



RCNI Position Paper

**Reducing Delays before and during Trial:
Case Management and Pre-Trial Hearings**

July 2011

Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist **information and resource** centre on rape and all forms of sexual violence with a proven capacity in strategic leadership. The RCNI role includes the development and coordination of national projects including expert data collection, using our expertise to influence **national policy and social change** and supporting **Rape Crisis Centres** to reach best practice standards. We are the representative umbrella body for our member Rape Crisis Centres who provide **free advice, counselling and support** for survivors of **sexual abuse** in Ireland.

Drawing on the decades of expertise of member Rape Crisis Centres and our recent publication Rape and Justice in Ireland¹, in the interests of victims of sexual violence in 2010 the RCNI has adopted the objective of securing a Case Management and Pre-Trial Hearings system in the Irish courts. The RCNI has committed to a strategic leadership role to build an informed consensus among the relevant stakeholders in order to achieve this.

1. Introduction:

The Rape Crisis community has for decades witnessed first hand **the detrimental impact of delays in the legal system on victims of sexual violence**. We have also witnessed the **impact of delays on attrition rates**, when supporting victims who decide that they can no longer be involved with the legal system as the personal cost is too high. Recommendation 22 of Rape and Justice in Ireland (2009)² states: **“With regard to every stage of the process, but particularly once the case is returned for trial, every possible means of reducing delay should be explored and pursued where appropriate.** It is recommended therefore that the National Crime Council research recommendations of delay set out in this report are followed.”

The National Crime Council research from 2004 on delay, states:

“The Council accepts the professionals' view that there could be benefits to dealing with certain issues through **pre-trial hearings**. In addition to this, the Council notes and endorses the findings of the Working Group on the Jurisdiction of the Courts (the Fennelly report) in relation to pre-trial hearings. The Council is of the opinion that the introduction of pre-trial hearings would lead to shorter and possibly fewer jury trials and would assist in making the court process more efficient for all users. The Council recommends, therefore, that consideration be given to the introduction of pre-trial hearings” (p.25, emphasis added).³

¹ “Rape and Justice in Ireland”(2009), Hanly & ors, Liffey Press (“RAJI”). See RAJI Executive Summary via online link at <http://www.rcni.ie/uploads/Exec-Summary.pdf>

² *ibid*

³ The Report of the National Crime Council, An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002-2004 (GPO, 2006), available online at http://www.crimecouncil.gov.ie/downloads/Time_Intervals_Research.pdf

2. What does the RCNI understand by **Case Management** and **Pre-Trial Hearings**?

- **Case Management** refers to: the supervision and where necessary, determination, by a judge of **as many matters as possible** pre-trial. These can be either **administrative matters** or **discrete legal issues**, in the course of one or more appointments after return for trial; and
- the supervision and where necessary, determination by a judge of **the conduct of the trial process itself**, to ensure that the outcome is one which is fair to all concerned.
- **Pre Trial Hearings** refers to:
 - a pre-trial appointment before the trial judge where **administrative matters** and **discrete legal issues** are raised, considered, noted, and where necessary, argued and determined by the trial judge.
- **Case Management** and **Pre Trial Hearing processes** should provide appropriate safeguards for the rights of the defendant (e.g. right to legal advice before a pre trial hearing, right to privacy pre-trial, appropriate rights of review where there has been a material change of circumstances, etc), as unsound rulings are not in the interests of **survivors**.

3. Rationale:

Why does RCNI see Case Management and Pre-Trial Hearings as important to the improvement of the criminal justice system experience for survivors of sexual violence? This is a summary of the reasons:

- To reduce **additional stress and trauma** to survivors and their supporters arising from avoidable delays before and during criminal trials, as far as possible, by reducing delays **before** trials are heard and eliminating, where possible, or where not reducing, delays **during** trials;
- To provide **juries with an uninterrupted flow of evidence**, by eliminating where possible the need for interruptions in the course of the trial arising from legal arguments in their absence;
- To **narrow the issues** and **improve presentation** of cases, thereby
- Improving the **quality of justice** for survivors of sexual violence in our criminal courts,
- Reducing the number of cases which are **appealed**, and
- Reducing **costs** to the public purse of these avoidable delays.

4. **Case Management and Pre Trial Hearings in the Criminal Courts: the current practice in Ireland:**

- No formal Case Management system in the Criminal Courts, but
- Informal, ad hoc Case Management system is operating in the Central Criminal Court
- **Limitations:** this system has no formal basis, is dependant on good will and good behaviour of all concerned, is not **general** around the country in **all Circuit Criminal Courts**. Also in the

Central Criminal Court, often witnesses are already present in the Court precincts when Case Management matters are dealt with.

5. Support for Case Management and Pre-Trial Hearings.

Who supports RCNI in recommending some form of Case Management /Pre Trial Hearing process in Irish trials on indictment? There is widespread support, including the following:

- Law Reform Commission in its 2006 Report on Prosecution Appeals (see Ch 4)⁴
- Report of the Working Group on the Jurisdiction of the Courts (On the Criminal Jurisdiction), CS 2003⁵
- Joint Oireachtas Committee on Justice, Equality, Defence & Women's Rights report *A Review of the Criminal Justice System* (2004)⁶
- National Crime Council Report 2006 *An Examination of Time-Intervals in the Investigation and Prosecution of Murder and Rape 2002-2004* (cited in *Rape and Justice in Ireland*, Hanly et al, Liffey Press, 2009)⁷
- *Rape and Justice in Ireland*, the Report of the Research Project on Attrition in Rape Cases commissioned by RCNI and completed by Hanly, Scriver and Healy, Liffey Press, 2009, recommendation 22: **"...every possible means of reducing delay should be explored, and pursued where appropriate..."**⁸ and
- Cosc, the National Office for the prevention of Domestic, Sexual and Gender-Based Violence, included an examination of the feasibility of Pre-Trial Hearings in its National Strategy, published 2010 (Activity 12.2)⁹

6. Case Management and Pre-Trial Hearings: What could be done in the Irish context?

Ireland could adapt existing precedents to suit the current constraints of Irish Criminal Law. These include:

- Commercial Court procedural rules (RSC Order 3A) were established by secondary legislation and provide useful mechanisms, e.g. pre trial questionnaires, obligations on parties to produce a case summary, including an agreed chronology of relevant events, a list of issues not in dispute, and so on, and pre trial conferences chaired by the judge at which all practical

⁴Its full title is: Law Reform Commission Report on Prosecution Appeals and Pre Trial Hearings, LRC 81-2006 (2006), available online at

<http://www.lawreform.ie/fileupload/Reports/Report%20Prosecution%20Appeals.pdf>

⁵ This is the Report of the Working Group on the Jurisdiction of the Courts: the Criminal Jurisdiction of the Courts (often referred to as the "Fennelly Report") (2003), available online

[http://www.courts.ie/courts.ie/library3.nsf/\(WebFiles\)/92E26C802274604280257888003CFD32/\\$file/WGJC%20Report.pdf](http://www.courts.ie/courts.ie/library3.nsf/(WebFiles)/92E26C802274604280257888003CFD32/$file/WGJC%20Report.pdf)

⁶ This is the Report of the Oireachtas Committee on Justice, Equality, Defence and Women's Rights: *A Review of the Criminal Justice System* (GPO, 2004), available online at

<http://www.oireachtas.ie/viewdoc.aspx?DocID=3067&CatID=78&StartDate=01%20January%202004&OrderAscending=0>

⁷ This is the Report of the National Crime Council, *An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002-2004* (GPO, 2006), available online at

http://www.crimecouncil.gov.ie/downloads/Time_Intervals_Research.pdf

⁸ cited above at note 1

⁹ See Cosc National Strategy, March 2010, available online at

<http://www.cosc.ie/en/COSC/Final%20Electronic%20NS%20full%20doc%203%20March.pdf/Files/Final%20Electronic%20NS%20full%20doc%203%20March.pdf>

arrangements for the trial such as witness and technology needs may be raised and directions given as necessary; a trial date may also then be fixed.

- We could adopt and adapt the UK Criminal Procedure Rules (UKCPR) 2010¹⁰ to suit our criminal justice system constraints:
 - Part 3 UK CPR 2010: Case Management – covers all kinds of criminal cases
 - 3.1: Lays duty of Case Management squarely on the Court
 - 3.2: Defines active case management (8 points)
 - 3.3: Duty on **all parties** to assist Court in its duty of active case management
 - 3.4: Case Progression Officers normally appointed – nb these are non lawyers whose duty is to ensure that all parties fulfil their Case Management obligations
 - 3.5: Court's Case Management powers are wide and includes provision to: "require...issues in the case ..be determined separately and in what order they will be determined.." and includes powers to sanction non compliance with directions
 - 3.8: Case preparation and progression
 - 3.10: Trial Conduct: judge may require party to give notice of witnesses he/she intends to call, in what order, whether they wish to raise any point of law, and so on.
- NB: Rules are intended to be used alongside the Practice Direction, which includes the proper Plea and Case Management Hearing (PCMH) form (questionnaire) and which makes PCMHs obligatory in all indictable cases. They are also complemented by the Criminal Case Management Framework, and are underpinned by statute.
- NB: Pre Trial Hearings at which **legal issues** may be raised and decided upon are governed by Section 40 of the (UK) Criminal Procedure and Investigations Act 2003. Note that **evidential issues** may be ruled upon at these hearings and that these rulings are **binding** on the trial judge for the whole of the trial (unless varied or discharged by him). Directions to provide for such hearings to be held may be made at the PCMH.

Note also the key difference between Ireland and England & Wales : since 1996 in England & Wales, the accused or his representative on his behalf must disclose his defence in advance to the prosecution. This is not the case here, with a few exceptions, such as alibi evidence and expert evidence.

Note also that in England & Wales: the accused must enter a plea at PCMH

6.1. Case Management: How could it be implemented in the Irish context?

- Given the constraints of our criminal justice system, any Case Management process would have to be founded on **statute** to be effective and would have to place both the responsibility and the powers to ensure its efficient implementation, on our judges. Such a process could possibly include the **mandatory** submission of pre-trial questionnaires, but should focus on **mandatory attendance by both parties' lawyers**, at a **Pre-Trial Appointment/Hearing**. These would provide opportunities for the judge to deal with a wide range of administrative matters, such as witness arrangements, availability of aides/technology, suitable trial dates, readiness for trial, and so on, to check the contents of

¹⁰ Available online at: <http://www.legislation.gov.uk/ukSI/2010/60/contents/made>

any questionnaires, give directions in relation to missing information/evidence, and set realistic timetables for any outstanding evidence or other disclosure, and for the trial itself.

7. **Pre-Trial Hearings** could also be used to identify and hear submissions and give rulings upon **discrete legal issues**, in addition to dealing with administrative matters.

Discrete Legal Issues which could be determined at the **Pre-Trial Hearing** include:

- Pleas of Guilty could be entered in early course
- Written statements which can be read can be identified and listed
- Matters not in issue can be identified and listed and admissions made where appropriate;
- Disclosure of Documents: Defence should identify any documents they say have not been furnished, and what documents they say are relevant to proceedings. Prosecution should confirm where possible that full disclosure has been made. If there is a dispute, the judge can make a determination.
- Applications to sever the indictment where several complainants are involved
- Applications to sever the indictment where more than one co-accused is involved. Occasionally the necessity to rule on this issue may arise during a trial, but the great majority of discrete legal issues may be dealt with in advance of the trial.
- Applications to cross-examine the complainant on other sexual history and/or to adduce previous sexual history evidence: the defence should be obliged at a pre trial appointment to indicate whether they wish to make such an application in the course of the trial. This would give the Courts Services a reasonable opportunity to notify the Legal Aid Board for the nomination of counsel and solicitor for the complainant to appear on this issue during the trial.

This is not an exhaustive list.

8. **Pre Trial Hearings regarding matters of evidence.**

- Since the Law Reform Commission Report was published it is no longer regarded as well settled in Irish case law that **evidential matters in issue** can only be ruled on at trial; the case of *Cruise v O'Donnell [2004] IEHC 376*, cited by the Commission, has since been overturned by the Supreme Court¹¹. However, this judgment does not mean that **any issues of admissibility of evidence** may now be decided at a pre-trial hearing. For the present, the wisest course might be to follow the recommendation made by the Balance in the Criminal Law Review Group in their 2007 Report, to the effect that these issues should be adjudicated upon by the trial judge on the day of the trial, but **before** the jury is sworn in.¹²

9. **Conclusion.**

It is clear that an appropriate system of Case Management and Pre-Trial Hearings is feasible and could have a positive impact on delay in sexual violence trials, and also, in all other trials on indictment in Ireland. This in turn would greatly alleviate the trauma and stress experienced by survivors of sexual violence who choose to engage with the legal system in Ireland.

¹¹Cruise v O'Donnell [2007] IESC 67

¹² Page 173, Balance in the Criminal Law Report (2007), available online at:
<http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf>

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A form of Judicial Case Management system incorporating a Pre-Trial Hearing could be devised and implemented by statute supplemented by Practice Direction/Statutory Instrument - see LRC report for detailed list of matters which could be covered). Administrative matters and discrete legal issues can often and where possible, should be determined pre-trial.

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