



Rape Crisis Network Ireland's submission to:  
Balance in the Criminal Law Review Group.



**The context within which we make this submission is clearly limited to sex offences and the effects those offences have on the victims of same and not crime more generally nor indeed the effects that such proposals, if implemented, would have on the fairness of proceedings against any potential defendants.**

**Within the context of sexual offences we have the combined experience of our 15 member Rape Crisis Centres<sup>1</sup> garnered over the past 25 years of working with the victims of sexual violence and it is that combined collective experience which informs our submission.**

**To further contextualise our submission we would draw the review group's attention to following:**

#### **The Prevalence of sexual violence in Ireland**

International research indicates that between 14-25% of adult women have been raped during their lifetime<sup>2</sup>, from national research (the SAVI study) we know that one in five (20.4%) of Irish women experience 'contact' sexual violence as an adult<sup>3</sup>.

#### **Under-reporting (and factors adversely contributing to same):**

We know that we do not know the complete picture. What we do know is of scant comfort. The legal process is perceived as long and slow, fraught with difficulties and often viewed as incomprehensible by the uninitiated. The legal world has variously been described as a "foreign" landscape, "confrontational, humiliating and fundamentally lacking in justice"<sup>4</sup>.

We do know that currently fewer than 1 in 10 complainants in cases concerning sexual violence engage with the criminal justice process at all<sup>5</sup>. This phenomenon of under-reporting cuts across many jurisdictions<sup>6</sup> and is in no way unique to our jurisdiction but the combined forces contributing to attrition appear to have coalesced in our jurisdiction in a particular way.

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<sup>1</sup> Athlone, Carlow & South Leinster, Donegal, Dublin, Dundalk, Galway, Kerry, Kilkenny, Limerick, Mayo, Sligo, Tipperary, Tullamore, Waterford and Wexford.

<sup>2</sup> Goodman, Koss and Russo, 1993.

<sup>3</sup> SAVI, Mc Gee et al, 2002.

<sup>4</sup> Olive Braiden speaking in her capacity as CEO of DRCC

<sup>5</sup> SAVI calculates 7.8% of women and 1% of men report their experiences of sexual violence to the Gardaí.

<sup>6</sup> Torrey (1991)- no more than 10% of sexual assaults occurring in the UK, US and Canada are reported to the police.

### **Attrition:**

As you all know of crimes committed, a smaller proportion are reported; of those reported, a smaller proportion are prosecuted; of those prosecuted a smaller proportion end in conviction. This progressive reduction between crimes committed and those, which end in conviction, known as the process of attrition.<sup>7</sup> What maybe less widely known is that we in Ireland have the highest rate of attrition in Rape cases compared to 20 of our European neighbours<sup>8</sup>

Gerrard Quinn, professor of Law at NUI Galway, speaking in his capacity as Dean at the launch of the Attrition Research project said:

*'The high attrition rate in rape cases in Ireland is a cause of concern for all of us as citizens. As citizens, we are all committed to the 'rule of law' – to the ideal that is possible to seek justice through law. When the legal system seemingly does not, or cannot, produce the results we know it should then it behoves us to investigate why – and to do so with an open mind and to make the consequential changes needed to enhance its operation'*

Of particular concern to the RCNI is that we are experiencing a vista of increased reporting to Gardaí that has had no correlative impact on either the number of prosecutions undertaken, nor indeed, on the number of cases resulting in conviction. What this means is that despite a quite dramatic rise in reports to the Gardaí, these increases in reports are not translating into more cases being 'heard' within the system. This "justice Gap"<sup>9</sup> as it has so neatly been termed by Prof. Kelly, means that in common with many other jurisdictions we are failing the vast majority of our citizens who have experienced sexual violence.

### **Current Challenges Encountered by Complainants in Cases of Sexual Violence Engaging with the Criminal Justice Process.**

#### **The Good News/ and the not so good news:**

We have a degree of specialisation of investigation, the Domestic Violence and Sexual Assault Investigation Unit based in Harcourt Square represents a concentration of specialisation of investigation in crimes of a sexual nature. As a result of that specialisation we have a nucleus of 'best practice' and a deep well of experience to draw on. Unfortunately this model is not uniformly replicated around the country<sup>10</sup> and as a result we have the equivalent of what is referred to as the 'post-code lottery' in our neighbouring jurisdiction. That is a wide variation in skill, interest, and priority given to the investigation of crimes of sexual violence throughout the country. As a result it is not surprising that research shows<sup>11</sup> that of the minority of complainants who do report to the Gardaí many recount experiencing profound dissatisfaction with

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<sup>7</sup> Living Without Fear, Home Office, 1999:31.

<sup>8</sup> Rape: Still a Forgotten Issue, Kelly and Regan.

<sup>9</sup> A Gap or a Chasm? Home Office Research Study 293.

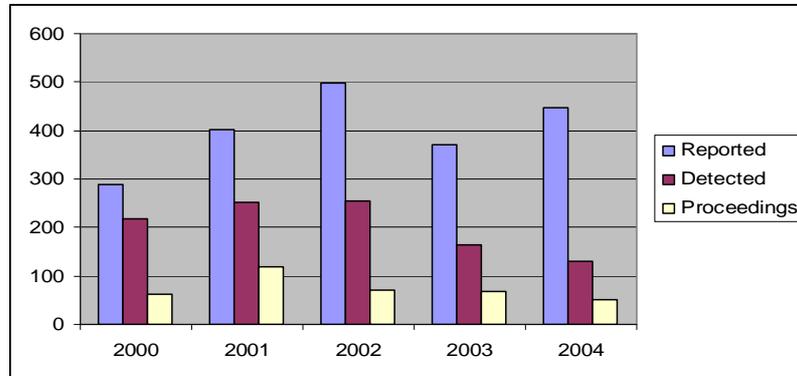
<sup>10</sup> Although a number of 'localised' commitments to specialisation are evident the RCNI/ members of DVSAIU and members of An Gardaí Stochana's policy unit visited just such an initiative in Cork under Mick Kelleher (D.I) where MK *designed and delivered* an intensive 4 day course. Course materials are drawn from a variety of sources, predominantly the US. Participants were selected based on their suitability as adjudged by their Superintendents or Detective sergeants. MK has assembled 4 women Gardaí whom he describes as "outstanding" they now act as mentors for the newly trained recruits. It is the practice to pair the newer recruits with one of these women when undertaking an investigation of a sexually violent case.

The course has been running for 9 years with approx 12-16 Gardaí participating (4 per District), the idea being that every District would have a trained uniformed Gardaí available on every shift (a rotation of four shifts).

<sup>11</sup> Dr Stephanie O'Keefe's research into Garda Attitudes

‘a climate of scepticism greeting their report’, the lack of information regarding “their” case, and resentment at their lack of preparedness for the trial process and most especially profound frustration at the length of time it currently takes for a rape trial to be heard.

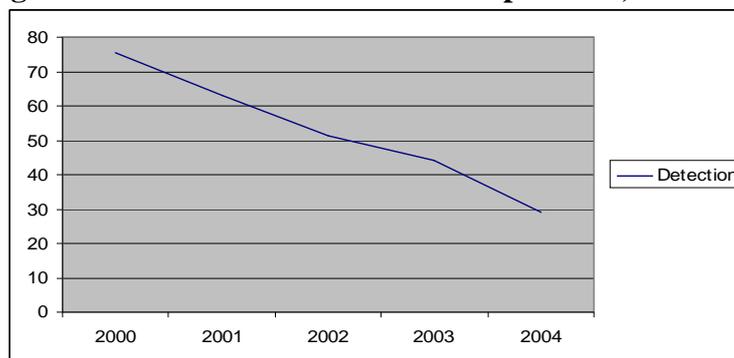
**Figure 2: Reporting, Detection and Prosecution of Rape, 2000-2004**



Source: Annual Reports of An Garda Síochána, 2000-2004.

Worse still, as Conor Hanly<sup>12</sup> recently told a conference at UCC: ‘Between 2000 and 2004, the Garda detection rate appears to have suffered a veritable collapse. In 2000, the Gardaí claimed a detection rate of some 76% of rape cases reported to them; by 2004, the detection rate had fallen to 29%, as set out in Figure 3:

**Figure 3: Garda Detection rates in Rape Cases, 2000-2004**



Source: Annual Reports of An Garda Síochána, 2000-2004.

Explanations for such a precipitous decline have not been provided by the Gardaí; indeed, 2004 was described as “another successful year for An Garda Síochána on the operational front”, with an overall detection rate listed at 35%.<sup>13</sup> It may be that the increasing number of rapes reported to the Gardaí has had an impact on the detection rate: if more cases are reported, the detection rate would decline in percentage terms if the number of cases cleared remained static or even increased by less than the increase in cases reported. Table 1 sets out the real numbers of rape cases detected between 2000 and 2004:

**Table 1: Rape Cases Reported and Detected**

<sup>12</sup> Lecturer of Law at NUI Galway and Research Director for the Attrition Research Project.

<sup>13</sup> An Garda Síochána, *Annual Report for 2004* (Dublin: 2005), at p.8 (available online at [www.garda.ie](http://www.garda.ie)). It is worth noting that the overall detection rate in 2000 was 42%: An Garda Síochána, *Annual Report for 2000* (Dublin: 2001), at p.39 (available online at [www.garda.ie](http://www.garda.ie)). Thus, the Gardaí’s “success” in 2004 represented a 7% drop in crime detection in the space of five years.

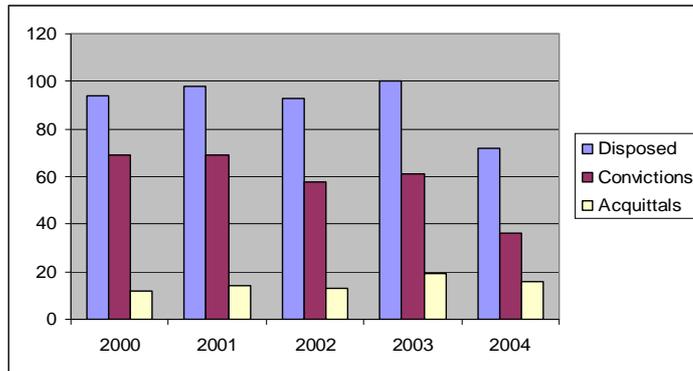
	<b>Reported</b>	<b>Detected</b>
2000	290	219
2001	401	253
2002	497	255
2003	370	163
2004	446	130

Source: Annual Reports of An Garda Siochana, 2000-2004

It is noteworthy that even though the detection rate declined from 76% in 2000 to 51% in 2003, the real number of cases cleared increased from 219 to 255. The real collapse, both in percentage and real terms, occurred in 2003 and 2004. It may be that the results for these years represent statistical anomalies, but there is no evidence that this decline has been arrested, much less reversed.'

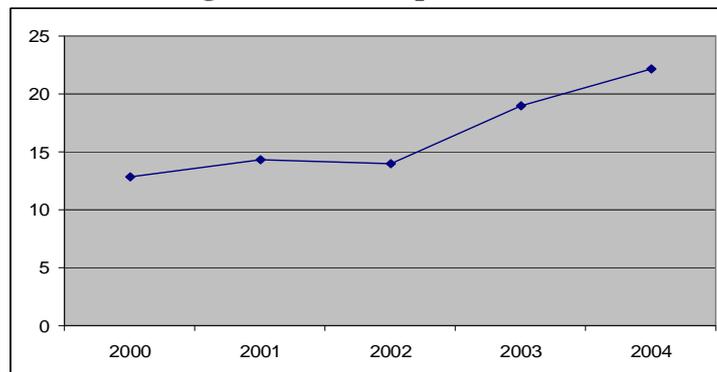
The picture continues to get 'bleaker' as we move further along the judicial process with the proportion of cases being prosecuted by the DPP following a pattern of 'striking' decline<sup>14</sup>:

**Figure 7: Disposition of Rape Cases, 2000-2004**



Additionally the number of acquittals at trial is increasing:

**Figure 9: The Acquittal Rate**



Source: Annual Reports of the Courts Service, 2000-2004.

<sup>14</sup> From a 'high of 2/3rds of cases received in the 1970's resulting in a prosecution being commenced to approximately 1/3 in more recent years (prof Ian O'Donnell, Director, Institute of Criminology, UCD).

All these factors contribute to us experiencing the highest rate of attrition compared to 20 of our European neighbours with 95%<sup>15</sup> of cases reported to the Gardaí “falling out of the system” prior to any adjudication by the courts.

It is against this alarming backdrop that the RCNI would advocate:

- i. **The Right to Silence be retained but if that right is exercised in circumstances that ‘fairness’ and ‘justice’ determines to be unjustifiable, that an adverse inference may be drawn from such silence<sup>16</sup>.**  
In particular our members note with great concern the ability of a defendant to avoid giving evidence at trial without any adverse consequences when the complainant has frequently undergone the most robust cross-examination. Such an unbalance is, we would submit, unconscionable. In such situations we would suggest that justice demands that a jury are explicitly informed that they may draw an adverse inference from silence in such circumstances as well as the failure to mention when questioned (by the Gardaí, under caution and with the benefit of independent legal advice) something that they wish to later rely on in court.
- ii. **Allowing the admission of character evidence of an accused, with appropriate safeguards (namely relevance) as well as the admission of evidence of relevant previous acquittals (to rebut assertions of ‘mistaken but honest’ belief in consent).** Given the nature of certain sex offences which frequently have a discernable ‘pattern’ the RCNI would see great value in trusting the jury with the most complete ‘picture’ of the defendant about whom they are adjudicating on notwithstanding the potential prejudicial effect that the inclusion of same.
- iii. **The exclusionary rule of evidence be modified to more fairly balance the consequences of minor, accidental, inadvertent encroachments on a citizen’s constitutional rights against the community’s right to see crime detected and punished.** It is difficult to relay to the review group the sense of outrage and distain for the rule of law felt by victims who see the effective prosecution of ‘their’ case defeated by unintentional, unintended minor ‘technical’ breaches of an alleged perpetrator’s constitutional rights. The niceties of the unhappy history of rejection and restatement of the law prior to *The People(DPP) v Kenny*<sup>17</sup> and the very significant restraints resulting from that judgement may be lost on the average person’s understanding of what will and will not cause highly relevant and probative evidence to be excluded. However what is not lost on the average person is the perception that, as stated by Charlton, McDermot and Bolger,: ‘virtually every criminal trial on indictment is an attempt by the accused to assert such [constitutional] rights and by the State to justify the actions of the Gardaí within the parameters of an express legal authority authorising such invasion. In consequence, the rules of substantive criminal law have either been ignored or overlooked in favour of this process’<sup>18</sup>

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<sup>15</sup> Rape: Still A Forgotten Issues? Prof. Liz Kelly et al.

<sup>16</sup> Akin to the adverse inferences drawn in England and Wales by virtue of sections 34-38 of the CJPOA 1994.

<sup>17</sup> [1990]2 LR 110.

<sup>18</sup> Criminal Law: page 134..

- iv. **Require the accused to outline the nature of his defence before or at the commencement of the trial, and further introduce pre-trial preparatory hearings to deal pleas, directions and service of pre-trial material including service of defence statements, notice of intention to seek leave to cross examine a complainant on his/her previous sexual history (thus triggering entitlement to separate legal representation under the Sex Offenders Act 2001).**

The English model contained within the Criminal Procedure and Investigation Act 1996, s.5, whereby the defence is required to submit in writing<sup>19</sup> the nature of his/her defence and state the elements of the prosecutions case with which they take issue has led to no discernable ‘unfairness’ to the accused and has positively contributed to the speedier and considerably more efficient trial process.

- v. **Re-opening new evidence where ‘justice’ is served by same.**
- vi. **Nullifying an acquittal where there is evidence of jury or witness tampering.**
- vii. **Allowing ‘with prejudice’ appeals in the case of wrongful acquittal.**
- viii. **Extending alibi evidence rules to other analogous situations<sup>20</sup>.**
- ix. **Allowing submissions by the prosecution before sentencing.**

The current situation is one in which our clients find it very difficult to understand as to why this is not currently the practice. It is a potential argument for the provision of separate legal representation to complainants, in particular following the Court of Criminal Appeal’s warning regarding victims going outside the appropriate scope of the evidence in their victim impact statements. Moreover, in particular on a plea, where the Judge has not had the benefit of hearing all the evidence at trial, it may be difficult to paint a full picture on an opening of the facts, allowing such submissions would hopefully assist the sentencing judge and it would also give the victim a much needed sense that the State, as represented by the prosecution, has a legitimate interest in the sentencing process which is frequently viewed by victims as the most crucial of junctures where seemingly the prosecution ‘abandon’ them. One would imagine that the additional benefits of such submissions ought to lead to a greater consistency in sentencing practice as well as providing the sentencing judge with in effect an *amicus curiae*, albeit an arguably partisan *friend*.

- x. **Modifying the rule in relation to the hearsay evidence in general, where to do so serves the interests of justice and *in particular* by allowing the admission of the complainant’s original statement of complaint (or video recording thereof) as his/her evidence in chief<sup>21</sup> and expanding the current exception regarding ‘recent complainant’ to allow evidence of the complaint<sup>22</sup> (whether ‘recent’ or otherwise).**

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<sup>19</sup> Within 14 days of receipt of ‘primary disclosure’.

<sup>20</sup> The proposal requiring the service of a defence statement and identification of the matters with which the defendant ‘takes issue’ would be intended to cover such ‘analogous situations’.

<sup>21</sup> Being as it is so often far more contemporaneous to the offence than the account subsequently proffered at trial that may take years to be heard and allowing the jury a very useful ‘portal’ into the events complained of.

<sup>22</sup> Again by so doing we are offering the jury what is frequently a very crucial ‘piece of the jigsaw’ - for instance complainants often report historical child sexual abuse when they become a parent themselves, when their own children attain the age at which they themselves were abused etc., the current requirement of ‘cry of rape’ to be ‘recent’ does not reflect the reality that victims frequently hold

As the terms of reference of the review group includes the caveat of ‘ and any other proposals regarding criminal law, criminal evidence and criminal procedure that may come to attention of the Review Group in the course of their examination of those issues’ may I direct the group’s attention to the legislative, practice and policy reforms contained within the RCNI’s Agenda for Justice I & II hard copies of which are enclosed herein and in addition are available on our website at: [www.rcni.ie](http://www.rcni.ie).

In conclusion I wish to highlight to the review group what I hope will not be received as any criticism of the very valuable consideration of the matters under review, that in alarmingly increasing numbers the justice system is not ‘reaching’ victims of sexual crimes. A re-balancing of the criminal law no matter how perfectly undertaken is unlikely in and of itself to halt what can only be described as the abandonment of the process by the vast majority of such victims<sup>23</sup>. A variety of innovative and creative interventions will be needed to tackle these issues some of which we hope will be identified by the Attrition Research study that we have commissioned NUI Galway to undertake and is due to report on in Autumn 2007, to that end I would ask the Review group to make a special case for the review of the law/policy/practice on sex offences as ‘a matter which came to your attention’ during this review.

May I close by wishing you as a group fruitful deliberations and a very Happy Christmas.

I would of course be only too pleased to discuss or expand on any of the matters contained within this, the RCNI submission, accordingly my contact details are contained below,

With warmest regards,

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back from reporting in the immediate aftermath, and this is equally applicable for adult assault as well, furthermore it unfairly reduces the scope of the information permitted to go before the jury often leaving them with a set of seemingly unrelated facts that actually have a very plausible explanation if we but trusted juries with the information

<sup>23</sup> RCNI statistics from 15 member centres in 2004 showed only 20% of our clients reported to the Gardaí.