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Preventing and healing the trauma of rape and sexual abuse

Dublin Rape Crisis Centre

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

26 February 2021

1. About Dublin Rape Crisis Centre

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

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

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

2. About this submission

We welcome the opportunity to contribute on the topic of victims' testimony in cases of rape and sexual assault.

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

The submission should also be read in the light of the extensive "*Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*"[2] published by the Department of Justice in August 2020 and commonly called the 'O'Malley Report' in deference to Mr Tom O'Malley BL, Lecturer at NUI Galway, who authored the report of the Interdepartmental Group which conducted that review. DRCC welcomed the findings of that report and the implementation plan of the Department of Justice that followed it.[3] However, we submit that there were ways in which the Report underestimated the experience and rights of victims and that it was also limited by its terms of reference.

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

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

[2] http://www.justice.ie/en/JELR/Pages/O'Malley_Report

[3] http://www.justice.ie/en/JELR/Supporting_a_Victims_Journey.pdf/Files/Supporting_a_Victims_Journey.pdf

3. Context

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

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

It is for this reason therefore, we particularly welcome the recognition in the O'Malley Report that although the term 'vulnerable witness' is normally used in law to signify someone who is vulnerable because of disability or youth, a person maybe vulnerable in a sexual offence criminal trial by virtue of the circumstances in which they find themselves – that the trial itself may make them vulnerable[4]. This is the reality for many who are asked not just to give evidence, but to put their most intimate and private actions on display to strangers in a disputed way in the course of a trial. Given that most victims know and are known to the accused – and may be from their own family or community, the vulnerability of victims becomes even more acute.

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

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

The O'Malley Report also notes[5] existing rights for victims and advances in those rights over recent decades but highlights the need for many further reforms, only some of which require legislation. This submission recognises that while the giving of evidence in chief and on cross-examination are necessary elements of due process and fair trial, there are a number of ways in which the current process can be improved for victims.

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[4] O'Malley Report Para.1.4

[5] O'Malley Report, Ch. 2

In advance of highlighting reforms to current laws and procedures, we will provide some insight into the experiences of the women and men accessing our services who had interactions with the criminal justice system or have considered engaging in the process. Our recommendations are informed by Dr. Leahy's research and where appropriate, they are also informed by and linked with the O'Malley Report.

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

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

- **Pre-trial**

Before a victim ever gets to give their testimony in court, they have to wait for their case to come to trial. People talk about having to put their life on hold or of not being able to move on from the crime during that period of waiting. Our therapists and court accompaniment personnel working with those who wait for court dates see and hear the stress, anxiety and inconvenience that delays have on them. Waiting is hard but waiting characterises much of a victim's journey in the criminal justice system and their experience in court. Outside of a lengthy wait for their case to come to trial, they may also have to endure short notice that their trial has been put back. It is not uncommon for victims to be told to arrive at court in the morning only for the trial to start later in the day. There will be valid reasons for many of these delays but more often than not, the victim is the last person to be given an explanation about why it happened. That lack of information only serves to heighten a victims' feelings of marginalisation in the trial process, where many aspects of the process can be difficult to understand because as some of our clients have said, '*it's a world I know nothing about'*.

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

- **The Trial**

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

Some left the meeting without ever getting a chance to ask their own questions. All of which can leave victims feeling very disempowered.

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

- **Giving evidence/ Being heard**

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

Victims have described to us how giving evidence is an extremely isolating experience where they are asked to '*go back to that time and place*' and focus on the facts of the sexual violence they suffered, without an opportunity to explain context or how this crime has impacted on their life. For some, their description is one of re-living the most horrendous day or night of their life in front of family and strangers. The is no real recognition to the trauma they experienced and that they are still going through. Victims are well aware that this is the system that they have to engage in but too often it is the manner in which they are treated that they find intolerable and one which leaves a lasting impact. Some speak to the anger they feel towards themselves for not giving their best evidence, for getting upset, for getting tripped up by defence and those feelings don't leave them, they linger long after the case has concluded, regardless of the outcome.

- **Cross-Examination**

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

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

Cross-examination has affected victims we know in many different ways. From some it was the manner in which the defence sought the use of counselling notes, medical or mental health records, phone records, and social media posts to undermine them. For others, it was how the defence deliberately critiqued their behaviour, clothing and sexual character, including some instances where an application was made for permission to introduce evidence of sexual experience. Facing into a trial not knowing or only knowing very briefly in advance if their sexual history was going to be called into question left them feeling like every part of their life was invaded and scrutinised. The cross examination can have a long-lasting effect on victim that far outlasts the trial process. It only serves to re traumatise the victim and play on any myths that exist for juries in relation to victims of sexual violence.

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

5. Special measures.

There is a presumption in our legal system that the best evidence is that given in person in court at a trial. We submit that this presumption pre-dates any understanding of the traumatic impact of crimes of intimate violence or indeed modern understanding of child development or how memory operates. In the case of these offences, the routine trial process can actually hamper the delivery of best evidence. For this reason, and recognising that a victim of sexual offences can be vulnerable by reason of having to go through the trial process, existing measures for victim protection need to be more widely used.

Among these are the use of screens and video links to enable victims to give evidence remotely to reduce the risk of being re-traumatised. While there is existing legal provision for these special measures, the reality is that these are not widely used. Where the witness is a child, evidence can be given by video link. As matters currently stand, screens or video links for adult victims are rare. Even if an application is made, many courthouses are not equipped to hear evidence with these special measures. Given the rapid development of technology, every courthouse, at every level should have such facilities in place.

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

6. Tackling Rape Myths

The presence of so-called rape myths or misperceptions about the realities of sexual violence in society is at this stage generally well-accepted. Research has repeatedly demonstrated that such myths can impact negatively on juror deliberations if jurors make decisions with

reference to these erroneous perceptions of what constitutes a 'real rape' or a 'real victim', as opposed to deliberating dispassionately on the facts of the case before them.

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

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

To assist judges in achieving this, we recommend that they are provided with bench book guidance such as that which is currently available in the English *Crown Court Compendium*.[6] The *Compendium* contains a number of model directions which judges can use to direct jurors to be wary of drawing unwarranted assumptions because of issues such as: delayed complaint; inconsistent accounts; lack of emotion/distress when giving evidence, or; the clothing worn by the victim at the time of the incident. Such directions can be given at the start of the trial or when summing up for the jury and it is recommended that any proposed direction be discussed with counsel in advance.[7] The following extract, providing sample guidance on the avoidance of assumptions in sexual offence cases, is illustrative of the type of guidance which is available in the *Compendium*:

> 'It would be understandable if some of you came to this trial with assumptions about the crime of rape. But as a juror you have taken a legal oath or affirmation to try D based only on the evidence you hear in court. This means that none of you should let any false assumptions or misleading stereotypes about rape affect your decision in this case. To help you with this I will explain what we know about rape/sexual offences from experience that has been gained in the criminal justice system. We know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people, quite often when the people involved are known to each other or may be related. We also know that there is no typical response to rape. People can react in many different ways to being raped. These reactions may not be what you would expect or what you think you would do in the same situation. So all of you on this jury must make sure that you do not let any false assumptions or stereotypes about rape affect your verdict. You must make your decision in this case based only on the evidence you hear from the witnesses and the law as I explain that to you.'[8]

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

[7] Ibid, 20-2, para 5.

[8] Ibid, 20-5.

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

Participants were also asked when such guidance should be given in a trial: at the beginning; at the end, or; at both the beginning and the end. There were differing views on this. Six of the 15 legal professionals who felt that guidance similar to the *Compendium* would be useful in Ireland were of the view that such guidance should be given at the end of the trial. Concerns were raised that the provision of such guidance at the start may potentially be prejudicial or encroach upon the rights of the accused. However, 4 legal professionals recommended that such guidance be given at the beginning of the trial, with a further 3 suggesting that such guidance be given at both the beginning and the end.[9] The majority of the accompaniment workers (8) felt that guidance should be given at the beginning and the end of the trial.

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

7. Legal Support for Victims.

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

Further, in such trials, the defendant's legal team may make a number of applications to admit evidence which they assert is relevant to the defendant's right to a fair trial. These applications typically relate to the victim's sexual experience or counselling records.

[9] Two of the legal professionals in favour of the adoption of guidance similar to the *Compendium* did not provide an opinion on when the direction should be given.

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

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

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

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

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

8. Sexual History Evidence

A significant concern for victims in sexual offence trials is that they will be questioned about their previous sexual history during the trial. Such questioning is obviously very traumatic and intrusive for victims. In Irish law, such evidence cannot be adduced without the leave of the trial judge.[10] Such applications are adjudicated in a private hearing and the victim is entitled to separate legal representation (via the civil Legal Aid Board) for the purposes of this application.

[10] Section 3 of the Criminal Law (Rape) Act 1981 (as amended).

The O'Malley Report has highlighted a number of shortcomings with the current procedure for dealing with applications for the admission of sexual history evidence which need to be rectified if victims are to be properly protected in this process. The findings of the Report are also supported by Dr. Leahy's empirical research in this area. First, the Report has highlighted a gap in the legislation whereby victims in sexual assault trials (as distinct from rape/ aggravated sexual assault) are not afforded separate legal representation for the purposes of an application to adduce sexual history evidence. It accordingly recommends that the relevant legislative provisions be amended to provide 'separate legal representation (and the associated right to legal aid) to all trials for sexual assault offences'.[11] This recommendation should be acted on as a matter of priority to ensure equal protection for all victims in sexual offence cases as all such victims are affected equally by the prospect of such evidence being adduced at trial.

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

To maximise protection for victims in this area, the O'Malley Report has recommended that where an application to admit sexual history evidence is successful, the victim's legal representative should continue to represent the victim while the questioning is taking place.[12] This is an important added protection for victims which would ensure that any questioning on sexual history evidence goes no further than is necessary and is in accordance with the leave provided by the trial judge. While the trial judge will be overseeing such questioning carefully, having the support of separate legal representation will provide added support and confidence to the victim during this particularly challenging and traumatic form of questioning.

Finally, on this topic, the O'Malley Report also recommends, in relation to representation for the application to hear and the questioning on sexual experience that 'the Legal Aid Board…should endeavour to ensure that the victim is represented by a counsel of a level of seniority similar to that of counsel representing the prosecution and the defence'.[13] While this may not always be possible, we recommend that at the very least any counsel who is briefed in relation to such an application should have received appropriate certified training on best practice in representing victims in these cases.

[11] Para 6.10.
[12] P 84.
[13] p. 84

9. Counselling Records

Issues surrounding the disclosure of victims' counselling records is now a feature of most rape trials in Ireland. In the Criminal Law (Sexual Offences) Act 2017[14], a regime to regulate disclosure of counselling records was introduced for the first time in Ireland. For the purposes of this process, a 'counselling record' is defined as:

> '…any record, or part of a record, made by any means, by a competent person[15] in connection with the provision of counselling[16] to a person in respect of whom a sexual offence is alleged to have been committed ('the victim'), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy.'[17]

The regime provides for an application process similar to that which applies for the introduction of sexual history evidence (including the provision of legal representation for victims). Counselling records may only be introduced at trial where the judge grants leave for this to occur. However, a victim may waive the application of this scheme and permit disclosure of their counselling records without going through this process.[18] Many do. This waiver provision has significantly undermined the potential of the new regime for disclosure of counselling records to protect victims from being questioned about the contents of their counselling notes.

Legal professionals participating in Dr. Leahy's research study reported little impact of the new disclosure regime, even though it has been in operation for a year at the time of the research study. Similarly, the O'Malley Reports notes that the regime is 'seldom used'.[19] This supports the contention that, in general, victims consent to disclosure of their counselling records early in the investigation process, either to the investigating Garda or to the DPP, thus obviating the application of the disclosure scheme. Five of the legal professionals who participated in Leahy's study made specific reference to the fact that the majority of victim's consent to the disclosure of their counselling records, often in the very initial stages of the investigation process. The O'Malley Report also notes that '[i]t seems to remain the norm for victims and other witnesses to waive their right to a court hearing and to consent to the disclosure of their counselling records'.[20]

While victims are, of course, entitled to waive the operation of the regime and consent to disclosure of their records, it must be questioned whether they are making such decisions on a fully informed basis. For example, they may not be aware at the early stage of an investigation that their records may provide the basis for cross-examination by the defence at trial.

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[14] Section 39 of the 2017 Act inserted this new regime into section 19A of the Criminal Evidence Act 1992.

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

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

[17] Section 19A(1) of the Criminal Evidence Act 1992 (as amended).

[18] Section 19A(17) of the Criminal Evidence Act 1992 (as amended).

[19] Para 6.39

[20] Para 6.39.

Further, they may not fully understand that they have a choice whether to disclose and that they have the option of letting a judge adjudicate on this. We know for certain that many victims believe that non-disclosure would result in their case not proceeding to trial. We note and welcome the commitment in *Supporting a Victim's Journey: A Plan to help victims and vulnerable witnesses in sexual violence cases*, that victim's information on section 19A (i.e. the disclosure regime) will be available for release by An Garda Síochána in Q1 2021.[21] However, this does not go far enough to protect victims. Thus, we recommend that a robust informed consent process be introduced to ensure that victims do not consent to the disclosure of their counselling records without full knowledge of their entitlement to object to this and to let the judge decide on what, if any, disclosure should be made. This informed consent process should be supported by the entitlement to legal advice, discussed above.

A further important reform to consider is the extension of this regime beyond counselling records. O'Malley suggested that consideration should be given to whether the disclosure of medical records should be made subject to a statutory disclosure regime because they give rise to a similar expectation of privacy.[22] We would go further and recommend that the disclosure regime be extended to apply to all 'personal records', as defined by section 278 of the Canadian Criminal Code, on which the Irish regime on counselling records is closely modelled. For the purposes of Canadian regime, a 'record' is defined as:

> '...any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.'[23]

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

10. Electronic or Communications Data

A significant challenge in sexual offence trials which has yet to be dealt with effectively is the disclosure of electronic or communications data (e.g. content from a Victim's mobile phone). Naturally, the accessing of such sensitive and private information and the potential questioning about such data while giving testimony is very upsetting for victims. Further, the challenges surrounding the management of effective disclosure of such data has the potential to contribute to delays in trials. That said, there may be evidence there which is of relevance to the defence and thus must be disclosed in order to protect the defendant's right to a fair trial.

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[21] Recommendation 5.6.

[22] Para 6.41

[23] Section 278.1.

Given the complexities of this area, it is necessary to devise a suitable regime to manage disclosure of such data, which while appropriately respecting defendants' rights, ensures that victims are not subjected to fishing exercises or unnecessarily invasive questioning about potentially irrelevant information. The development of such a scheme has been recommended by the O'Malley Report which proposed that '[a] formal code of practice should be established to govern the collection and disclosure of a victim's digital material and electronic data such as text messages, social media and internet usage'.[24] Significantly, it is also recommended that '[t]here should be periodic evaluation of the process and, as part of that, feedback should be sought from victims as to their experience of this aspect of the criminal investigation'.[25]

11. Consistency of Practice

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

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

12. Training for Judges and Legal Professionals

The trial judges who preside over sexual offence trials and the legal professionals who prosecute and defend these cases play a vital role in ensuring fair treatment of victims while they give their testimony. Thus, it is vital that any judge or legal professional working within these trials have received appropriate training on best practice in the treatment of victims. This aligns with the recommendations of the O'Malley Report which propose that '[a]t a minimum…all practising lawyers dealing with sexual offence cases should undergo a foundational course of training and that all should have completed it by a date to be agreed with the two professional bodies- the Law Society and the Bar Council'.[26] They propose that the completion date for this training should 'not be later than the beginning of the legal year 2021-22, but preferably sooner'.[27]

[24] P 85.
[25] P 85.
[26] Para 10.15
[27] Para 10.15.

We also welcome the request by the Report that the Judicial Studies Committee be asked to give high priority to training on 'dealing with persons in respect of whom it is alleged an offence has been committed', and with a special emphasis on sexual offences.[28] Training for all judges who preside over sexual offence trials is vital to ensure consistent practice and that the regulation of examination and cross-examination of victims in these trials is always appropriately trauma-informed and sensitive to the specific vulnerabilities of these witnesses.

13. Sentencing

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

14. After-care

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

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

Again, linked to the recommendations about legal advice/ representation above, it is also important that victims have somewhere to direct any outstanding queries they have about the trial process, such as why certain evidence was included or excluded or how a sentence was structured. Such follow-up after-care would ensure that victims have the advice and support they need after the trial and would acknowledge the service they have provided by giving their testimony in these cases. As noted by Dame Vera Baird (Northumbria Police and Crime Commissioner) in her response to her Gillen Review in Northern Ireland, '*victims in sexual violence cases give evidence as a public duty in the interests of the community, exactly like victims in every other kind of case*'.[29]

[28] Para 10.10

[29] *Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1*, p 181.

An appropriate recognition of this is to ensure that they are provided with any supports they require after the trial has completed and are not forgotten once they have provided their evidence.

Conclusion

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

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

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