12-month time limit which applies to prosecutions for unlawful carnal knowledge of girls between 15 and 17, but which does not apply in respect of the offence of buggery on those under 17).

In relation to the definition of rape, it was suggested that the definition of the new offence of section 4 rape should be re-examined, since it has caused confusion within the gardaí. No logical reason was offered for excluding anal penetration with an object from this definition, and indeed the Law Reform Commission envisaged that it would be included. Further, the validity of continuing to criminalise consensual sexual intercourse with a person aged between 15 and 17 was questioned, particularly when the two persons involved are of the same age.

On the issue of sentencing, it was suggested by some that the 10-year maximum sentence for sexual assault should have been maintained. Under the 1990 Act, the maximum sentence for sexual assault was reduced to five years, and the new offence of aggravated sexual assault with a maximum penalty of life imprisonment was introduced. The aggravated sexual assault offence has created difficulties for the prosecution in practice; so, it now appears to many victims as if the sentence for sexual assault has simply been reduced.

It was suggested that some formal means should be provided for keeping victims informed of the progress of their case; a separate state agency, independent of the DPP's office and of the gardaí, might fulfil this function. Reduction of delays at pre-trial stage was advocated, and it was also suggested that separate facilities should be provided in the courts for victims, to protect them from contact with the defendant. All commentators were agreed that it would be desirable to formalise good practices in relation to victims, rather than leaving them to the discretion of individual gardaí and prosecution counsel. It was suggested that the DPP could produce a Code for prosecutors, obliging them to meet with the victim before the trial in order to explain trial procedures. It was also suggested that information and education should be made available for judges generally, both in relation to the law on sexual offences and to assist in sentencing consistency.

While all were agreed that resources should be made available for prison treatment programmes for those convicted of sexual offences, much criticism was offered of sentences in rape cases, which are seen as too arbitrary. Concern was expressed about the lack of available data on sentencing patterns, and this was reflected in the different views expressed as to sentencing levels. Some saw sentences in rape cases as being too low relative to other offences; queries were raised as to whether prosecution counsel should be entitled to address the court in relation to sentence, other than simply putting the facts and the victim impact report before the court, as they do at present. However, another view was expressed that the ‘tariff’ of seven years informally operating in relation to rape sentencing was too high, and that the prosecution should have no formal role in relation to sentence.

In summary, while all those familiar with Irish rape law and procedure had criticisms, particularly around the lack of clarity within the law, the lack of reliable statistical information about the operation of the law, the lack of training for practitioners, the absence of adequate criminal injury compensation and the lack of formalised support systems for victims, the suggestions which were put forward for reform fell short of proposing the introduction of advocates for the victim in court.

Greater support could be found for the introduction of some form of separate legal representation for the victim pre-trial. It was also suggested that adequate support measures could be introduced for victims simply through the reform of existing prosecution structures, and the imposition of obligations upon gardaí and prosecutors to keep victims informed about the progress of their case, and about their role at trial. However, it is submitted that such minimal reform would not be sufficient to address the needs of victims of rape within the trial process in Ireland.

## **Chapter Eleven**

# **The Legal Process: Other Member States**

### **Authors' Note**

The information contained in this chapter is based upon the responses received to questionnaires sent to each of the 10 member states not studied in depth. While every attempt was made to ensure consistency in response, some of the information provided may be incomplete. In particular, statutory references and statistics on rape were provided for some jurisdictions, but not for others, so direct comparison between jurisdictions may be hindered somewhat.

The laws and procedures on rape in England and Wales were considered, but not the law relating to rape in Scotland, Northern Ireland or the Isle of Man; thus, the term 'United Kingdom' is not used in this text. The word 'England' is used to refer to the jurisdiction of England and Wales.

Finally, while responses were sought from 10 member states, completed questionnaires were only received from nine. It did not prove possible to obtain a full response from Greece within the necessary time, although some limited information was provided on Greek rape law. Thus, the information provided in most of the sections in this chapter relates only to the other nine member states: Austria, England and Wales, Finland, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.

## **SECTION ONE: THE LAW ON RAPE**

### **1.1 Definition of rape**

#### **(i) Austria**

There are two kinds of rape provided for in the Austrian Criminal Code of 1989. Rape is defined by paragraph 201(1) as forcible sexual

intercourse, or activities that are equal to sexual intercourse. Force is defined as the use of strong violence against the victim, the making of threats of imminent physical harm, or by deprivation of liberty. Under paragraph 201(2), 'less serious rape' is defined as forcible sexual intercourse involving the use of violence, or threats of imminent danger to body or life. The victim can be male as well as female.

### **(ii) England**

In England, section 1 of the Sexual Offences Act, 1956, as amended by the Criminal Justice and Public Order Act, 1994, provides that a man commits rape if (a) he has sexual intercourse (vaginal or anal) with a person who at the time of the intercourse does not consent to it; and (b) at the time he knows that the person does not consent to the intercourse, or is reckless as to whether that person consents to it. The 1994 Act extended the definition of rape to include male rape.

### **(iii) Finland**

Chapter 20, section 1 of The Penal Code of Finland, 1994, provides that rape is committed where a person forces a woman to have sexual intercourse by violence, or by threat of imminent danger. The impairment of a woman's ability to offer resistance or consent is deemed equivalent to actual or threatened violence.

### **(iv) Greece**

Articles 337 and 338 of the Greek Penal Code provide that rape occurs where a person compels another to submit to have sexual intercourse outside of marriage or to commit acts involving sexual penetration through physical force or threat of significant and direct danger. The offence was reformed in 1984 to become gender-neutral, .

### **(v) Italy**

The Italian definition of rape provides that rape is committed where violence or menaces, abuse of authority or deceit, are used to force someone to perform or to suffer sexual acts. Abuse of the victim's physical or mental vulnerability at the time of the offence will also be taken into consideration in determining the gravity of the offence. Under Italian law, a woman can be convicted on the same basis as a man.

**(vi) Luxembourg**

In Luxembourg, article 375 (L.10.8.1992) of the Penal Code provides that any act of sexual penetration committed on another person, by aid of violence or threat, or by use of a trick or artifice or by abuse of a person incapable of consenting or of resisting, constitutes a rape. Rape can be committed against men or women.

**(vii) Netherlands**

Article 242 of the Dutch Penal Code (1-12, 1991) states that a person who, by an act or threat of violence, compels another to submit to acts comprising or including sexual penetration of the body, is guilty of rape. Women may also be convicted of rape.

**(viii) Portugal**

In Portugal, the Penal Code of 1995 defines rape as an act by a man who copulates with a woman, using serious violence or serious threat, or causing her to become unconscious or unable to resist. This definition also applies to copulation between men.

**(ix) Spain**

Article 178 of the Spanish Penal Code (25 May 1996) provides that '[o]ne who infringes the sexual freedom of another person with violence or intimidation will be penalised as guilty of sexual assault'. Article 179 of the Penal Code provides for an increased penalty where 'the sexual assault consists of carnal knowledge, the introduction of objects or oral or anal penetration'.

**(x) Sweden**

Under chapter 6 of the Swedish Penal Code (1992), a person commits rape who, by violence or threat of imminent danger, forces another person to have sexual intercourse or engage in a comparable sexual act. Rendering the person unconscious or otherwise placing the person in a similarly helpless state is regarded as equivalent to violence. The offence is gender-neutral.

### 1.3 – 1.4 Women as offenders

Rape is now defined in a gender-neutral way in every jurisdiction. Thus, both men and women may be victims of rape, and be convicted of rape.

### 1.5 – 1.6 Minors as offenders

As a general rule, minors can be convicted of rape in all the member states. However, the age of criminal responsibility differs markedly between different states, ranging from 10 (England) to 16 (Luxembourg and Portugal). The average age of criminal responsibility is 14.

In England, there is a rebuttable presumption that children aged between 10 and 14 years are *doli incapax* (incapable of committing crime unless they are sufficiently mature to recognise that what they were doing was wrong). Additionally, until 1993, it was presumed in English law that a boy under 14 was incapable of committing rape; this rule has now been abolished by the Sexual Offences Act, 1993.

#### Age of criminal responsibility by country (where provided):

Austria	14
England	10
Finland	15
Italy	14
Luxembourg	16
Netherlands	12
Portugal	16
Spain	16
Sweden	15

### 1.7 – 1.8 Source of legal definition

The legal definition of rape in each of the jurisdictions studied is contained in a criminal code, with the exception of England, where the definition is provided in legislation, although the change in the law on rape within marriage was introduced via the common law (in *R v R [1991] 4 All ER 481*). All member states except Greece have reformed their rape laws since 1989.

### **1.9 – 1.10 Marital rape**

Rape within marriage is recognised as an offence in all of the member states except Greece. In Greece, rape by the victim's husband may instead be prosecuted as an indecent assault. For the most part there are no special procedures relating to the prosecution of this offence, although in Austria, rape within marriage or a non-marital heterosexual relationship is only prosecuted on the petition of the victim. The sentence will be mitigated if the victim declares she wants to continue her relationship with the offender.

### **1.11 – 1.12 Categories of rape**

In all of the countries except England, the codified definition of rape includes a list of different categories of rape, defined according to the existence of aggravating circumstances. In England, there are no formal categories of rape, but distinctions between types of rape exist in practice: see for example Lees and Gregory (1996).

### **1.13 – 1.14 Time limits**

England is the only member state which has no limitation period within which the prosecution of sexual offences must be commenced. In other countries, the time limit varies from six months in Portugal and Italy, to 20 years in Spain and Austria. The length of the limitation period is determined by the gravity of the offence. Limitation periods are extended where the victim is a child, and generally only run from when the child reaches majority.

## **SECTION TWO: PRE-TRIAL**

### **2.1 – 2.3 Reporting of rape**

The police in all of the nine member states which responded have responsibility for receiving reports of rape. In general, sexual assault units exist in police stations in the larger cities or districts in each jurisdiction. In Luxembourg, a police telephone hot-line is provided for children; in the Netherlands, policy and practice are determined at

regional level, so some police units have special sexual assault units and some do not.

In the larger cities in Austria, the police usually have special sections or departments for dealing with sexual offences and indecent assaults, but police stations in smaller cities and towns do not usually have such facilities. While the service is very limited, women would generally have the right to ask for a female police officer to receive the report. The practice in Portugal is that there is a special sexual assault group of police officers dealing with rape crimes. A female police officer always deals with the victim. In Italy, the only special reception procedures for victims of sexual assault are provided exclusively for children.

In Spain, the Women's Care Service, a specialist service made up of women police, deals exclusively with reports of rape, sexual crimes and domestic violence. It is currently operating in 14 cities and progressive expansion all over Spain is planned. Child victims of sexual abuse are dealt with by a special minors' group within the police.

## **2.4 – 2.7 Police training**

Some form of training for police officers in dealing with rape is provided in eight states, but no specialist training is provided in Italy. Training is usually provided by the police school or academy, but in Austria it is provided through the Ministries of the Interior and of Women's Affairs.

## **2.8 – 2.11 Medical facilities**

There is great diversity amongst the nine member states in the provision of specialist medical facilities. In Finland and Luxembourg, special medical facilities are provided for conducting the forensic examination. In other member states, the police have special arrangements with the emergency services or medical facilities; in Italy, an independent forensic doctor will conduct the examination. In Sweden, the examination may be carried out by a doctor at an emergency hospital.

In Spain, the police have agreements with medical centres staffed by doctors from the departments of gynaecology and obstetrics. In Portugal, there is a special sexual assault medical unit to which the victim can go directly after the rape has occurred. She can report the rape to this

medical unit, so that she does not need to go to the police either before or after her medical examination.

In England, a police surgeon generally conducts the forensic examination, and a 'rape suite' is usually provided in the police station. Specialised personnel in gynaecology and psychology are available in Italy, but this service is only provided for children.

Whether or not the victim will be examined by a female doctor or the doctor of her choice varies greatly from state to state. In Austria, Luxembourg and the Netherlands, women doctors are available on request. However, in the other states, even where the victim is given a choice of doctors, women doctors are not always made available.

### **2.12 – 2.13 Legal advice at the reporting stage**

In Spain, Netherlands, Luxembourg, Finland, Austria and England the victim is entitled to the presence of a lawyer or support person (Austria) at the reporting stage. In Italy and Portugal there is no such entitlement. In Sweden, the victim is entitled to one hour of free legal advice. In Austria and England this legal assistance is not state-funded, but Finland, Luxembourg, the Netherlands and Spain provide state-funded legal advice.

### **2.14 – 2.15 Other pre-trial support**

Pre-trial support for the victim can take many forms. In many states such as England, voluntary groups exist to provide support for victims of crimes, but in some countries the state provides support to the victim. For example, in Sweden, the victim may be given protection by the state, including a ban on contact by the defendant and bodyguard protection. In Greece, a number of state facilities are provided exclusively for the rehabilitation of women victims of physical, psychological or sexual violence.

### **2.16 – 2.17 Decision to prosecute**

Spain is the only member state of the nine in which the police may take the decision to prosecute, although this function can also be performed by a prosecutor or a judge. In the other member states, the decision is left to the public prosecutor.

## **2.18 – 2.19 Special prosecutor**

Italy and Luxembourg are the only member states of the nine where a special prosecutor may be assigned to the prosecution of sexual crimes against women and children. However, even in these two countries special prosecutors are not always assigned. In Italy, individual prosecutors may request to specialise, and in Luxembourg selection occurs on an informal basis.

## **2.20 – 2.21 Prosecutorial discretion**

Prosecutors generally have a broad discretion, and in every country except Italy, Luxembourg and Portugal they may choose to discontinue the investigation even where the victim wishes it to proceed. Prosecutors also have the discretion to reduce the charge from rape to a less serious offence in every state except Italy and Portugal. However, in Spain the prosecution is obliged to have regard to the interests of the victim in the exercise of their discretion.

## **2.22 Withdrawal of complaint**

In every country except Italy and Spain, the victim is entitled to withdraw her complaint at any stage of the proceedings. In Austria, she is only entitled to do so where the offence has occurred within marriage. In England, she may be charged with contempt of court if she leaves it too late to withdraw her complaint. In a number of member states, such as Greece, a prosecution may commence even where a complaint has not been made, and can continue even where a complaint has been withdrawn.

## **2.23 – 2.25 Private prosecution**

There is no provision for a victim to take a private criminal prosecution for rape against her attacker in Portugal, Luxembourg or the Netherlands. Private prosecutions may be taken by the victim in a number of states, such as England, Finland and Sweden, but in every country except Spain the victim will have to pay legal costs; in practice this deters the taking of such cases.

### **2.26 – 2.29 Plea bargaining**

There is no opportunity for a defendant to plead guilty to a lesser charge by arrangement in any country except England and Sweden; plea bargaining exists on an informal basis in both countries, but the victim has no right to participate in the process, although her wishes may be taken into account.

### **2.30 – 2.31 Investigation**

The police are in charge of the investigation of reported rapes in all nine of the member states which responded.

### **2.32 – 2.33 Bail**

The use of the word 'bail' was problematic in this question, since in many European jurisdictions it is assumed to apply only to the monetary conditions imposed on pre-trial release. In every state, the accused is entitled to be granted bail on certain conditions; in Finland, Italy and Sweden, monetary conditions cannot be attached. Conditions routinely imposed include a ban on contact with the victim, but only in Spain does the victim have any say in the bail decision.

### **2.34 Free legal aid for the suspect**

The suspect is entitled to free legal aid in all nine of the respondent member states.

### **2.35 – 2.36 Pre-trial protection for the victim**

Bail conditions may be imposed in each jurisdiction to provide protection for the victim from any threats or intimidation by the defendant. In Austria, the victim is entitled to anonymity even when giving evidence pre-trial, if she is a minor, or there is serious danger to her life, physical integrity or freedom. Her pre-trial evidence may be recorded on video and transmitted live to another room, where the prosecutor and the defendant can watch the questioning and ask questions via audiolink.

Apart from the bail conditions which may be imposed in order to protect the victim, a number of other protective measures exist in different

jurisdictions. In England, the victim may obtain an injunction or non-molestation order through the civil courts. In Luxembourg, a parent accused of sexual offences against their child loses all parental rights over the child immediately. In the Netherlands, safe houses are made available for victims' protection. In Spain, where a victim is considered by a judge to be in grave danger, protection may be ordered under a statutory scheme; police protection can be provided, the identity of the victim can be hidden, and economic support can be put into place.

### **2.37 – 2.41 Pre-trial judicial procedure**

In Finland, Portugal and Sweden, there is no pre-trial procedure where a judge considers whether the evidence is sufficient to proceed to trial. However, in Austria, England, Italy, Luxembourg and Spain, a pre-trial examination of the evidence is conducted.

In Finland, Italy, Luxembourg, Spain and Sweden, the victim is required to give evidence at this pre-trial stage; in England she need only give a statement to the police, and in Austria she can refuse to answer questions concerning details of the offence if she wishes. If the judge, however, thinks her evidence is indispensable, he can insist on her answering the questions. In the Netherlands, if the victim gives evidence at this stage, she is usually not required to do so again at trial.

In every member state except England and Finland, victims are entitled to legal representation at this pre-trial stage. In Portugal, even though the victim is not required to give evidence pre-trial, she is still entitled to legal representation. This representation is state-funded in Luxembourg, the Netherlands, Portugal, Spain and Sweden.

### **2.42 – 2.43 Keeping the victim informed**

Different bodies are given the duty to keep the victim informed of the case pre-trial in the various states. In the Netherlands and in Sweden the police or prosecutor has this duty, but it is the function of the police in Finland; the investigating judge in Luxembourg; the judicial authority in Spain; and the prosecutor and judge in Austria and Italy. In England, the police are considered responsible for keeping the victim informed, although the respondents were vague on this point.

## **2.44 – 2.45 Meeting with the prosecutor**

In six countries (Finland, Italy, Luxembourg, the Netherlands, Portugal and Sweden), an opportunity is provided for the victim to meet with the prosecutor before the case comes to trial. In Austria and England, no such provision is made officially, although it may happen in practice. In England, even where a meeting takes place, the prosecutor may not discuss the evidence with the victim, due to the strict rules against 'coaching' of witnesses which apply in the adversarial system.

Those countries that do facilitate such a meeting tend to do so on an informal basis; in Portugal, for example, the prosecutor might invite the victim to an informal meeting. In Italy, the meeting tends to be more formal, and in the Netherlands, the prosecutor is obliged to ask the victim if she wishes to have a meeting. She can also make the request at her own initiative, either by approaching the prosecutor herself, or by instructing her lawyer to request such a meeting.

## **2.46 – 2.47 Information on the trial process**

While all nine member states make some information on the procedures available to victims before the trial, the situation is somewhat unclear in Austria and England. In Austria, judicial information is available free on special days from every local court; an elaborate booklet is provided which contains a comprehensive summary of information about the proceedings. The Austrian Bar Association also provides information free to the public on special days. In England, information is also provided, although not as a matter of right: a Victim's Charter has been introduced and a leaflet entitled 'Witness in Court' is made available for victims (see also Home Office Report, 1998).

In Portugal and Spain, leaflets are also provided to victims containing the requisite information; in Spain these leaflets are available in the police stations and are given to victims who report rape as a matter of course. In Luxembourg, not only is information provided by the victim's lawyer but also, following the indictment, the victim will be given information on the trial procedures in a letter sent to her by the examining judge. In Sweden, leaflets are available in the court from victims'

organisations, from victims' lawyers, or alternatively from the prosecution.

Victims in Finland are not entitled to pre-trial legal representation, but a record of the pre-trial investigation should be made available to them by the police or prosecution; it is not clear to what extent this access is provided.

## SECTION THREE: TRIAL

### 3.1 – 3.3 General procedures

#### 3.1 Jury

In inquisitorial systems, the principle of jury trial does not have the same significance which it holds in the adversarial process. Thus, in some jurisdictions no lay jurors are used for rape trials; in others, lay magistrates may be used, who are appointed for a fixed number of years rather than for each individual trial. In some jurisdictions, rape may be tried before more than one type of court, depending on the perceived gravity of the particular circumstances.

In Austria, for example, rape is tried by a judge and jury, but there are two kinds of jury; the *Schoffen* and the *Geschworenen*. Rape is usually tried by a *Schoffen* court, but the *Geschworenen* court will hear the trial if the rape has caused the victim's death or serious physical injury, or if the rapist has tortured the victim or particularly humiliated her. On the *Schoffen* Court there are two judges and two jurors, and on the *Geschworenen* Court, three judges and eight jurors.

In England, rape is tried by a judge and 12 lay jurors, and in Finland, rape is tried by a judge and three lay jurors. In Portugal, rape may be tried either by three professional judges alone, or by three judges and four lay jurors. The public prosecutor, the defendant or the victim can ask for the use of a jury; but if this is not requested, then the case is heard by the three-judge court.

In Italy, Luxembourg and the Netherlands, rape is tried before three professional judges and no jurors. In Spain, rape is tried before a president and two or more magistrates; but where the rape is sufficiently

serious to warrant a jury trial, it will be tried before a jury court, made up of a provincial court magistrate and nine jurors. In Sweden, rape is tried before one professional judge and three lay judges, but where the sentence will be two or more years' imprisonment, then the court will consist of one professional judge and five lay judges.

### 3.2 Objections to jurors

In Austria, England and Finland, the defendant and prosecutor may both object to any members of the jury on the grounds of bias. In England, the victim has no formal right to object, although in practice she can object through the prosecutor if one of the jurors is known to her or to the defendant. In Finland, the victim has the same rights to object as the defence and prosecution, but in Austria, the victim can only object to a juror if she has joined the trial to claim compensation which can be awarded by the trial court if the defendant is found guilty.

In Spain, the prosecutor or other parties may reject jurors for a number of reasons, and in Sweden, both the lay and the professional judges are subject to challenge by any party on the grounds of lack of bias.

#### 3.2.1 Jury selection

In Austria, every second year a register of possible jurors is drawn up by random selection, and jurors are chosen by random selection from that register again. Interestingly, and uniquely, there are special rules for juries in sexual offence trials in Austria: at least one person (judge or juror) of the *Schoffen* court and at least two people (judges or jurors) of the *Geschworenen* court have to be of the same sex as the victim and as the defendant. Special rules also exist for trials where the defendant is a juvenile: the jurors have to be specially qualified (e.g. teachers etc.). For such trials, special registers of possible jurors are made.

In England, new jurors are selected randomly from the electoral register for each criminal trial, whereas in Finland, jurors are elected by the municipal councils for terms of four years each. In Spain, a biennial list of candidates in each province is drawn up by lottery, by the Electoral Register Office. Any citizen may challenge the procedure used by this Office. In Sweden, lay judges are appointed politically; they are chosen

by the political parties in each municipality, and serve for a four-year term.

### **3.3 Trial court**

In seven of the countries studied, rape trials are heard before the court of first instance, which is referred to in most systems as the District Court. However, in Austria, the *Landesgericht* (regional court) hears rape cases; this is a court which is superior to the District Court and has no equivalent in other legal systems. In England, rape cases are heard before the second level of court, the Crown Court, with a senior judge presiding.

### **3.4 – 3.5 Training for legal personnel**

No training for legal personnel in the conduct of rape trials generally is provided in seven countries (Austria, Finland, Italy, Luxembourg, the Netherlands, Portugal and Spain). However, in England senior judges are supposed to preside at rape trials, so this enables specialisation. In Sweden, some optional training is provided for legal personnel, and in Luxembourg training is provided for lawyers who take on cases involving children. In Spain, the provision of training for judges is under review.

### **3.6 – 3.9 Special procedures**

#### **3.6 Special procedures for minor defendants**

In every country studied except Finland, special procedures were said to apply for the trial of offences involving minor defendants. In most jurisdictions, such offences are tried before juvenile or youth courts. In countries with codified legal systems, a special Youth Code governs the trial of such offences. Special rules are generally also provided for preserving the anonymity of the minor defendant.

#### **3.8 Special procedures for victims: court facilities and exclusion of defendant**

No separate facilities are provided as a matter of course for the victim in any of the nine jurisdictions. Generally, the victim is not protected from contact with the defendant during the trial, although a number of

rules exist in some jurisdictions which have the effect of minimising her contact with him. For example, in Austria, the victim can give evidence at trial by way of video-link, and the judge can order that the defendant be absent from the court while she is giving her evidence. The defendant may also be removed from the courtroom during the victim's testimony in Sweden. In Finland, the victim is not protected from contact with the defendant during the trial, but the accused may be excluded from the trial during the testimony of a witness who is so afraid that she will be unable to talk otherwise.

### **3.10 – 3.19 Anonymity and protective measures**

#### **3.10 Anonymity of victim**

In Austria and England, the victim is entitled to anonymity both during and after the trial; her name may not be published. However, in Finland, Italy and Luxembourg, the victim is not entitled to anonymity either during or after the trial, unless she is a minor.

In the Netherlands and Sweden, the victim is only entitled to anonymity where she is likely to be intimidated if her name is made public. In Spain, the victim has no right to anonymity, but the prosecutor is responsible for ensuring that she is protected from all unwelcome publicity which reveals information about her private life or interferes with her personal dignity. The victim can also request the court to omit any information which might identify her from the written record of the criminal proceedings.

#### **3.12 Public trial**

In Austria, rape trials are usually held in public, but the judge may exclude the public for reasons of decency or public order, or if the victim or defendant have to answer questions regarding their personal life. In England, rape trials are held in public but restrictions are imposed on media reporting.

In Finland, rape trials are usually held in public but are increasingly being held *in camera*. In Italy, rape trials are held *in camera* if the defendant is a minor, or on the victim's application. In Luxembourg, the

Netherlands, Portugal and Sweden, rape trials are generally held in public unless the victim is a minor.

In Spain, the president of the court has discretion to order the trial to be held *in camera*, out of respect for the victim or her family; the prosecutor may request this, or the victim may request this herself, where she has constituted herself as a party to the proceedings.

### **3.13 Media restrictions**

In most countries, restrictions on media reporting may be imposed at the court's discretion, and are particularly imposed where the victim is a minor. However, in Sweden, there are no formal restrictions on press reporting, but the ethical rules of the media ensure that the victim's name is never published and the defendant's is only published when there is a public interest in doing so. In the Netherlands, no restrictions are imposed upon the media in relation to rape trials.

### **3.15 Presence in court**

In Austria and Sweden, the defendant may be excluded during the victim's testimony, where she is intimidated by his presence. The defendant is then placed in an adjoining room, and can hear the victim's testimony via audio-link.

In England, there are no restrictions on who may be present in the courtroom. In Finland, Luxembourg, Portugal and Spain, where the trial is held *in camera*, only the parties and their lawyers may be present and the permission of the court is needed to have anyone else present.

### **3.18 Non-lawyer support**

The victim may have a non-lawyer support person present with her in court in all of the jurisdictions studied.

### **3.19 Prosecutor's duty to victim**

In five countries (Austria, England, Finland, Italy and Luxembourg), the prosecutor has a duty to be objective, and is not obliged to look after the victim's interests in court.

In the Netherlands, Portugal, Spain and Sweden, however, the prosecutor is regarded as having a duty to look after the victim's interests in court; in Spain, the prosecutor's office has the duty to protect victims of sexual crimes from undue intrusion on their privacy.

### **3.20 – 3.26 Examination in court**

#### **3.20 Cross-examination**

The issue of cross-examination is one of the areas in which there is greatest difference between the adversarial and inquisitorial systems. In England, the defence lawyer must cross-examine the victim in every contested rape case, and multiple cross-examination will occur where there is more than one defendant. Where the defendant is not legally represented, he can cross-examine the victim himself, although restrictions upon this facility have recently been proposed.

Cross-examination is not conducted in the same way in the other legal systems. The defence lawyer is permitted to question the prosecution witnesses, but this questioning is not conducted in the hostile style of the adversarial cross-examination. Most jurisdictions allow multiple questioning where there is more than one defendant, but in Italy, Portugal and Spain, the defendant must be legally represented in court and so cannot question the victim himself. In Spain, the examination of the victim in court must always be conducted with respect for her personal dignity.

#### **3.23 Video evidence**

In two countries (Austria and Italy), the victim can give evidence at trial by way of video-link. However, in five countries the victim is not entitled to give evidence on video (Finland, England, the Netherlands, Portugal and Sweden). In Spain, the victim may give evidence from behind a screen to prevent her identification.

#### **3.24 Evidence of child victims**

In four states (Austria, England, the Netherlands and Sweden), child victims can give evidence by way of video-link. In Austria, victims under 14 do not have to repeat their evidence during the trial if the

defence has already had an opportunity to question their statement pre-trial. In England and Sweden, a pre-recorded video of the child's interview with the police can be used as evidence at trial. In Finland and Portugal, no special procedures exist for the giving of evidence by child victims.

### **3.26 Other special procedures**

In Austria, the jury in sex offence trials must have a certain gender balance (see above). In England, restrictions in rape trials on the disclosure of personal information about the victim and on the cross-examination of the victim by a defendant himself have recently been introduced.

### **3.27 – 3.35 Evidence**

#### **3.27 Proof of lack of consent**

In all nine jurisdictions, the prosecutor must prove in law that the victim was not consenting to sexual intercourse. However, in Sweden, the definition of rape focuses on the violence or intimidation used by the defendant, not on the consent of the victim.

Again, in all of the jurisdictions studied, the prosecutor does not have to show that the victim resisted physically or that the defendant used force in order to prove lack of consent, because serious threats of violence are regarded as sufficient to negative consent.

In those countries with a codified definition of rape, a list of circumstances in which consent is deemed to be absent is provided in the code. For example, in Luxembourg, consent is deemed absent where it has been obtained through violence or serious threats, or the use of a deceit or trick. In Portugal, consent is absent where a woman is not conscious or unable to resist. In Italy, consent may be negated through abuse of authority by the defendant.

#### **3.32 *Mens rea* of defendant**

Subjective or objective tests may be used to judge the defendant's *mens rea*. In six out of nine states, the test used is subjective; that is, the

defendant must have been aware that the victim did not consent (Austria, England, Italy, Luxembourg, Portugal and Sweden). This means that an honest but unreasonable belief in the consent of the victim is a defence. In Austria, Luxembourg and Sweden, a subjective test for *mens rea* is applied to all crimes. In England, however, an objective test is used to judge *mens rea* for some crimes, but the subjective test for rape was established in *DPP v. Morgan [1975] 2 All ER 347*.

An objective test for *mens rea* is used in three jurisdictions. In Finland and the Netherlands, the defendant's belief in the victim's consent has to be reasonable to afford him a defence. In Spain, the defendant's belief in consent cannot afford him a defence where it amounts to an *error invencible* (untenable mistake), having regard to the circumstances of the act.

### **3.34 Victim's evidence alone**

In seven of the states (Austria, Finland, Italy, Luxembourg, Portugal, Spain and Sweden), the defendant can be convicted on the victim's evidence alone, once its probative strength is sufficient to overturn the presumption of innocence. These are all inquisitorial systems, in which the principle of free evaluation of evidence is central to the trial process; the court may take into account all of the evidence which is presented to it, and strict evidential rules do not apply.

Special procedures apply to the use of this evidence in two jurisdictions. In Sweden, the professional judge will instruct the lay judges as to the desirability of having supporting evidence. In England, it is possible to convict the defendant on the victim's evidence alone, but the judge has a discretion to warn the jury of the dangers of convicting where there is no corroboration of the victim's testimony. Finally, in the Netherlands, the victim's evidence alone is not sufficient to obtain a conviction.

### **3.36 – 3.39 Victim's prior sexual experience**

In all of the countries studied except England, evidence of the victim's prior sexual experience with the defendant or with others is admissible

according to the principle of free evaluation of evidence, once it is deemed by the judge to be relevant.

However, in some jurisdictions particular restrictions apply to the admission of such evidence. In Austria, the victim is not obliged to answer questions concerning her sexual experience if she finds it unacceptable to do so. The judge can only insist that she answer those questions which are seen as indispensable. In Spain, the defendant may only call such evidence if it is deemed not to infringe the fundamental rights of the victim.

In England, a tighter restriction exists in law on the admission of such evidence; it can only be admitted with the consent of the trial judge, if it is in the interests of justice to do so.

### **3.40 – 3.44 Verdict**

In all nine jurisdictions, the two possible verdicts are: guilty and not guilty.

In Austria, if the rape is tried by a *Schoffen* court, but the *Schoffen* court is of the view that the *Geschworenen* court should be responsible for the trial, a verdict of ‘incompetence’ (lack of jurisdiction) may be given instead.

### **3.41 Judge and jury functions in verdict**

In seven of the jurisdictions studied, the verdict is given by the judges and jury together, or by the judges alone, depending on the level of trial court. The verdict is only given by the jury in two jurisdictions (Austria and England). In Austria, the verdict is given by the jury when rape is tried before the *Geschworenen* court. In England, the jury always gives the verdict based on the evidence. The judge is obliged to advise the jury as to the law.

A majority verdict is sufficient in all of the jurisdictions studied, although specific rules exist in each country as to how the majority is calculated.

### **3.44 Alternative charges**

In all nine jurisdictions, the defendant can be found guilty of an alternative charge to rape, such as sexual assault or assault, once this is supported by the evidence before the court. For example, in England, the defendant may be tried for rape but convicted instead of the alternative charges of attempted rape, indecent assault or common assault.

## **SECTION FOUR: SEPARATE LEGAL REPRESENTATION**

### **4.1 – 4.3 Separate legal representation for victims**

The right to legal representation exists for the victims of rape and other crimes in all of the jurisdictions studied except for England. The nature of this representation varies according to the particular country, but there is no formal relationship between the prosecutor and the victim's lawyer in any jurisdiction. State-funded legal aid is available to the victim in every jurisdiction except Austria. The right to representation is well-established in most jurisdictions, and applies to victims who join the criminal proceedings as a party in order to claim compensation.

### **4.4 Rights of the victim's lawyer**

The rights of the victim's lawyer differ somewhat between jurisdictions. However, in six jurisdictions (Finland, Italy, Luxembourg, Portugal, Spain and Sweden), the victim's lawyer possesses the same rights of participation at trial as the prosecution and defence counsel. In Portugal, the victim's lawyer can even appeal an acquittal or a lenient sentence. The victim's lawyer may therefore exercise the following rights:

- the right of access to the evidence before the trial (including the right to inspect the prosecution files)

- the right to be present in court throughout the trial

- the right to speak on the victim's behalf in court

- the right to object to questions put to the victim by the defence or prosecution

the right to cross-examine the defendant

the right to make submissions on the law

the right to suggest that certain witnesses are called on behalf of the victim

the right to address the court as to the guilt or innocence of the defendant

the right to address the court as to compensation for the victim

the right to address the court as to sentence

The victim's lawyer has less extensive rights of participation in the Austrian and Dutch legal systems, and may only address the court on the victim's behalf in relation to compensation.

## **SECTION FIVE: POST-TRIAL**

### **5.1 – 5.10 Sentencing**

#### **5.1 Sentencing decision**

In the jurisdictions where lay jurors or magistrates try rape, they have a role in the sentencing decision along with the professional judge/s, and the decisions as to verdict and sentence are given at the same time. However, in England, the decision as to sentence is made by the trial judge alone, only after the jury has delivered a verdict of guilty.

#### **5.2 Training for judges**

In seven of the jurisdictions studied, judges are given no training in sentencing for rape. In Austria, judicial training covers only general rules of sentencing, and reasons for mitigation or aggravation of sentence. In Spain, the Women's Institute has been campaigning for the introduction of judicial training, and seminars have been run to train judges, for example in dealing with cases of domestic violence. In Sweden, some training is provided for judges on an optional basis.

### 5.3 Maximum sentence for rape

A scale of penalties for rape, providing for aggravating factors, is provided in the codified legal systems. Thus, it is difficult to give a comparable maximum sentence for rape for each jurisdiction, because the aggravating factors may be different in each jurisdiction. For example, in Austria the maximum sentence for rape is 20 years' imprisonment, if the victim dies as a result of the rape. In Sweden the maximum sentence for rape is six years; for less serious rape it is four years, and for aggravated rape a maximum sentence of 10 years may be imposed. The following table gives a rough approximation of maximum sentences of imprisonment for 'aggravated rape' (the term used in most jurisdictions).

Austria	20 years
England	life imprisonment
Finland	10 years
Italy	10 years
Luxembourg	10 years (20 years if the victim dies as a result of the rape)
Netherlands	12 years
Portugal	10 years
Spain	15 years
Sweden	10 years

### 5.4 Mandatory minimum sentence

In England and the Netherlands, there is no mandatory minimum sentence provided for rape. In the other seven jurisdictions, the mandatory minimum sentence ranges from six months' imprisonment (Austria, Finland) to three years' imprisonment (Portugal).

### 5.6 Sentencing guidelines or tariffs

No formal sentencing guidelines or tariffs exist in Austria, Finland or Italy, apart from the minimum and maximum penalties which are fixed by law in the criminal code.

Case-law provides guidelines for judges in sentencing in England and Luxembourg. In England, case-law provides that the sentence for most rapes should be between five and seven years' imprisonment, and that an immediate custodial sentence is almost invariably required; moreover,

recent English legislation (the Crime (Sentences) Act, 1997) provides for mandatory minimum custodial sentences for those twice convicted of rape.

In the Netherlands, the public prosecutor's department possesses sentencing guidelines, and in Sweden, judgments of the Supreme Court also supply some guidance.

## **5.8 Guilty plea**

In Austria and England, a guilty plea by the defendant has a reductive effect on sentence. In Finland, a guilty plea does not formally reduce sentence, but where the defendant has on his own initiative contributed to the investigation and tried to alleviate the damage the crime has caused, this may be taken into account as a mitigating factor in sentence. In Italy and Luxembourg, a guilty plea by the defendant is considered as having a mitigating effect upon sentence.

In the Netherlands, Portugal, Spain, and Sweden, a guilty plea by the defendant does not reduce his sentence.

## **5.9 Impact of the rape on the victim**

In Austria, England, Italy and Portugal, the impact of the rape on the victim has an effect upon sentence. In England, the prosecution or defence can refer to the impact upon the victim at the sentencing stage, and the judge can take this into account. In Luxembourg, the Netherlands and Spain, the impact of the rape upon the victim does not affect sentence formally, although it may be taken into account as one of a number of factors affecting sentence.

In Sweden, the impact of the rape on the victim affects the sentence, and will also determine whether the defendant is prosecuted for rape or aggravated rape, and must be referred to by the prosecutor in the indictment document itself.

## **5.11 – 5.13 Appeal**

In all of the jurisdictions studied except England, the verdict and sentence may both be appealed by either the prosecution or the defence

to the relevant court of appeal. In England, the prosecution can appeal a lenient sentence, but not an acquittal, to the Court of Criminal Appeal, while the defendant can appeal both a conviction and a severe sentence to the same court. The jury's verdict can therefore be overturned only on an appeal by the defendant, not on appeal by the prosecution or trial judge.

## **5.14 – 5.21 Criminal injury compensation**

### **5.14 Court-ordered compensation**

In all of the countries studied except England, the trial court is empowered to award compensation for victims of rape, which is paid by the defendant and is not subject to a maximum amount or ceiling in any of these states. If the defendant cannot pay, the victim is entitled to recover the amount from the state. The victim can join the criminal proceedings as a civil party in order to claim compensation from the court; this is the basis upon which the right to legal representation was generally established in inquisitorial systems.

In the Netherlands, the court can either order that the defendant pay compensation to the victim as part of her civil claim, or can oblige the defendant to pay a fine as part of the criminal penalty. In Spain, even if the victim does not exercise her right to join the action as a civil party, the prosecutor can request that the defendant pay her compensation.

### **5.17 Other reparation to victim**

A state-funded compensation scheme for victims of crime is established in all nine jurisdictions, to which victims of rape can apply. The awards are subject to a particular maximum amount or ceiling in each jurisdiction.

## **5.22 – 5.25 Civil and constitutional remedies**

In all of the jurisdictions studied, the victim can sue the perpetrator in tort through the civil courts for damages for the injury suffered. However, it is easier for the victim to obtain compensation through the criminal courts if possible (since the costs of the proceedings are paid by the state, and the state authorities are obliged to collect the evidence).

## 5.24 European Convention on Human Rights

The Convention is incorporated into the domestic law of all of the countries studied except England, but it has had no effect for victims of rape in any jurisdiction.

### SECTION SIX: STATISTICS

Statistics on rape are maintained by the following agency in each country:

Austria	Osterreichisches Statistisches Zentralamt Rennweg 12a; 1087 Wien.
England	Research and Statistics Department of the Home Office, London.
Finland	Statistics Finland, 00022 Finland.
Italy	ISTAT (National Institute of Statistics), Viale Liegi 11/13, Rome.
Portugal	Cabinete de Estudo e Planeamento, Ministerie de Justica, Av. Oscar Montaire Jones, 39, 1000 Lisboa.
Spain	Ministry of the Interior, Madrid.
Sweden	National Council for Crime Prevention, Box 6494, 113 8Z Stockholm.

#### Rapes reported to the police

	1993	1994	1995	1996	1997
Austria	552	553	514	470	—
England	4,589	5,032	4,986	5,789	—
Finland	365	387	446	395	—
Italy	—	860	946	1,151	—
Luxembourg	—	—	—	—	—
Netherlands	—	—	—	—	—
Portugal	488	498	534	494	551
Spain	—	—	—	—	1,083
Sweden	2,153	1,812	1,707	1,608	—

## Prosecutions commenced for rape

	1993	1994	1995	1996	1997
Austria	—	—	—	—	—
England	1,704	1,782	1,604	1,696	—
Finland	74	71	59	56	—
Italy	—	—	—	—	—
Luxembourg	—	—	—	—	—
Netherlands	—	—	—	—	—
Portugal	183	218	194	147	107
Spain	—	—	—	—	—
Sweden	592	357	288	340	—

## Convictions recorded for rape

	1993	1994	1995	1996	1997
Austria	157	139	130	112	—
England	482	460	578	573	—
Finland	67	64	51	50	—
Italy	—	—	—	—	—
Luxembourg	—	—	—	—	—
Netherlands	—	—	—	—	—
Portugal	118	152	128	95	65
Spain	—	—	—	—	—
Sweden	181	150	133	101	—

**SECTION 7: REFORM**

In Austria, Italy and Luxembourg, no reforms are currently proposed in rape law.

The following issues are under discussion for reform in different countries:

**England**

Personal cross-examination of the victim by the defendant.

The admissibility of evidence of the victim's prior sexual history.

The principle of anonymity for the defendant.

**Finland**

Reform of the codified definition of rape to include a separate provision on 'aggravated rape'; to define rape to include male victims and to provide a definition of 'sexual intercourse'.

Reform of the rule on initiation of prosecution: it is proposed that the decision to prosecute will henceforth be made by the prosecutor, without the need for a complaint by the victim.

**Portugal**

Reform of the definition of rape, to make it gender-neutral and to include oral intercourse.

**Spain**

Reform of the code to provide a definition of sexual harassment.

Introduction of a law invalidating consent given by minors under 16 in respect of sexual intercourse with adults.

**Sweden**

Reform of the definition of rape to extend its scope (at present, it is limited to sexual intercourse or other comparable sexual act).

Comprehensive reform of the legislation on sexual offences.



# **APPENDICES**



## Appendix One

# Psychological Interview Schedule

### GROTIUS PROGRAMME

A Joint Study Conducted by the School of Law, Trinity College Dublin & The Dublin Rape Crisis Centre. This is a European Commission-funded study of survivors of Rape and Sexual Assault. First of all, I would like to thank you for agreeing to participate in this study.

The goal of this interview is to find out about *your* experience of the legal process.

I would like to assure you that any information that you may give me during the course of this interview will be treated in the strictest of confidence.

May I continue with the interview?

### SECTION ONE: SOCIAL BACKGROUND INFORMATION

I'd like to start by asking you some general questions about yourself.

Q.1.1 What age are you?

Q.1.2 What is your current marital status?:

Married	<input type="checkbox"/>	Widowed	<input type="checkbox"/>
Single	<input type="checkbox"/>	Living with Partner	<input type="checkbox"/>
Separated	<input type="checkbox"/>	Other	<input type="checkbox"/>
Divorced	<input type="checkbox"/>		

Q.1.3 Are you currently employed? Yes  No

Q.1.4 If YES, what is your occupation?

Q.1.5 What is your educational background?

Q.1.6 Had you any experience of going to court prior to the trial for Rape/Sexual Assault?  
 Yes  No

Q.1.7 If YES, then in what capacity?  
 Defendant  Family Law Proceedings   
 Work Related  Other  Please Specify:

Q.1.8 How would you describe that experience of going to court?  
 Extremely Negative 1 2 3 4 5 6 7 Extremely Positive

Q.1.9 In what year did the Rape/Sexual Assault occur?

**SECTION TWO: PRE-TRIAL PROCEDURES**

**2.1 Reporting the Rape/Sexual Assault**

Now I am going to ask you some questions about your experience of reporting the Rape/Sexual Assault.

Q.2.1.1 Who made the decision to report the Rape/Sexual Assault?  
 Self  Other  Please specify:

Q.2.1.2 If OTHER, what was your reaction to their reporting the Rape/Sexual Assault?

Q.2.1.3 To Whom did [YOU / OTHER] report the Rape/Sexual Assault?  
 Police  Medical Centre/Hospital  Other  Please specify:

Q.2.1.4 How did [YOU / OTHER] report the Rape/Sexual Assault?  
 By Phone  Personal Visit  Other  Please specify:

Q.2.1.5 To what extent were members of your family supportive of your reporting the Rape/Sexual Assault?

Very Unsupportive	Somewhat Unsupportive	Neither Supportive Nor Unsupportive	Somewhat Supportive	Very Supportive
1	2	3	4	5

Q.2.1.6 Did you experience any doubts/hesitations about reporting?

Yes  No  Not Sure

Q.2.1.7 If YES, why did you feel doubtful / hesitant about reporting?

Q.2.1.8 What were your reasons for deciding to report the Rape/Sexual Assault?

Q.2.1.9 How would you describe your feelings about reporting the Rape/Sexual Assault?

## 2.2 Police Interview

I am now going to ask you some questions about your first interview with the police.

Q.2.2.1 Were you interviewed in a specialist Rape/Sexual Assault trauma unit?

Yes  No  Not Sure

Q.2.2.2 If NO, where were you interviewed?

Q.2.2.3 What was the gender of the police officer who interviewed you?

Male  Female

Q.2.2.4 How did you feel about being interviewed by a [Male / Female] police officer?

Q.2.2.5 Would you prefer to have been interviewed by an officer of the opposite gender?

Yes  No  No Opinion

Q.2.2.6 How would you describe the attitude of the police officer who interviewed you?

Q.2.2.7 Please rate the police officer who interviewed you on the following scales:

Hostile	1	2	3	4	5	6	7	Warm
Sympathetic	1	2	3	4	5	6	7	Unsympathetic

Q.2.2.8 How satisfied were you with the treatment you received from the police officer who interviewed you?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

Q.2.2.9 How had you expected to be treated by the police?

Q.2.2.10 Were your expectations confirmed?

Yes  No

Q.2.2.11 If YES, How so?

Q.2.2.12 Overall, how would you describe your experience of contact with the police?

Extremely Negative	1	2	3	4	5	6	7	Extremely Positive
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### 2.3 Medical Examination

I would now like to ask you about your first medical examination.

Q.2.3.1 Were you examined in a specialist Rape/Sexual Assault trauma unit?

Yes  No  Not Sure

Q.2.3.2 If NO, where were you examined?

Q.2.3.3 What was the gender of the doctor who examined you?

Male  Female

Q.2.3.4 How did you feel about being examined by a [Male / Female] doctor?

Q.2.3.5 Would you prefer to have been examined by a doctor of the opposite gender?

Yes  No  No Opinion

Q.2.3.6 Besides the examining doctor was there any other person present while you were being examined?

Yes  No  Not Sure

Q.2.3.7 If YES, then who else was present?

Q.2.3.8 How would you describe the attitude of the doctor who examined you?

Q.2.3.9 Please rate the doctor who examined you on the following scales:

Hostile	1	2	3	4	5	6	7	Warm
Sympathetic	1	2	3	4	5	6	7	Unsympathetic

Q.2.3.10 Overall, how satisfied were you with the treatment you received from the doctor who examined you?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

## 2.4 Additional Support Services

I would now like to ask you about other support services that you may have had contact with.

Q.2.4.1 Were you provided with information about support services available to you?

Yes  No  Not Sure

Q.2.4.2 If YES, then who provided this information.

- Police
- Medical Examiner
- Victim's Lawyer
- Family Member
- Other  Please Specify:

Q.2.4.3 Which support services did you receive information about?

Tick as many as apply.

- Rape Crisis Centre or Equivalent
- Victim Support Scheme or Equivalent
- State Psychological Services
- Private Psychological Services
- Religious Organisation
- Other  Please specify:

Q.2.4.4 Which if any of these services did you in turn, contact for support?

Tick as many as apply.

- Rape Crisis Centre or Equivalent
- Victim Support Scheme or Equivalent
- State Psychological Services
- Private Psychological Services
- Religious Organisation
- Other  Please specify:

Q.2.4.5 How satisfied were you with the support services that were available to you?

Very	Somewhat	Neither Satisfied	Somewhat	Very
Dissatisfied	Dissatisfied	Nor Dissatisfied	Satisfied	Satisfied
1	2	3	4	5

Q.2.4.6 Did the support services available, adequately address your needs?

- Yes  No  No Opinion

Q.2.4.7 If NO, why not?

## 2.5 Withdrawal of Complaint

I am now going to ask you some questions in respect of withdrawal of the complaint before the trial began.

Q.2.5.1 Did you at any stage, prior to the court hearing wish to withdraw the complaint?

Yes  No  Not Sure

Q.2.5.2 If YES, can you say why you wanted to withdraw the complaint?

Q.2.5.3 Could you have withdrawn your complaint easily, if you had wanted to?

Yes  No  Not Sure

Q.2.5.4 Were you at any stage pressured to withdraw the complaint?

Yes  No  Not Sure

Q.2.5.5 If YES, who pressured you to withdraw?

Police   
State Prosecutor   
Victim's Lawyer   
Your Family/Friends   
The Suspect/Accused   
Suspect's/Accused's Network   
Other  Please Specify:

Q.2.5.6 Can you say what charges were brought against the accused?

Q.2.5.7 Was there any suggestion of charges being downgraded (to a lesser offence) before the trial?

Yes  No  Not Sure

Q.2.5.8 If YES, how did you react to the reducing of the charge?

### 2.6 Bail Decision

I am now going to ask you some questions about the bail decision made by the court.

Q.2.6.1 Was the accused granted bail?

Yes  No  Not Sure

Q.2.6.2 Was this bail decision communicated to you?

Yes  No  Not Sure

Q.2.6.3 If YES, who communicated the decision to you?

Police Officer   
Victim's Lawyer   
Prosecuting Authority   
Other  Please specify:

Q.2.6.4 When was the bail decision communicated to you?

Same Day   
1-2 Days After   
3-7 Days After   
1-2 Weeks After   
Other  Please specify:

Q.2.6.5 If NO, how did you find out about the decision?

Reported in the Media   
Sighting of the Accused   
Informed by a Relative   
Other  Please specify:

Q.2.6.6 What was your reaction to the bail decision?

Q.2.6.7 To what extent were you concerned about your safety before the trial?

Very Concerned 1      Somewhat Concerned 2      Neither Concerned Nor Unconcerned 3      Somewhat Unconcerned 4      Very Unconcerned 5

Q.2.6.8 What particular concerns, if any, did you have?

## 2.7 Information Received about the Case

Now I would like to ask you some questions regarding the information you received about the progress of your case.

Q.2.7.1 Did you experience any difficulties obtaining information about your case?

Yes  No

Q.2.7.2 Please rate the degree of difficulty you experienced in obtaining information about your case:

Very Difficult 1 2 3 4 5 6 7 Very Easy  
To Obtain To Obtain

Q.2.7.3 What difficulties if any, did you experience in obtaining information?

Q.2.7.4 If you did receive information about your case, who did you receive it from?

Police   
Victim's Lawyer   
Prosecuting Authority   
Other  Please Specify:

Q.2.7.5 How would you rate your understanding of what was expected of you at the trial.

Very Poor Understanding 1 2 3 4 5 6 7 Very Clear Understanding

Q.2.7.6 Did you receive any formal preparation for your role prior to the trial?

Yes  No

Q.2.7.7 If YES, who provided such preparation for your role?

Police   
Victim's Lawyer   
Prosecuting Authority   
Other  Please Specify:

Q.2.7.8 If NO, would you have liked to receive some preparation for your role?

Yes No No Opinion 

## 2.8 Contact With The Victim's Lawyer

Now, I would like to ask you about the contact you had with the separate legal representative before the trial.

Q.2.8.1 What was the gender of your victim's lawyer?

Male Female 

Q.2.8.2 How did you feel about your victim's lawyer being [Male / Female]?

Q.2.8.3 Would you prefer to have had a lawyer of the opposite gender represent you in this case?

Yes No No Opinion 

Q.2.8.4 How was the victim's lawyer selected in your case?

Assigned by the State Chosen By You Other 

Q.2.8.5 If ASSIGNED BY THE STATE: Would you have preferred to have chosen your victim's lawyer yourself?

Yes No No Opinion 

Q.2.8.6 If YES, what are your reasons for such a preference?

Q.2.8.7 Did you have the opportunity to meet with your victim's lawyer prior to the trial?

Yes No

Q.2.8.8 How long before the trial did the first meeting take place?

- On the day of the trial   
 1 – 7 days before the trial   
 1 – 2 weeks before the trial   
 2 – 8 weeks before the trial   
 3 – 6 months before the trial   
 6 months or more before the trial

Q.2.8.9 Can you estimate (roughly) the total amount of time that you had in contact with your victim's lawyer?

Minutes:      Hours:

Q.2.8.10 How satisfied, were you with amount of time you had in contact with your victim's lawyer?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

## 2.9 Contact With The Prosecutor

Now, I would like to ask you about the contact you had with the prosecutor before the trial.

Q.2.9.1 What was the gender of the prosecutor?

Male       Female

Q.2.9.2 How did you feel about the prosecutor being [Male / Female]?

Q.2.9.3 Would you prefer to have had a lawyer of the opposite gender prosecute your case?

Yes       No       No Opinion

Q.2.9.4 Would you have preferred to have chosen the prosecutor yourself?

Yes       No       No Opinion

Q.2.9.5 If YES, what are your reasons for such a preference?

Q. 2.9.6 Did you have the opportunity to meet with the prosecutor prior to the trial?

Yes  No

Q.2.9.7 How long before the trial did the first meeting take place?

On the day of the trial   
 1 – 7 days before the trial   
 1 – 2 weeks before the trial   
 2 – 8 weeks before the trial   
 3 – 6 months before the trial   
 6 months or more before the trial

Q.2.9.8 Can you estimate (roughly) the total amount of time that you had in contact with the prosecutor?

Minutes:      Hours:

Q.2.9.9 How satisfied, were you with amount of time you had in contact with the prosecutor?

Very	Somewhat	Neither Satisfied	Somewhat	Very
Dissatisfied	Dissatisfied	Nor Dissatisfied	Satisfied	Satisfied
1	2	3	4	5

## SECTION THREE: TRIAL PROCEDURES

### 3.1 General Issues

Now that we have discussed your experience prior to trial, I'd like to ask you about your experience of the trial itself.

Q.3.1.1 Were you kept informed of the dates for court hearings?

Yes  No

Q.3.1.2 Who notified you about the court dates?

Police   
 Victim's Lawyer   
 State Prosecutor   
 Other  Please Specify:

Q.3.1.3 How long in total, did you have to wait, from the time of reporting, for the case to come to court?

Months:      Years:

Q.3.1.4 How did this delay impact on you?

Q.3.1.5 Where did you wait, in the courthouse, until the case was heard?

General Public Waiting Area        
 Specially Designated Witness Waiting Area     

Q.3.1.6 What length of time did you have to wait in the courthouse, before testifying?

Less than One Hour        
 1 - 3 Hours        
 4 - 8 Hours        
 2 - 5 Days        
 More than 5 Days     

Q.3.1.7 Did you encounter the accused or his relatives and friends, in the waiting areas of the courthouse?

Yes       No

Q.3.1.8 If YES, how did this make you feel?

**In some circumstances, it has been reported, that victims have been treated differently because the accused was known to them.**

Q.3.1.9 In light of this it would be useful if you could tell me if you had known the accused before the Rape/Sexual Assault?

Yes       No

Q.3.1.10 If YES, can you tell me how long had you known the accused?

Less than 24 hours        
 1 - 7 days        
 2 - 8 weeks        
 3 - 12 months        
 More than one year        
 Other       Please Specify:

Q.3.1.11 If YES, can you tell what was your relationship with the accused?

- Spouse   
 Ex-Partner   
 Close Relative   
 Neighbour   
 Friend   
 Acquaintance   
 Other  Please Specify:

Q.3.1.12 What impact, if any, in your opinion, did knowing the accused have on your experience of the trial process?

### 3.2 Interviewee's Participation in the Trial

Next I would like to ask you about YOUR participation in the trial.

Q.3.2.1 How anxious would you say you were about having to go to court?

Extremely 1 2 3 4 5 6 7 Not At All  
 Anxious Anxious

Q.3.2.2 Where did you testify?

- On the Witness Stand   
 From Behind a Screen   
 Via Closed-Circuit Television   
 Other  Please Specify:

Q.3.2.3 If ON THE WITNESS STAND, Would you have preferred to have testified from for example, behind a screen?

Yes  No  No Opinion

Q.3.2.4 Did you give evidence in front of:

Judge  Judge & Jury

Q.3.2.5 Did you have a support person/s present with you during the trial?

Yes  No

Q.3.2.6 If YES, who was this person/s?

- Spouse   
Close Relative   
Friend   
Support Service Personnel   
Other  Please Specify:

Q.3.2.7 Can you estimate, the total length of time, that you testified on the stand?

Minutes:                      Hours:                      Days:

Q.3.2.8 Were there any breaks allowed during your testimony?

Yes                       No

Q.3.2.9 If YES, then what were the reasons for these breaks?

Q.3.2.10 Can you estimate (approximately) the number of people who were present in the courtroom while you testified?

- Less than 10 People   
Between 10 & 20 People   
Between 21 & 40 People   
Between 41 & 100 People   
More than 100 People

Q.3.2.11 Were there restrictions on who was present while you were giving testimony?

Yes                       No                       Not Sure

Q.3.2.12 Were there members of the media present while you testified?

Yes                       No                       Not Sure

Q.3.2.13 Was your identity protected during course of the trial?

Yes                       No

Q.3.2.14 If NO, how did this impact on you?

Q.3.2.15 Was the accused present in the courtroom while you were testifying?

Yes  No

Q.3.2.16 If YES, how did his presence made you feel?

Q.3.2.17 Was the accused allowed to question you during the trial?

Yes  No

Q. 3.2.18 If YES, how did his questioning made you feel?

Q.3.2.19 If NO, who questioned you on behalf of the accused?

Defence Lawyer   
Other  Please specify:

### 3.3 Feelings about Testifying

The previous questions in this section of the interview asked about what happened at the trial. Now I'd like to ask some more specific questions about your FEELINGS in relation to testifying.

Q.3.3.1 How would you describe how you felt about testifying?

Q.3.3.2 How anxious would you say you felt when giving testimony:

Extremely 1 2 3 4 5 6 7 Extremely  
Anxious Calm

Q.3.3.3 How would you describe your Level of Confidence when Giving Testimony:

Extremely 1 2 3 4 5 6 7 Extremely  
Confident Unconfident

Q.3.3.4 How would you describe your Level of Articulateness when Giving Testimony:

Extremely 1 2 3 4 5 6 7 Extremely  
Articulate Inarticulate

Q.3.3.5 How intimidating would you say the experience of testifying was for you?

Extremely 1 2 3 4 5 6 7 Not at All  
Intimidating Intimidating

Q.3.3.6 How stressful was the experience of testifying for you?

Extremely 1 2 3 4 5 6 7 Not at All  
Stressful Stressful

### 3.4 Issues Raised During The Trial

Now, I would like to ask you about some issues which may have been raised during the trial.

Q.3.4.1 (IF APPLICABLE [See Section 3.1 p.12]) Was the fact that you had known the accused raised during the trial?

Yes  No

Q.3.4.2 If YES, how did this make you feel?

Q. 3.4.3 Was permission sought to question you in public about your prior sexual history?

Yes  No

Q.3.4.4 If YES, were you questioned in public about your prior sexual history?

Yes  No

Q.3.4.5 If YES, how did this make you feel?

Q.3.4.5a If YES, did this questioning relate to your relationship with the accused only?

Yes  No

Q.3.4.6 Was the Degree of Resistance which you put up against the accused raised during the trial?

Yes  No

Q.3.4.7 If YES, how did this make you feel?

Q.3.4.8 Was the Degree of Force used by the accused against you raised during the trial?

Yes  No

Q.3.4.9 If YES, how did this make you feel?

Q.3.4.10 [IF APPLICABLE] Was the issue of Delay in your making the complaint raised as an issue during the trial?

Yes  No

Q.3.4.11 If YES, how did this make you feel?

### 3.5 Cross-Examination

Next, I would like to ask you about your experience of being cross-examined.

Q.3.5.1 Did the accused's lawyer (or any other person) at any stage, make suggestions that you were in some way to blame, e.g. alcohol/drug consumption, the clothes you were wearing?

Yes  No

Q.3.5.2 If YES, how did this make you feel?

Q.3.5.3 Did the accused's lawyer (or any other person) repeatedly question you about any issue?

Yes  No

Q.3.5.4 If YES, would you mind telling me what was the issue?

Q.3.5.5 How did this questioning make you feel?

Q.3.5.6 Did the accused's lawyer (or any other person) in your opinion use insensitive questioning?

Yes  No

Q.3.5.7 If YES, how did this make you feel?

Q.3.5.8 Did the accused's lawyer (or any other person) ask you questions which embarrassed you or which you thought were intended to embarrass you? [Eg. about the clothes you were wearing]

Yes  No

Q.3.5.9 If YES, how did this make you feel?

Q.3.5.10 [IF APPLICABLE] What role did the victim's lawyer, your legal representative, play during the trial?

### 3.6 Treatment Received from Legal Personnel

I would like to ask you some questions in relation to the treatment you received from the various legal personnel during the trial.

Q.3.6.1 How would you describe the attitude of the victim's lawyer towards you?

Q.3.6.2 Please rate the victim's lawyer on the following scales:

Hostile	1	2	3	4	5	6	7	Warm
Sympathetic	1	2	3	4	5	6	7	Unsympathetic

Q.3.6.3 How would you rate the victim lawyer's treatment of you during the trial?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

Q.3.6.4 How would you describe the attitude of the prosecutor towards you?

Q.3.6.5 Please rate the prosecutor on the following scales:

Hostile	1	2	3	4	5	6	7	Warm
Sympathetic	1	2	3	4	5	6	7	Unsympathetic

Q.3.6.6 How would you rate the prosecutor's treatment of you during the trial?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

Q.3.6.7 What was the gender of the accused's lawyer?

Male  Female

Q.3.6.8 How would you describe the attitude of the accused's lawyer towards you?

Q.3.6.9 Please rate the accused's lawyer on the following scales:

Hostile	1	2	3	4	5	6	7	Warm
Sympathetic	1	2	3	4	5	6	7	Unsympathetic

Q.3.6.10 How would you rate the accused's lawyer's treatment of you during the trial?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

Q.3.6.11 What was the gender of the trial judge?

Yes  No

Q.3.6.12 How would you describe the attitude of the trial judge towards you?

Q.3.6.13 Please rate the trial judge on the following scales:

Hostile	1	2	3	4	5	6	7	Warm
Sympathetic	1	2	3	4	5	6	7	Unsympathetic

Q.3.6.14 How would you rate the judge's treatment of you during the trial?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

- Q.3.6.15 Which of the legal personnel would you say you were most satisfied with during the trial?
- Q.3.6.16 Why?
- Q.3.6.17 Which of the legal personnel would you say you were most dissatisfied with during the trial?
- Q.3.6.18 Why?

### 3.7 Final Outcome of the Trial

Now, I'm going to ask you some questions about the final outcome of the trial.

- Q.3.7.1 What was the final outcome of the criminal proceedings?

Guilty Verdict   
 Not Guilty Verdict   
 Other  Please Specify:

- Q.3.7.2 How satisfied would you say you were with the verdict that was reached?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

- Q.3.7.3 If the Accused was Found Guilty — what sentence was passed down?

More than 7 years Imprisonment   
 3-7 years Imprisonment   
 1-2 years Imprisonment   
 Less than 12 months Imprisonment   
 Suspended Sentence   
 Other  Please Specify:

- Q.3.7.4 Were you present in court for the sentencing of the accused?

Yes  No

- Q.3.7.5 What was your reaction to the sentence that was passed down?

- Q.3.7.6 Did you prepare a Statement of how the rape/sexual assault had impacted on your life?
- Q.3.7.7 Was your Victim Impact Statement presented at Sentencing?  
Yes  No  Not Sure
- Q.3.7.8 Was there a subsequent appeal either of?  
the verdict? Yes  No  Not Sure   
the sentence? Yes  No  Not Sure
- Q.3.7.9 If YES, What was the outcome of the appeal/s?

### 3.8 Compensation

Next, I would like to ask you some questions about criminal and civil compensation.

- Q.3.8.1 Was Criminal Injury Compensation available to you?  
Yes  No  Not Sure
- Q.3.8.2 If YES, Did you claim this compensation?  
Yes  No
- Q.3.8.3 Did you receive this compensation?  
Yes  No
- Q.3.8.4 Did you experience any practical difficulties in obtaining such compensation?  
Yes  No
- Q.3.8.5 If YES, what were these difficulties?
- Q.3.8.6 Are there any issues you would like to raise in respect of compensation?
- Q.3.8.7 Did you take a civil action?  
Yes  No
- Q.3.8.8 If YES, what sort of civil action did you take?

Q.3.8.9 Was it successful?

Yes  No

Q.3.8.10 Again, did you experience any practical difficulties in obtaining compensation through the civil courts?

Yes  No

Q.3.8.11 If YES, what were these difficulties?

## SECTION FOUR: POST-TRIAL STAGE

### 4.1 Impact of the Trial

Next, I'd like to ask you some questions about what happened after the trial itself.

Can you tell me what the overall effect of the legal process was on:

Q.4.1.1 Your relationship with your partner at the time [if applicable]?

Extremely Negative	1	2	3	4	5	6	7	Extremely Positive
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Q.4.1.2 Your employment?

Extremely Negative	1	2	3	4	5	6	7	Extremely Positive
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Q.4.1.3 Your relationship with your family generally?

Extremely Negative	1	2	3	4	5	6	7	Extremely Positive
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Q.4.1.4 Your friendships generally?

Extremely Negative	1	2	3	4	5	6	7	Extremely Positive
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Q.4.1.6 How fair do you think the legal process was?

Very Fair	Somewhat Fair	Neither Nor Unfair	Fair	Somewhat Unfair	Very Unfair
1	2	3	4	5	

Q.4.1.7 Do you think that you have been treated fairly by the legal process?

Yes  No

Q.4.1.8 If YES or NO, How so?

Q.4.1.9 As a result of the trial do you believe that justice was done?

Yes  No

Q.4.1.10 If YES or NO, How so?

Q.4.1.11 How satisfied would you say you were with the legal process in general?

Very Dissatisfied	Somewhat Dissatisfied	Neither Satisfied Nor Dissatisfied	Somewhat Satisfied	Very Satisfied
1	2	3	4	5

Q.4.1.12 What would you say your satisfaction/ dissatisfaction most depended on?

Q.4.1.13 Do you feel you were in any way denied participation in the trial?

Yes  No

Q.4.1.14 If YES or NO, In what way?

Q.4.1.15 Would you have preferred to have had a greater decision-making role in the trial proceedings?

Yes  No

Q.4.1.16 If YES, Why?

Q.4.1.17 Overall, how would you describe your feelings about having gone to court:

Extremely Negative	1	2	3	4	5	6	7	Extremely Positive
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## SECTION FIVE: RECOMMENDATIONS FOR REFORM

Finally, I would like to ask you if you have any suggestions for reforming the criminal process in relation to the prosecution of rape/sexual assault cases.

Q.5.1.1 Given your experience of the legal process, Do you think you would now report a rape / sexual assault?

Yes  No

Q.5.1.2 Do you think you would proceed with a prosecution?

Yes  No

Q. 5.1.3 What advice would you give to another person who may find themselves in a similar position to you?

Q.5.1.4 Are there any particular changes which could be made that you feel would have improved *your* experience of the trial?

Q.5.1.5 What changes, generally, do you think are needed in the legal process of prosecuting Rape/Sexual Assault cases?

Q.5.1.6 Finally, is there anything that you would like to add that you feel has not been considered or given adequate mention in the above questions but that you feel was an important factor in your experience of the legal process?

This completes our interview.

Thank you for taking the time to answer these questions.

Once again, please be assured that the information that you have given to me today, will be treated in the strictest of confidence.

Your participation in this study helps us to understand the experiences of women who as a result of having been raped /sexually assaulted have become involved in the criminal justice system.

## Appendix Two

# Detailed Statistical Analysis of the Psychological Interviews

**Table A. Participant's Contact with the Police**

**Location of Police Interview:**

Being interviewed in a specialist unit, however, did not have a significant positive effect on participant's rating of their overall experience of contact with the police ( $t=1.43$ ,  $p=.21$ ,  $df=5.52$ ).

**Gender of Police Officer and Hostility Rating**

A t-test was conducted to elicit the effect of gender of interviewer on the perceived hostility, however, no significant difference was found ( $t=-1.83$ ,  $df=17$ ,  $p=.08$ ). It should be noted that the difference was approaching significance at  $p=.05$  level.

**Gender of Police Officer and Sympathy Rating**

A t-test was again conducted to elicit the effect of gender of interviewer on the perceived sympathy shown by the interviewer, however, no significant difference was found ( $t=1.82$ ,  $df=17$ ,  $p=.086$ ). It should be noted that the difference was approaching significance at  $p=.05$  level.

**Gender of Police Officer and Satisfaction with Treatment Rating**

A t-test was conducted to elicit the effect of gender of interviewer on overall satisfaction with the treatment received from the interviewer, no significant difference was found. ( $t=-.49$ ,  $df=16$ ,  $p=.633$ ).

**Time Period of Reporting and being Interviewed by the Police and their rating of the overall experience of contact with the police**

A one-way analysis of variance was conducted to examine whether the time period in which the report was made, (i.e. since 1994, 1990-1994, prior to 1990) had an effect on participant's overall experience of contact with the police. However, no significant effect was found ( $F=1.62$ ,  $p=.23$ ,  $df=19$ ).

### Correlations Between Assessments of Police Interview Experience

Perceptions of Interviewer	Overall Rating of Interview Experience	
Feelings about Gender of Interviewer	r=-.38	p=.166
Perception of Attitude of Interviewer	r=-.55	p=.014
Perceived Hostility of Interviewer	r=-.67	p=.001***
Perceived Sympathy of Interviewer	r=-.69	p=.001***
Satisfaction with Police Interviewer	r=.56	p=.012*

\* Significant at the 0.05 Level

\*\* Significant at the 0.1 Level

\*\*\* Significant at the 0.01 Level

### Findings for the Multiple Regression on Overall Experience of Contact with the Police.

A multiple regression was carried out with participants overall rating of their experience of contact with the police as the dependent variable and sympathy, hostility and satisfaction with the chief police interviewer entered as the independent variables. (R Square = .49, T=4.02, Significance of T = .0009).

**Table B. Participant's Experience of the Medical Examination****Medical Examiner Hostility**

A t-test was conducted to elicit the effect of gender of medical examiner on the perceived hostility, however, no significant difference was found ( $t=-1.31$ ,  $df=12$ ,  $p=.21$ ).

**Medical Examiner Sympathy**

A t-test was again conducted to elicit the effect of gender of examiner on the perceived sympathy shown by the examiner, however, no significant difference was found ( $t=1.52$ ,  $df=12$ ,  $p=.16$ ).

**Participants Satisfaction with Treatment Received from Medical Examiner**

Once again, the differences between the mean satisfaction ratings for male and female medical examiners was not found to be significant ( $t=-1.29$ ,  $df=12$ ,  $p=.20$ ).

**Time Period of undergoing the Forensic Medical Examination and Satisfaction with the Treatment of the Medical Examiner**

An analysis of variance was conducted to examine whether the time period when the report was made, (i.e. since 1994, 1990-1994, prior to 1990) had an effect on participant's overall satisfaction with the medical examiner, no significant effect was found ( $F=.046$ ,  $p=.955$ ,  $df=13$ ).

**Correlations Between Perceptions of the Medical Examiner**

Perceptions of Medical Examiner	Satisfaction with the Examiner
Feelings about Gender of the Examiner	$r=-.18$ $p=.699$
Perceived Attitude of Examiner	
Perceived Hostility of Examiner	$r=.91$ $p=.000^{***}$
Perceived Sympathy of Examiner	$r=-.92$ $p=.000^{***}$

\* Significant at the 0.05 Level

\*\* Significant at the 0.01 Level

\*\*\* Significant at the 0.001 Level

**Multiple Regression**

Based on the above correlations a multiple regression was carried out with participants satisfaction with the treatment received from the medical examiner as the dependent variable with sympathy and hostility ratings of the medical examiner entered as the independent variables. This stepwise regression selected once again, the level of sympathy exhibited by the medical examiner as the variable which significantly explains the greatest degree of variance ( $R\text{ Square} = .85$ ,  $T=-8.21$ , Significance of  $T = .000$ ). These figures indicate that the degree to which the examiner was perceived as sympathetic has the greatest effect on participants satisfaction with the treatment of the medical examiner.

**Table C. Participant's Experience of Testifying: Mean Ratings on Five Semantic Differential Scales**

<b>Variable</b>	<b>Mean Rating (Scale 1-7)</b>	<b>Standard Deviation</b>
Stressfulness Of Testifying	1.13	(Sd = 0.5)
Level Of Anxiety When Testifying	2.23	(Sd=2.0)
Level Of Intimidation When Testifying	2.57	(Sd=2.0)
Level Of Articulateness When Testifying	3.63	(Sd=1.9)
Level Of Confidence When Testifying	4.31	(Sd=1.8)

**Table D. Mean Satisfaction Rating with Treatment Received from Law Enforcement Medical and Legal Personnel.**

<b>Individual Rated</b>	<b>Mean Rating (Scale 1-5)</b>	<b>Standard Deviation</b>
Police Interviewer	3.08	(SD=1.69)
Medical Examiner	2.71	(SD=1.59)
State Prosecutor	3.21	(SD=1.58)
Accused's Lawyer	1.73	(SD=1.16)
Trial Judge	3.19	(SD=1.56)
Victim's Lawyer	4.25	(SD=1.70)

**Table E. Mean Hostility Rating of Law Enforcement Medical and Legal Personnel.**

<b>Individual Rated</b>	<b>Mean Rating (Scale 1-5)</b>	<b>Standard Deviation</b>
Police Interviewer	3.25	(SD=2.26)
Medical Examiner	3.71	(SD=2.23)
State Prosecutor	3.58	(SD=1.98)
Accused's Lawyer	5.75	(SD=1.36)
Trial Judge	4.39	(SD=1.94)
Victim's Lawyer	0.50	(SD=1.22)

**Table F. Mean Sympathy Rating of Law Enforcement Medical and Legal Personnel.**

Individual Rated	Mean Rating (Scale 1-5)	Standard Deviation
Police Interviewer	4.66	(SD=2.34)
Medical Examiner	3.93	(SD=2.40)
State Prosecutor	4.33	(SD=2.19)
Accused's Lawyer	2.17	(SD=1.47)
Trial Judge	3.96	(SD=2.13)
Victim's Lawyer	6.33	(SD=1.21)

**Table G. Correlations Between the Outcome Satisfaction Measures: Perceived Fairness of the Legal System, Overall Satisfaction with the Legal Process and General feelings of Having Gone Through the Legal Process along with the Stage Specific Measures of Satisfaction.**

Satisfaction Measures	Fairness of Legal Process	Overall Satisfaction with Legal Process	General Feelings About Legal Process
Police	r=.11 p=.678	r=.44 p=.065	r=.49 p=.045*
Medical Examiner	r=.34 p=.300	r=.17 p=.576	r=-.01 p=.967
Support Services	r=.45 p=.141	r=-.60 p=.841	r=-.22 p=.448
Understanding of Trial Process	r=-.22 p=.468	r=.50 p=.055	r=.58 p=.036*
Time Spent with State Prosecutor	r=-.81 p=.003**	r=.70 p=.011	r=.63 p=.052
State Prosecutor at Trial	r=-.38 p=.202	r=.60 p=.024*	r=.51 p=.093
Trial Judge	r=-.25 p=.384	r=.55 p=.028*	r=.59 p=.027*
Fairness of Legal Process		r=-.50 p=.049*	r=-.62 p=.017*
Overall Satisfaction with Legal Process	r=-.50 p=.049*		r=.86 p=.000***
General Feelings About Legal Process	r=-.62 p=.017*	r=.86 p=.000***	

\* Significant at the 0.5 Level

\*\* Significant at the 0.01 Level

\*\*\* Significant at the 0.001 Level

**Table H. Factors Significantly Associated with Participant's Perception of the Fairness of the Legal Process**

Variable	Spearman r & Probability Values
(i) Satisfaction with treatment of victim lawyer	r= -.8767, p=.010, N=7
(ii) Satisfaction with contact time with the state prosecutor	r= -.8095, p=.003, N=11
(iii) Feelings re: overall involvement in the legal process	r= -.6235, p=.017, N=14
(iv) Satisfaction with the legal process overall	r= -.4990, p=.049, N=16

**Table J. Factors Significantly Associated with Participant's Feelings in Relation to their Involvement in the Legal Process**

Variable	Spearman r and Probability Values
(i) Overall experience of contact with the police	r=.4926, p=.045, N=17
(ii) Satisfaction with treatment of victim lawyer	r=.7329, p=.039, N=8
(iii) Satisfaction with treatment of trial judge	r=.5869, p=.027, N=14
(iv) Understanding of role in trial process	r=.5830, p=.036, N=13
v) Perceived fairness of the legal system	r= -.6235, p=.017, N=14
(vi) Satisfaction with the legal process overall	r=.8623, p=.000, N=16

**Table K Factors Significantly Associated With Participant's Rating Of Their Overall Satisfaction With The Legal Process.**

Variable	Spearman r and Probability Values
(i) Satisfaction with treatment of the state prosecutor	r=.5990, p=.024, N=14
(ii) Satisfaction with contact time with state prosecutor	r=.7004, p=.011, N=12
(iii) Satisfaction with treatment of trial judge	r=.5465, p=.028, N=16
(iv) Perceived fairness of the legal system	r= -.4990, p=.049, N=16
(v) Feelings re: overall involvement in the legal process	r=.8623, p=.000, N=16
(vi) Understanding of role in trial process	r=.5048, p=.055, N=15

**Table L. The Impact of Having a Victim's Lawyer****T-tests for independent samples.**

<b>Variable</b>	<b>Significant at the .01 level</b>
Overall Satisfaction with the Legal Process	t=3.54, p=.008, df=8.00
General Feeling about having gone to court	t=4.00, p=.003, df=8.92
Level of Confidence when giving Testimony	t= -4.0, p=.002, df=11
Hostility Scale for Defence Lawyer During Trial	t=4.25, p=.004, df=7.00

<b>Variable</b>	<b>Significant at the .05 level</b>
Degree of Difficulty in obtaining information	t= 2.30, p=.035, df=11.73
Level of Articulatness when giving testimony	t=-2.71, p=.018, df=13
Satisfaction with state prosecutor during trial	t=2.58, p=.024, df=12
Overall Impact of the Legal Process on Family	t=3.50, p=.017, df=5.00

<b>Variable</b>	<b>Approaching Significance at .05 level</b>
Level of Understanding of Role at Trial	t=2.15, p=.051, df=13

**Chi-squared Analysis**

<b>Variable</b>	<b>Significant at the .01 Level</b>
Difficulty in Obtaining Information	Chi= 4.05, p= .002, df=1
Source of Information on the Trial Process	Chi= 9.26, p= .009, df=2
Restrictions on People Present During the Trial	Chi= 5.53, p= .018, df=1

<b>Variable</b>	<b>Significant at the .05 Level</b>
Source of Information on the Bail Decision	Chi= 4.05, p= .044, df=1

Variable	Approaching Significance at .05 Level
Representation of Interests by State Prosecutor	Chi= 3.60, p= .058, df=1
Perceived Fairness of the Legal Process	Chi= 3.69, p= .055, df=1

**Table M. Comparative Analysis Between Ireland and the Other Four Selected Member States**

#### **Attitude of Chief Police Interviewer**

Irish participants rated the attitude of the chief police officer much more positively when compared to participants from the other four selected member states ( $t=-2.17$ ,  $df=17$   $p=.045$  (Equal)).

#### **Reported Confidence Levels when Testifying**

Irish participants ( $n=3$ ) reported feeling less confident when testifying, mean of 7.0, when compared with participants from the other four selected member states ( $n=10$ ), mean of 3.5. This difference in reported confidence levels was significant ( $t=10.01$ ,  $df=9.00$   $p=.000$ ).

#### **Reported level of Articulateness when Testifying**

Irish participants ( $n=4$ ) reported feeling less articulate when testifying, mean of 5.5 when compared with participants from the other four selected member states ( $n=11$ ), with a mean of 2.95. ( $t=2.75$ ,  $df=13$   $p=.017$ ).

#### **Hostility Rating of Defence Lawyer**

Irish participants ( $n=3$ ) rated the defence lawyer as more hostile, mean was 1.00 when compared with participants from the other four selected member states ( $n=9$ ), mean of 2.66. This difference in hostility ratings for defence lawyers was statistically significant ( $t=-3.78$ ,  $df=8.00$   $p=.005$ ).

#### **Attitude of Trial Judge**

Irish participants ( $n=4$ ) reported the trial judge as having a more positive attitude, mean score of 1.25 compared to mean score of 2.55 for participants from the other four selected member states ( $n=9$ ). ( $t=-4.18$ ,  $df=11$   $p=.002$ ).

#### **Effect on Family Life**

Irish participants ( $n=4$ ) reported that involvement in the legal process had a significantly more negative effect on their family life when compared to the effect on participants from the other four selected member states. Irish participants had a mean score of 1.00 compared to mean score of 2.28 for participants from the other four selected member states ( $n=7$ ). ( $t=-3.06$ ,  $df=6.00$   $p=.022$ ).

**Perceived Fairness of the Legal Process**

Irish participants (n=6) had a mean rating of 5.00 in relation to perceived fairness of the legal process, when compared with the mean rating of 3.70 for participants from the other four selected member states (n=10). ( $t=2.75$ ,  $df=9.00$ ,  $p=.022$ ).

**General Feelings about having been Involved in the Legal Process**

Irish participants (n=4) reported being significantly more negative about involvement in the legal process when compared to participants from the other four selected member states (n=13). Irish participants had a mean rating of 1.25, while non-Irish participants had a mean rating of 3.577. ( $t=-3.31$ ,  $df=14.51$ ,  $p=.005$ ).

**Overall Satisfaction with the Legal Process**

Irish participants (n=6) reported being significantly less satisfied with the legal process when compared to participants from the other four selected member states (n=12). Irish participants had a mean satisfaction rating of 1.00, while non-Irish participants had a mean satisfaction rating of 2.25. ( $t=-3.04$ ,  $df=11.00$ ,  $p=.011$ ).

**Table N. Comparisons Using Chi-Squared Analysis to examine for any Significant Differences Between Ireland and the other Four Selected Member States**

**Significant at the .01 Level****Source of Official Information**

( $X = 11.429$ ,  $df=1$ ,  $p=.0033$ ).

**Significant at the .05 Level****Detention of Accused Prior to Trial**

( $X = 6.562$ ,  $df=1$ ,  $p=.01041$ ).

**Difficulties Experienced in Obtaining Information about the Case**

( $X = 6.377$ ,  $df=1$ ,  $p=.01156$ ).



**Overall Effect of the Legal Process on the Victim's Family**

F= 15.31, p= .003, df= 3

Means: Country 1= 1.00 Student-Newman-Keuls test at .05 level of significance indicates  
Country 3= 1.00 that country 4 is significantly different from the all others.  
Country 4= 3.50 Therefore, respondents  
Country 5= 1.67 from France reported a significantly less negative effect of the trial process on their families than did those from other countries.

**Perceived Fairness of the Legal Process**

F= 13.09, p= .001, df= 3

Means: Country 1= 5.00 Student-Newman-Keuls test at .05 level of significance indicates  
Country 3= 4.00 that country 5 is significantly different from all the others.  
Country 4= 5.00 Therefore, respondents from Germany reported a significantly fairer perception of the legal process than did those from other countries.  
Country 5= 2.33

**Significant at the .05 Level**

**Intimidating Nature of Testifying**

F= 5.21, p= .020, df= 3

Means: Country 1= 1.75 Student-Newman-Keuls test at .05 level of significance indicates  
Country 3= 1.75 that country 5 is significantly different from all the others.  
Country 4= 1.25 Therefore, respondents from Germany reported finding the experience of testifying less intimidating than did those from other countries.  
Country 5= 5.00



## Appendix Three

# Legal Questionnaire

### Format of questionnaire

1. The Law on Rape
2. Pre-trial
3. Trial
4. Separate Legal Representation
5. Post-trial
6. Statistics
7. Reform

### 1. The Law on Rape

- 1.1 What is the legal definition of rape?
- 1.2 Can rape be committed against:
  - (a) women only
  - (b) men and women
  - (c) children (at what age: \_\_\_\_\_ )
- 1.3 Can a woman be convicted of rape?
- 1.4 If yes, please explain on what basis:
- 1.5 Can a child be convicted of rape?
- 1.6 If yes, please explain at what age and on what basis:
- 1.7 Is the legal definition of rape contained in:
  - (a) A code
  - (b) Act of Parliament
  - (c) other (please specify)
- 1.8 In what year was the present legal definition introduced?
- 1.9 Is rape within marriage recognised as an offence?
- 1.10 If yes, are there any special rules which apply to rape within marriage? (for example, different procedures)

- 1.11 Are there distinctions made in law between categories of rape (e.g. stranger/acquaintance rape, indoor/outdoor rape)?
- 1.12 If yes, what are the distinctions ?
- 1.13 Does rape have to be prosecuted within a certain time?
- 1.14 If yes, what is the time limit?

## **2. Pre-trial**

### **Reporting and Prosecution**

- 2.1 Do the police have responsibility for receiving reports of rape?
- 2.2 Is there a special rape/sexual assault unit in the police?
- 2.3 If yes, give more details:
- 2.4 Do police officers get training for dealing with rape?
- 2.5 Who provides this training?
- 2.6 What does it consist of?
- 2.7 Is it provided:
  - (a) during initial training of police recruits
  - (b) as part of an in-service training programme
- 2.8 Is there a special rape/sexual assault medical unit which conducts a medical examination of the victim when a rape is reported?
- 2.9 If yes, what facilities are available?
- 2.10 Are these facilities available to all victims?
- 2.11 Are women doctors/police surgeons available to conduct the medical examinations if the victim requests?
- 2.12 Is the victim entitled to legal advice at the reporting stage?
- 2.13 If yes, is this legal advice State funded?
- 2.14 Is the victim entitled to any other support pre-trial?
- 2.15 If yes, please specify:
- 2.16 Do the police take the decision to prosecute?
- 2.17 If no, who takes the decision to prosecute?
- 2.18 Is a special prosecutor assigned to rape cases?
- 2.19 If yes, please explain how the special prosecutor is selected.
- 2.20 Does the prosecutor have the discretion to drop the case, even where the victim wishes to proceed?
- 2.21 Does the prosecutor have the discretion to reduce the charge from rape to a less serious charge?
- 2.22 Can the victim withdraw her complaint at any stage?
- 2.23 Can the victim take a private prosecution for rape?

- 2.24 If yes, does she have to pay costs?
- 2.25 How much does it cost (approximately)?
- 2.26 Can the defendant plead guilty to a less serious charge than rape instead after agreement with the prosecutor?
- 2.27 If yes, is there a formal system of 'plea-bargaining'?
- 2.28 Does the victim have any right to participate in the 'plea bargaining' process?
- 2.29 If yes, please outline the role of the victim:

### **Investigation**

- 2.30 Are the police in charge of investigating the reported rape?
- 2.31 If no, who investigates the reported rape?
- 2.32 Once a suspect has been identified and arrested, is he entitled to be released on bail?
- 2.33 Does the victim have any say in the bail decision?
- 2.34 Is the suspect entitled to free legal aid?
- 2.35 Is the victim entitled to any pre-trial protection from the suspect?
- 2.36 If yes, what protections are provided?
- 2.37 Is there a pre-trial procedure where a judge can decide if there is enough evidence to proceed with the case?
- 2.38 Does the victim have to give evidence at any stage before the trial?
- 2.39 Is the victim entitled to pre-trial legal representation?
- 2.40 If so, what form does it take?
- 2.41 Is legal aid available for the victim pre-trial?
- 2.42 Is the victim kept informed of the progress of the case pre-trial?
- 2.43 If yes, who has responsibility for informing the victim ?
- 2.44 Does the victim have an opportunity to meet the prosecutor before the trial?
- 2.45 If yes, please explain:
- 2.46 Is information on the trial procedures available to victims pre-trial?
- 2.47 If yes, what form does this information take (leaflet, letter, etc.)?

### 3. Trial

#### General Procedures

- 3.1 Is rape tried by:
  - (a) judge alone;
  - (b) judge and jury;
  - (c) other (please specify)?
- 3.2 Where a jury is used for rape trials:
  - (a) How many jurors are on it?
  - (b) Who has the right to object to any members of the jury?
    - (i) the defendant;
    - (ii) the prosecutor;
    - (iii) the victimIf (iii), on what grounds can the *victim* object to a juror?  
How many objections can she make?
  - (c) Please explain how the jurors are chosen:
- 3.3 Which level of court hears rape trials?
- 3.4 Is special training in the conduct of rape trials provided for:
  - (a) lawyers;
  - (b) judges?
- 3.5 Is any special training provided where the victim is a child?
- 3.6 Are there any special procedures where the defendant is a child?
- 3.7 If yes, please give details:
- 3.8 In the courts in which rape is tried, is there:
  - (a) a separate waiting room for the victim?
  - (b) separate bathroom facilities for the victim?
  - (c) a separate eating area for the victim?
- 3.9 Is the victim protected from contact with the defendant during the trial?
- 3.10 Is the victim entitled to anonymity throughout the trial?
- 3.11 Is the victim entitled to anonymity after the verdict?
- 3.12 Is the trial held:
  - (a) in public;
  - (b) *in camera* / private?
- 3.13 Are there restrictions on how the media report rape trials?
- 3.14 If yes, what are they?
- 3.15 Are there restrictions on who may be present in the court?
- 3.16 If yes, what are the restrictions ?

- 3.17 Does the victim have any power to decide on who may be present in the court-room?
- 3.18 Does the victim have the right to have a non-lawyer support person present in the court-room during the trial?
- 3.19 Does the prosecutor have a duty to look after the victims interests in court?
- 3.20 Does the defence lawyer cross-examine the victim?  
(challenge her orally in court about her statement)
- 3.21 Is there a possibility of multiple cross-examination (i.e. by more than one defence lawyer) where there is more than one defendant?
- 3.22 Where the defendant is not legally represented, can he cross-examine the victim?
- 3.23 Is the victim entitled to give evidence behind a screen/on video?
- 3.24 Are there special procedures in place for victims who are minors to give evidence?
- 3.25 If yes, what are they?
- 3.26 Are there any other special procedures relating to the conduct of rape trials?

### **Evidence**

- 3.27 Does the prosecutor have to prove in law that the victim was not consenting to sexual intercourse?
- 3.28 Does the prosecutor have to prove that the victim resisted physically in order to show she did not consent?
- 3.29 Does the prosecutor have to prove that the defendant used physical force?
- 3.30 Are there any other elements of the offence of rape which the prosecutor has to prove
- 3.31 If yes, what are they?
- 3.32 Is it a defence that the defendant genuinely believed the victim was consenting?
- 3.33 Is an honest but unreasonable belief by the defendant in the victims consent a defence?
- 3.34 Can the defendant be convicted on the evidence given by the victim alone?

- 3.35 Where the only evidence is that given by the victim, are there special rules which apply to the use of that evidence, for example, a special judicial warning to the jury?
- 3.36 Can evidence of the victim's prior sexual experience with the defendant be used by the defendant in court?
- 3.37 If yes, are there any special rules which apply to this evidence?
- 3.38 Can evidence of the victim's sexual experience with others be used by the defendant in court?
- 3.39 If yes, are there any special rules which apply to this evidence?
- 3.40 What possible verdicts may be given ?
- 3.41 Is the verdict given by:
  - (a) judge and jury
  - (b) judge alone
  - (c) other (please specify)
- 3.42 If the verdict is given by the jury, does it have to be unanimous?
- 3.43 If no, what majority verdict is sufficient to convict?
- 3.44 Can the defendant be found guilty of an alternative charge to rape ?

#### **4. Separate Legal Representation**

- 4.1 Is the victim entitled to have her own lawyer during the trial?
- 4.2 If yes;
  - (a) When was this right introduced?
  - (b) Is state-funded legal aid available for her lawyer?  
If not, who pays for her lawyer?
  - (c) Can the victim appoint a lawyer of her choice?  
If not, how is the lawyer appointed?
- 4.3 What is the relationship between the prosecutor and the victims lawyer?
- 4.4. Does the victims lawyer have the right to:
  - (a) access to the evidence before the trial?
  - (b) be present in Court throughout the trial?
  - (c) speak on the victim's behalf in Court?
  - (d) call witnesses on behalf of the victim?
  - (e) object to questions put to the victim by the defence?
  - (f) object to questions put to the victim by the prosecutor?
  - (g) cross-examine the defendant?

- (h) make submissions to the court on the law?
- (i) address the court as to the guilt/innocence of the defendant?
- (j) address the court as to the sentence?
- (k) address the court as to compensation for the victim?
- (l) any other rights (please specify):

## 5. Post-trial

### Sentencing

- 5.1 Is the sentence given by:
  - (a) judge alone;
  - (b) jury;
  - (c) other, please specify:
- 5.2 Are judges given training in sentencing for rape?
- 5.3 What is the maximum sentence of imprisonment for rape?
- 5.4 Is there a mandatory minimum sentence?
- 5.5 If so, what is it ?
- 5.6 Are there guidelines or tariffs available to assist in sentencing?
- 5.7 If yes, what are they?
- 5.8 Does a guilty plea by the defendant reduce his sentence?
- 5.9 Does the impact of the rape on the victim affect the sentence?
- 5.10 If yes, please explain how it is presented to the court, and how it influences the sentence:

### Appeal

- 5.11 Is it possible for the prosecution to appeal:
  - (a) an acquittal?
  - (b) a lenient sentence?  
If yes, to which court?
- 5.12 Is it possible for the defendant to appeal:
  - (a) a conviction?
  - (b) a severe sentence?  
If yes, to which court?
- 5.13 Where the verdict is given by the jury, can it be overturned:
  - (a) on appeal by the prosecution
  - (b) on appeal by the defendant
  - (c) by the trial judge
  - (d) any other process (please specify)

**Criminal injury compensation**

- 5.14 Is the trial court entitled to award compensation to victims of rape ?
- 5.15 If yes, is it paid by:
- (a) the state;
  - (b) the defendant;
  - (c) other, please specify:
- 5.16 If yes, is it subject to a maximum amount (a ceiling)?
- 5.17 Is any other form of reparation to the victim available after a criminal conviction?
- 5.18 If yes, please specify:
- 5.19 Is there a state-funded scheme for victims of crime generally?
- 5.20 If yes, does this cover victims of rape?
- 5.21 If yes, is there a maximum amount which may be awarded?

**Civil & constitutional procedures and remedies**

- 5.22 Are there any:
- (a) civil or
  - (b) constitutional procedures or remedies available to victims of rape, separate to the criminal trial for rape?
- 5.23 If yes, please specify:
- 5.24 Is the European Convention on Human Rights incorporated into your domestic law?
- 5.25 If yes, please outline if it has any effect for victims of rape:

**6. Statistics**

- 6.1 Are statistics kept on reported rape?
- 6.2 If yes, who publishes such statistics?  
Please give the name and address:
- 6.3 What is the most recent year for which statistics are available?
- 6.4 How many rapes were reported to police in:
- (a) 1993
  - (b) 1994
  - (c) 1995
  - (d) 1996 (if available)

- 6.5 How many prosecutions for rape were commenced in:
- (a) 1993
  - (b) 1994
  - (c) 1995(d) 1996 (if available)
- 6.6 How many convictions for rape were recorded in:
- (a) 1993
  - (b) 1994
  - (c) 1995
  - (d) 1996 (if available)

## **7. Reform**

- 7.1 Are any reforms currently proposed in rape law?
- 7.2 If yes, what are these reforms?
- 7.3 Who has proposed these reforms ?
- 7.4 What reforms would you see as the most important?
- 7.5 Have you any other comments on the way in which rape is dealt with in your legal system, with reference to the aims and specific objectives of this study?

*We thank you very much for taking the time to complete this questionnaire.*

## Appendix Four

# Directory of Contacts and Selected Materials Provided for Victims in Different States

### Directory of Contacts (by chapter)

#### CHAPTER SIX: BELGIUM

##### Legal Experts Interviewed

Legal academic	Professor Frank Hutsebeout Professor of Criminal Law University of Leuven Hooverplein 10, 3000 Leuven
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Ministry of Justice	Ann Foubert Assistant Adviser Ministry of Justice Waterloolaan 115 1000 Brussels
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##### Additional Interviews

Juge d'instruction	Juge Damien Vandermeersch Extension du Palais de Justice Rue des Quatre Bras 1000 Brussels
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Prosecutor	Mme. Paule Somers Parquet de Bruxelles Rue des Quatre Bras 1000 Brussels
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## Police

Mme. Diane Pellegrims  
Police Judiciaire  
Extension du Palais de Justice  
Rue des Quatre Bras 13  
1000 Brussels

Hans de Wiest  
and René Stormacq  
Gendarmerie, Brigade  
de Wlouwe-Saint-Pierre  
Rue David Van Bever 6  
1150 Woluwe-St-Pierre

## Victims' lawyer

Nathalie Kumps,  
Hirsch & Hirsch, Avocats  
Rue Dantzenberg 42, 1050 Brussels

**Rape Support Groups**

SOS Inceste  
650 Rue J. Paquet  
1050 Brussels

SOS Viol  
29, Rue Blanche  
1060 Brussels

Additional thanks to Els Lecompte and Liesbet Stevens, Assistants to Professor Hutsebeout.

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**CHAPTER SEVEN: DENMARK****Legal Experts Interviewed**

Legal Academic	Professor Vagn Greve Institute of Criminal Law University of Copenhagen Stuðiestraat 6, 1455 Copenhagen K
Ministry of Justice	Jens Kruse Mikkelsen Head of Division for Criminal & Procedural Law Lena Hatrejsen Division for Criminal and Procedural Law Ministry of Justice Law Department, Slotsholmsgade 10 1216 Copenhagen K

**Additional Interviews**

Victims' Lawyer	Advokat Jytte Lindgard Niels Hemmingsens Gade 10 1153 Copenhagen K
Victims' Lawyer	Advokat Hellen Thorup Gammeltovej 6 1457 Copenhagen
Victims' Lawyer/Defence	Advokat Steen Bech Ny Ostergade 10 1101 Copenhagen
High Court Judge	Judge Sven Danielsen Parcelvej 28A 2840 Holte
<b>Rape Support Group</b>	Joan Sostrene (Sisters) Dannerhuset, Nansengade 1 1366 Copenhagen K

## CHAPTER EIGHT: FRANCE

### Legal Experts Interviewed

Legal Academics	Professor Jacques Robert Sylvie Klein Institut de Criminologie Université de Paris II, Panthéon-Assas 12, Place du Panthéon, 75 005 Paris
Ministry of Justice	Jean-Christophe Hullin, Magistrat Jean-Paul Besson, Magistrat Direction des Affaires Criminelles et des Grâces Ministère de la Justice 13, Place Vendôme, 75 042 Paris Cedex 01  Christian Erre, Chef d'escadron Bureau de la Police Judiciaire Section Documentation Criminelle Gendarmerie Nationale, Ministère de la Défense 35, Rue Saint-Didier, 75 775 Paris Cedex 16

### Additional Interviews

Victims' lawyers /Defence counsel	Maître Jean-Claude Woog, Avocat Maître Marie-Christine Sari, Avocat 131, Boulevard Malesherbes, 75 017 Paris
Prosecutor	Alain Blanchot Premier Substitut du Procureur de la République de Paris Poste 40 27 Paris

Police  
Rudolph Hidalgo  
Alain Le Roi  
Commissaires de Police  
Direction Centrale de la Police Judiciaire  
13, Rue des Saussaies, 75 008 Paris

### **Rape Support Group**

Collectif Feministe Contre le Viol  
9 Villa d'Este, 75013 Paris

Additional thanks to Jean-Claude Salomon, Criminologist, Institut des Hautes Etudes de la Sécurité Intérieure, 13, Rue Pequet, 75015 Paris.

## **CHAPTER NINE: GERMANY**

### **Legal Experts Interviewed**

Legal Academic  
Professor Hans-Heiner Kühne  
Law Department  
University of Trier  
5500 Trier Postfach 3825

Ministry of Justice  
Eberhard Siegismund  
Ministerialrat, Bundesministerium der  
Justiz  
Heinemannstrasse 6  
53170 Bonn

### **Additional Interviews**

Federal Ministry of  
Family Affairs  
Renate Augstein  
Head of Division  
B. Min für Familie  
53123 Bonn

Federal Women  
Lawyers' Association  
Jutta Lossen  
Rechtsawaltin  
Beethovenplatz  
53115 Bonn

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Prosecutors/Judges	Petra Strohbach Staatsanwältin Krischker Judge Strahfrichter Worner Oberlandesgericht, Nürnberg
Victims' Lawyers	Barbara Sieben, Julia Zinsmeister Bucher 79, 90419 Nürnberg
Police	Special Police Unit for Sexual Assaults, Nürnberg
Bavaria state offices	Dr. Broderson Bavarian State Ministry of Justice, Munich

### **Rape Support Groups**

Notruf Nürnberg  
Bleichstrasse 25 RG  
90429 Nürnberg

Berliner Initiative gegen Gewalt gegen  
Frauen (BIG)  
Berlin

Additional thanks to Professor Dr. K.H. Gössel, Chair of Criminal Law and Criminal Procedure, Friedrich-Alexander University of Erlangen, 91054 Erlangen, Nürnberg, and also to Herr Weingartner, the SDP spokesperson on Justice, and to Herr Van Essen, the FDP spokesperson on Justice, for their help.

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## CHAPTER TEN: IRELAND

### Legal Experts Interviewed

Legal Academic	Una Ní Raifeartaigh, B.L. Law Library Four Courts, Dublin 7
Ministry of Justice	Garrett Byrne Richard Fennessy Frank Lyons Department of Justice, Equality and Law Reform 72-76 St. Stephen's Green Dublin 2

### Additional Interviews

Police	Det. Sgt. Mary Delmar Det. Bernard Owens Garda Síochána Domestic Violence and Sexual Assault Investigation Unit Harcourt Square, Dublin 2
Defence Counsel	Patrick Gageby S.C. Law Library Four Courts, Dublin 7
Prosecution	Simon O'Leary Office of the Director of Public Prosecutions 14 – 16 Merrion Street Dublin 2
<b>Rape Support Group</b>	The Dublin Rape Crisis Centre, 70 Lower Leeson Street, Dublin 2

Additional thanks to Inspector Karl Heller, M.Sc., Marie Torrens BL, Fiona McPhillips LLB and Michele Finan LLB.

## CHAPTER ELEVEN: OTHER MEMBER STATES

Legal questionnaires were completed by the following legal experts in each member state:

### 1. Austria

Legal Academic: Jure Ingrid Tricole  
Universtat Linz  
Institut fur Strafrecht  
Strafprozessrecht und Kriminologie  
A-4040 Linz/Donau, Auhof

Ministry of Justice: Mag. Petra Smutny,  
Bundesministerium fur Justiz,  
Museumstrasse 7,  
A-1070 Wien

### 2. England

Legal Academic: Aileen McColgan  
Lecturer in Law  
King's College, Strand  
London WC2

Ministry of Justice: Maggie Pearson  
Criminal Policy Directorate  
Home Office  
50 Queen's Gate  
London SW1H 9AT

### 3. Finland

Legal Academic: Johanna Niemi-Kiesilainen, S.J.D.  
Faculty of Law, Box 4  
FIN-00014 University of Helsinki

Ministry of Justice: Jukka Lindstedt  
Counsellor of Legislation  
Law Drafting Dept  
Ministry of Justice  
Etelaesplanadi 10, PO Box 1  
FIN-00131 Helsinki

**4. Greece**

Legal Academic: Maria Kranidioti  
Lecturer in Criminology  
Department of Penal Sciences  
University of Athens

Additional thanks to E. Xenou, Ministry of Justice, 96 Messogion Street, 11527 Athens.

**5. Italy**

Legal Academic: Professor Piermaria Corso  
Studio Legale Corso  
V. le Regina Margherita, 39  
20122 Milano

**6. Luxembourg**

Legal Academic: Dean Spielmann, Avocat  
Dupong & Dupong  
14A Rue des Bains  
Boite Postale 472  
L-2014 Luxembourg

Ministry of Justice: M. Jean-Paul Reiter  
Ministre de la Justice  
16 Boulevard Royal  
L-2934 Luxembourg

**7. Netherlands**

Legal Academic: Dr. Katinka Lunnemann  
Universiteit Utrecht  
Europa Instituut  
Achter Sint Pieter 200  
3512 HT Utrecht

Ministry of Justice: Just. J. Wiarda  
Senior Counsellor, Legislation  
Directorate-General for Legislation  
Public Law Legislation Division  
P.O. Box 20301  
2511 EH The Hague

**8. Portugal**

Legal Academic: Maria Joao Antunes  
Faculdade de Direito da  
Universidade de Coimbra  
3049 COIMBRA codex

**9. Spain**

Ministry of Justice: Concepcion Dancausa Trevino  
General Director  
Ministerio de Trabajo y  
Asuntos Sociales  
Instituto de la Mujer  
Condesa de Venadito, 34  
28027 Madrid

Additional thanks to Pedro Jimenez Nacher, Jefe de Relaciones Internacionales, Consejo del Poder Judicial.

**10. Sweden**

Legal Academic: Annika Nilsson, LL.M.  
Stockholm University  
Faculty of Law  
S-106 91 Stockholm

Ministry of Justice: Cecilia Bergman  
Ministry of Justice  
Division for Criminal Law  
SE-103 33 Stockholm

Additional thanks for providing information are due to a number of others individuals in different countries, and in particular to Hilde Indreberg, Legal Adviser, Legislation Department, Royal Ministry of Justice and the Police, Norway.

## Selected Materials Provided for Victims in Different States

*Authors' Note:* The following is not intended as an exhaustive list of the materials available to victims in different countries, but rather is included in order to provide an indication of the diversity of information available to victims from different sources throughout the member states.

### Chapter 6. Belgium

#### *Leaflets available for victims*

*L'aide financière aux victimes d'actes intentionnels de violence/Financiële hulp aan slachtoffers van opzettelijke gewelddaden* (brochures issued by the Ministry of Justice, Brussels, 1998).

*Vous Êtes victime d'une infraction pénale: Preuve de votre préjudice; Avocat? votre choix; Constitution de partie civile.* Ministère de la Justice.

*Vous avez été victime d'un délit: que faire? Aide aux victimes par les services d'aide sociale aux justiciables* Ministère de la Communauté française.

*Informations pratiques* (practical information for victims of crime available from the *police judiciaire*).

*Informations sur la violence sexuelle: un guide pour les victimes* (June 1997).

*Maatschappelijk Assistenten voor Slachtofferonthaal ...* (Social Assistance — addresses of victim support services throughout Belgium).

*Un enfant n'est pas un partenaire sexuel* CL Lelievre, Délégué Général aux Droits de l'Enfant.

### Chapter 7. Denmark

While the authors were unable to locate any leaflets or brochures specifically provided for victims of rape in Denmark, it would appear that sufficient information is available to victims from the victims' lawyers.

### Chapter 8. France

#### *Leaflets available for victims*

*Vous Êtes juré.* Ministère de la Justice, octobre 1993.

*Vous portez plainte.* Ministère de la Justice, janvier 1996.

*L'aide juridictionnelle.* Ministère de la Justice, mars 1996.

*L'indemnisation des victimes.* Ministère de la Justice, mars 1996.

- L'aide aux victimes.* Ministère de la Justice, mars 1996.
- La médiation pénale.* Ministère de la Justice, décembre 1996.
- Les droits des victimes.* Ministère de la Justice, décembre 1996.
- Les chiffres-clés de la Justice.* Ministère de la Justice, Sous-Direction de la Statistique, des Etudes et de la Documentation, octobre 1997.
- Viols et agressions sexuelles constatés de 1993 à 1997 par les services de Police et les unités de Gendarmerie.* Direction Centrale de la Police Judiciaire, Sous-Direction des liaisons extérieures, janvier 1998.
- Aspects de la criminalité et de la délinquance constatées en France en 1996.* Ministère de l'Intérieur, Direction Générale de la Police Nationale / Direction Centrale de la Police Judiciaire, 3ème trimestre 1997.
- Journées techniques nationales sur les violences contre les femmes, 27-28 et 29 juin 1995.* Préfecture d'Ile de France, Délégation régionale aux droits des femmes, juin 1995.
- Viols, Femmes, Informations.* Collectif Féministe Contre le Viol, 1995.
- Viols, Femmes, Informations, 8 ans découte, 8 000 appels, 1986-1994.* Collectif Féministe Contre le Viol, 1994.
- Violences sexuelles : Réflexions & commentaires sur les lois.* Mouvement Français pour le Planning Familial, octobre 1996.
- Les femmes victimes de violences conjugales.* Ministère de l'Intérieur, Direction Centrale de la Sécurité Publique, 1995.
- Projet de loi relatif à la prévention et à la répression des infractions sexuelles ainsi qu'à la protection des mineurs.* Assemblée Nationale, Document mis en distribution le 9 septembre 1997.
- Rapport à Monsieur le Garde des Sceaux, Ministre de la Justice.* Haut Comité Consultatif sur la Procédure de Jugement en Matière Criminelle, avril 1996.
- Viol d'autrui ou viol de la loi?.* Jurisclasseur, mars 1998.
- Alternatives non violentes: face aux violences sexuelles.* Paris: Centre National de Lettres, 1993.

## **Chapter 9. Germany**

### ***Leaflets available for victims***

- Der Staat hilft den Opfern von Gewalttätern.* Bonn: Bundesministerium für Arbeit und Sozialordnung.
- Hilfe für Angehörige und FreundInnen von vergewaltigten Frauen.* 284400. Nortruf und Beratung für vergewaltigte Frauen und Mädchen e.V. Nürnberg.

*Was nach einer Vergewaltigung zu beachten ist 284400.* Notruf und Beratung für vergewaltigte Frauen und Mädchen e.V. Nürnberg.

*Beratungsangebote und Öffentlichkeitsarbeit — eine Projektbeschreibung 284400.* Notruf und Beratung für vergewaltigte Frauen und Mädchen e.V. Nürnberg.

*Cinsel tecavüze uğrayan bir kisinin ilk elde yapması gereken seyler...284400.* Notruf und Beratung für vergewaltigte Frauen und Mädchen e.V. Nürnberg.

*DATE RAPE! Gewalt gegen Mädchen und junge Frauen. Eine Information des Vereins Gegen VerGEWALTigung.* Notruf und Beratung für vergewaltigte Frauen und Mädchen e.V. Nürnberg Tel 0911 / 28 44 00.

*10 Jahre Gegen VerGEWALTigung 1983-1993.* Notruf und Beratung für vergewaltigte Frauen und Mädchen e.V. Nürnberg.

*Das Programm zur Ausstellung. Frauen in Gewaltverhältnissen. Die Passion ist weiblich.* Gustav-Adolf-Gedächtniskirche, Allersberger Str. 114, Nürnberg — Lichtenhof 5. bis 26 Juli 1998 Ein Ausstellungsprojekt.

## **Chapter 10. Ireland**

### ***Leaflets available for victims***

*Violence Against Women.* Garda Community Relations Section, Garda Headquarters, Harcourt Square, Dublin 2.

Protection from Domestic Violence: a guide to the new law. Office of the Minister for Equality and Law Reform, March 1996.

*Healing the trauma of rape and sexual abuse .* Dublin Rape Crisis Centre. Dublin Rape Crisis Centre leaflets and brochures on: Child Sexual Abuse; Trial of Rape and Sexual Assault, Rape and Sexual Assault — medical information; Sexual Harassment in the Workplace.

Victim Support leaflets and brochures including: *Have you been injured as a result of a crime?* and *Working to help you.*

# **Organisation Profiles and Authors' Biographies**

## **Organisation Profiles**

### **The European Union Grotius Programme**

This research project was conducted with funding supplied by the European Union Grotius Programme. The EU Council adopted the Grotius Programme as a programme of incentives and exchanges for legal practitioners, which applies to the member states of the European Union. The Programme covers the period from 1996 to 2000, and set out to support operations which aim to foster mutual knowledge of the member states' legal and judicial systems among legal practitioners, with a view to facilitating judicial co-operation. The objectives of the Programme are to facilitate practitioners in becoming more familiar with each others' legal and judicial procedures, institutions and cultures, and to persuade them gradually of the benefits of incorporating the European dimension at every stage of their studies.

### **The Dublin Rape Crisis Centre**

Healing the Trauma of Rape and Sexual Abuse is the mission statement of the Dublin Rape Crisis Centre, founded in 1979. The Centre provides 24-hour crisis services for victims of rape and sexual assault. It also provides counselling and therapy for adult victims, male and female, of child sex abuse. It has a comprehensive training and education service for professionals who come into contact with victims of sexual violence in their work. The Centre continues to lobby for social and legislative change and is also involved in the training of community workers and professionals in Bosnia and Croatia. It has a staff of 25 and a comprehensive team of trained volunteers. The Irish Government provides part of the funding for the service.

## **The School of Law, Trinity College Dublin**

Trinity College Law School is Ireland's oldest law school, established some years after the founding of Trinity College, Dublin University, in 1592. It is strongly committed to the service of society through education, research and public service activities. Its teaching staff are actively engaged in research and publication on many areas of the law, and maintain a high profile on matters of law and policy within Irish society. The Law School is also the home of the Irish Centre for European Law, and two former women Reid Professors of the Law School have become Presidents of Ireland.

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