



**RCNI Submission on
3rd National Strategy on
Domestic, Sexual and Gender-Based Violence:**

**Sexual Violence in the
Criminal Justice System**

July 2021

Updated September 2021

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Introduction – Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

Introduction – This Submission on Sexual Violence in the Criminal Justice System

The scope of this Submission is limited to sexual offences investigated and prosecuted within our criminal justice system. The criminal justice system is examined from the point of view of a survivor of sexual violence as s/he undergoes each stage of the process in turn. RCNI's view is that while good progress has been made, and much more will follow as the recommendations made in the O'Malley Review¹ are implemented, there is still more that can be done. More must be done, because too many survivors are still being failed by the system. This means that the original grave primary trauma of the sexual violence may be compounded by the secondary trauma caused by the criminal justice system, so that the survivor suffers additional psychological harm because of their decision to take part in the criminal justice process and may be unable through lack of appropriate support (as well as for other reasons) to contribute their best evidence to that process. This is not fair or right.

The aim of this Submission is to propose practical solutions to some challenges faced by survivors who make the difficult decision to report the crime and follow it through from investigation and prosecution to court proceedings and beyond. It does not aim to duplicate or argue against the recommendations made in the O'Malley Review, but to endorse them and also complement them so that the criminal justice system offers as much protection and support to survivors as possible, but still ensures that accused persons are ensured of a fair trial in accordance with their rights under our Constitution and international law.

Structure of this Submission

This Submission is part of a much wider submission on the 3rd National Strategy from RCNI. This document itself is divided into three sections.

- The first section focuses on themes which are common to both this and the wider submission: client-focused continuous support, specialist training in the nature and

¹ Available online via this web-link:

http://www.justice.ie/en/JELR/Review_of_Protections_for_Vulnerable_Witnesses_in%20the_Investigation_and_Prosecution_of_Sexual_Offences.pdf/Files/Review_of_Protections_for_Vulnerable_Witnesses_in%20the_Investigation_and_Prosecution_of_Sexual_Offences.pdf

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effects of sexual violence, effective inter-agency working at every level, appropriate data collection and analysis, and the creation of a Victims' Commissioner to receive, investigate and make decisions on individual complaints from victims relating to breaches of their rights under the Criminal Justice (Victims of Crime) Act 2017².

- The second section summarises several recent RCNI submissions on sexual offences and other themes now being considered by the Law Reform Commission as part of its Fifth Programme of Law Reform³.
- The third section examines the procedural changes proposed in the O'Malley Report recommendations.

Our aim in each of these sections is to make practical proposals which will improve the experience of survivors of sexual violence as they undergo each stage of the criminal justice system. Each theme is developed briefly below. More detail on most of these proposals may be found in two earlier RCNI submissions to the Department of Justice, one on "A Criminal Justice Strategy" dated 3rd August 2020⁴ and another dated 30 September 2020 and entitled RCNI Commentary on the Tom O'Malley Review⁵.

I RCNI 3rd National Strategy Common Themes:

(i) Client-focused continuous support

RCNI's view, expressed in previous submissions and proposals to Government, is that there is an urgent need to create a national network of professionalised advocacy and support workers, to be based in rape crisis centres, whose role would be to provide practical and emotional support to survivors of sexual violence from the beginning of the criminal justice process, the point at which a decision is taken to report the crime, as and when needed. Their role is to respond to the individual needs of every client as well as possible. It is not to replace that of any other criminal justice professional, or to provide intensive specialist counselling, but to listen to survivors' concerns with sensitivity and understanding, to provide information where possible, and to act as a bridge to other supports as appropriate,

² Text of this Act is available via this web-link:

<https://revisedacts.lawreform.ie/eli/2017/act/28/front/revised/en/html>

³ Available online via this web-link:

<https://www.lawreform.ie/fileupload/Programmes%20of%20Law%20Reform/LRC%20120-2019%20-%20Fifth%20Programme%20of%20Law%20Reform.pdf>

⁴ Available online via this web-link: <https://www.rcni.ie/wp-content/uploads/RCNI-Criminal-Justice-Strategy-Submission-August-2020-LPD-Final.pdf>

⁵ Available online via this web-link: <https://www.rcni.ie/wp-content/uploads/RCNI-TOM-Review-Report-commentary-September-2020-LPD-7.pdf>

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such as legal advice from the Legal Aid Board or practical support from a domestic violence service or refuge, and finally to provide accompaniment services to both Garda and Court appointments.

RCNI and rape crisis centre colleagues are now working with other specialist sexual violence services already providing a professionalised advocacy service, and other criminal justice professionals, on proposals for a pilot National Advocacy Project, to run for a fixed period in one or two rape crisis centres. This model is now working well in Scotland, a country with a similar population and rape crisis centre count to our own, since 2015. (The Scottish National Advocacy Project was the subject of a positive independent evaluation in 2018).

(ii) Specialist training in the nature and effects of sexual violence and related matters

RCNI considers it vital to the success of the O'Malley Implementation Plan⁶ that all criminal justice professionals have specialist training in the nature and effects of sexual violence, and also have a clear understanding of the prevalence and tenacity of some very widely-held "rape myths". To be successful in its aim of helping professionals to understand the experiences of survivors, this training needs to be interactive and dynamic. In our view, it should be given ideally by specialists in sexual violence, and where this is not possible, these specialists should be asked to provide appropriate material for other experienced trainers to relay to each criminal justice professional group. This theme is the subject of several recommendations in the O'Malley Report whose implementation is being overseen by the Specialist Training inter-agency Subgroup. We welcome these latest positive developments very much.

(iii) Effective inter-agency working at every level

Effective inter-agency working is the best way of ensuring that survivors' needs and rights inform the practice and policy of all professionals involved in criminal justice and that information about the criminal justice system, including measures to assist survivors, is disseminated from the centre to every local support service and ultimately, to every individual who may need it. At local level, collaboration between rape crisis centres and State services such as An Garda Síochána and the Courts Service which is informal but reasonably regular, can have a great positive impact on survivors' experiences of the criminal justice system. At both local and national level, survivors' experiences, whether relayed through advocacy or training or otherwise, can and should inform the development of policy and procedures.

⁶ "Supporting a Victim's Journey", available online via this web-link:

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

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In order to be effective, inter-agency structures such as advisory groups and steering groups (at any level) need good leaders with a clear vision of the best possible system to support survivors of sexual violence and other vulnerable witnesses. They also need to include representatives from all agencies and professions involved with survivors in the criminal justice system - ideally who are senior enough to have influence within their own organisations or professions. Essential to that infrastructure are frontline local organisations including rape crisis centres with the capacity to make themselves available for this work. At present, many are funded only for narrowly defined service delivery roles and not for their leadership and interagency work. In addition, they need good administrative support, dedicated time and space, a commitment from each of their members to treat all other members as their equals and a common determination to listen to and respect other points of view. These are the foundations on which a consensus may be built which will benefit survivors and other vulnerable witnesses - and through which important information about the criminal justice process may be disseminated as efficiently as possible to those who need it.

(iv) Effective data collection and analysis

RCNI welcomes very much Recommendation 8.3 in the O'Malley Review to the effect that research should be carried out into the possible causes of delays at each stage of the criminal justice process. We also acknowledge the careful attention and expertise which is now being dedicated to the Sexual Violence Survey by the Central Statistics Office.

RCNI respectfully submits that it is also important that all State agencies are resourced to record and examine the use of the full range of protective and special measures by survivors of sexual violence (and other vulnerable witnesses) throughout their journey through the criminal justice system. Regular analyses of this data will provide a firm evidence base upon which future proposals for improvements to these measures may take shape.

Further, it would be extremely useful if there were a data collection system capable of recording and analysing the reasons for which sexual offences are not prosecuted, and of separating out the various factors associated with decisions not to prosecute. Our understanding is that it is not possible to track these reasons and factors now (other than through a very slow and labour-intensive manual process).

Finally, consideration should be given to the creation of a "report to court" criminal justice data collection system which is capable of tracking individual offences (or victims) right through the system from the early stages of an investigation right through to sentence and beyond.

(v) Victims' Commissioner

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In common with our victim support colleagues in the Victims' Rights Alliance, RCNI recommends the introduction of a single office/officer dedicated to the examination and resolution of individual complaints made by victims of crime in whose case there has been no satisfactory resolution of their initial complaint to the relevant State agency that they have not had the benefit of the commitments made by that agency under the Victims' Charter or that some aspect of their rights under the Criminal Justice (Victims of Crime) Act 2017 has been denied to them without reasonable excuse.

II Sexual Offences and related matters (many of which are now under examination by the Law Reform Commission as part of the Fifth Programme of Law Reform)

(i) Gaps in the current list of sexual offences

RCNI recommends that the following new offences are introduced:

- A new form of rape which is digital penetration of the vagina without consent;
- A specific offence of voyeurism which is capable of capturing clandestine "Peeping Tom" activities taking place on or offline without the knowledge or consent of their victim;

RCNI also recommends that consideration should be given to the creation of a new gender-specific offence against a man of being "forced to penetrate" the vagina or other orifice of the perpetrator of the offence with his penis and without his consent;

(ii) Consolidation of sexual offence statutes

RCNI recommends further that consideration be given to amending Section 45(1) Criminal Law (Sexual Offences) Act 2017, which might be paraphrased as intentional exposure of one's genitals to another person thereby causing him or her fear distress or alarm - to include the phrase "including by electronic means", in order to put it beyond doubt that "cyber-flashing" is a criminal offence;

RCNI recommends that as soon as possible, all sexual offences are regrouped under a single statute, as in England & Wales;

(iii) Reasonableness of belief in consent: Section 2 Criminal Law (Rape) Act 1981⁷

RCNI recommends that a belief in consent to sexual intercourse under this statute should be phrased explicitly to be invalid unless it is **both** honest and **reasonable** (as already indicated in our submission on this topic to the Law Reform Commission in 2018)⁸;

⁷Available online via this web-link: <https://revisedacts.lawreform.ie/eli/1981/act/10/front/revised/en/html>

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RCNI also recommends in this regard that the definition of what is “reasonable” should be amended so that it is in line with, but not identical to, the definitions in Sections 16 and 17 of the Criminal Law (Sexual Offences) Act 2017⁹, so that whenever a defence of honest and reasonable belief is raised, “the court shall consider whether, in all the circumstances of the case, a reasonable person would have concluded that the complainant was not consenting to sexual intercourse” [or similar wording].

(iv) Corroboration

At present, there is no obligation on the trial judge to deliver a corroboration warning to the jury (that is, to warn them of the dangers of convicting a person on the uncorroborated evidence of the complainant). However, our understanding is that corroboration warnings are still very often given in sexual cases, and that the attitude persists among legal professionals and judges that it is “safer” to do so, to mitigate the risk that any conviction will be set aside on appeal. RCNI’s view is that any mention of corroboration endorses and perpetuates the prevailing rape myth that victims of sexual crimes are more likely to be inherently unreliable than victims of other crimes against the person.

RCNI recommends that consideration be given to the abolition of any corroboration warnings as currently given by the trial judge to the jury. If corroboration is mentioned by the judge to the jury at all, it should be with the sole purpose of reassuring them that they can indeed convict the accused on the evidence of the complainant alone if their conclusion is that they are sure beyond reasonable doubt that the defendant is guilty of the offence with which he is charged.

(v) Recent complaint

It is fair to say that the old doctrine of recent complaint also endorses and perpetuates a common rape myth, this time to the effect that telling another person about the crime with the absolute minimum of delay is evidence that the complainant is a reliable and credible witness. We now know that the experience of sexual violence may be so traumatic that the victim cannot talk about it to anyone, even close family and friends, sometimes for days, weeks, or even years. On the other hand, many survivors of recent and traumatic rape and sexual assault are able to share their experiences and to seek help from the appropriate State services. It seems unjust to recommend that this group of survivors should not have the benefit of “recent complaint” rules in their case, and we do not do so.

⁸ Available online via this web-link: <https://www.rcni.ie/wp-content/uploads/RCNI-LRC-Knowledge-or-Belief-concerning-Consent-in-Rape-Law-Submission-October-2018.pdf>

⁹ Available online via this web-link: <https://revisedacts.lawreform.ie/eli/2017/act/2/front/revised/en/html>

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RCNI recommends that in any case in which there is no evidence of recent complaint being led, the judge should direct the jury that victims' responses to the trauma of sexual violence vary with every individual and therefore, they should not infer that any complainant is less likely to be telling the truth about what happened to her because s/he did not tell someone else about the crime very soon afterwards.

(vi) Other sexual experience (often called "previous sexual history") provisions – also the subject of recommendations in O'Malley Review;

RCNI supports the recommendations in the O'Malley Review to the effect that the current "other sexual experience" provisions should be extended to offences of sexual assault and that the advocate providing legal representation to the complainant on defence applications for leave to adduce evidence of her "other sexual experience", should also be allowed (indeed, expected) to remain in court while the complainant is giving evidence in order to draw attention to any failures to follow the judge's ruling on the relevant evidence.

RCNI also recommends that the current wording of Section 3 of the Criminal Law (Rape) Act 1981¹⁰

- is simplified so that its meaning is clearer but the high threshold for admission of "other sexual experience" evidence is retained;
- is amended to include a clear definition of what is considered to be evidence of "other sexual experience", as there seems to be doubt about what is and is not covered by Section 3 as matters stand¹¹;
- is amended to refer to clear time limits by which notice of an application for leave will have to be given unless there are exceptional circumstances;
- is amended to include a clear outline of the procedure for any ensuing application, which ought to take place as far as possible ahead of the trial itself; and
- is also amended to give the legal representative for the complainant a right to request and retain copies of the complainant's statement and also a summary of the prosecution evidence already tendered or to be tendered.

III Procedural changes recommended in the O'Malley Review and related matters

(i) Intermediaries

¹⁰ Available online via this web-link: <https://revisedacts.lawreform.ie/eli/1981/act/10/front/revised/en/html>

¹¹ This recommendation among others is included in the RCNI Position Paper on Previous Sexual History (2012), which may be accessed via this web-link: <https://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>

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RCNI supports the recommendations made in the O'Malley Review aimed at creating a new cadre of specially trained expert intermediaries to assess the communication needs of vulnerable witnesses, then advise Garda investigators and the Court on the best way to communicate with these witnesses, having regard to their age or mental condition, and also to facilitate communication with these witnesses in court.

In addition, **RCNI recommends** that

- Access to intermediaries as a special measure in Court should not be confined to those witnesses who are under 18 or whose “mental condition” warrants the use of intermediaries, but should be extended to any witness who has a communication difficulty which is not related to their “mental condition” and who does not have a “mental disorder” of any kind, for example witnesses with a speech impediment;
- Section 14 of the Criminal Evidence Act 1992¹² as amended should be reworded to put it beyond doubt that not only the questions put to the witness but also the witness's **answers**, should be interpreted by the intermediary, where one is used to facilitate communication in court;
- Consideration should be given to allowing intermediaries to interpret other selected parts of court proceedings besides the witness's own evidence, at a minimum the details of the court's rulings and the verdict of any jury, to the extent that this is practicable;
- Finally, RCNI would like to emphasise once again its view (based on those of counsel experienced in prosecuting and defending cases in the Central Criminal Court) that professional intermediaries should only be used in court as interpreters when they are really needed. Once the court and both prosecution and defence counsel have had the benefit of the expert advice of an intermediary (who had already assessed the communication needs of the witness) at a preliminary trial hearing, it should be possible in most cases for the advocate and the judge to put questions to the witness and to understand the witness's answers.

(ii) Novel or unusual special measures to support survivors/witnesses of sexual violence

RCNI recommends that a widely-drafted statutory provision should be created to allow any new or unusual special measure to be used to facilitate any survivor of sexual violence or other vulnerable witness to give evidence in both the Circuit Court and District Court, provided that its use is not contrary to the interests of justice. An example of such an unusual special measure is the use of Court dogs to reduce the stress levels of anxious child witnesses who must give live evidence in court.

¹² Available online via this web-link: <https://revisedacts.lawreform.ie/eli/1992/act/12/front/revised/en/html>

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(iii) “Aged out” minors – UK Youth Justice and Criminal Evidence Act 1999 Section 22¹³ as amended;

RCNI recommends that an appropriately worded version of this provision is included in the Bill, to ensure that recently “aged out” witnesses who were children at the time that their Garda interview was recorded but who must come to court to give evidence as adults because of delays before hearing, are still able to have the benefit of the special measures to which they would have been presumed entitled if they were attending court when they were still under 18. Among these measures, being able to give evidence by video-link is viewed by many survivors as an important protection, without which they would find it very difficult (or even in some cases, impossible) to give their evidence to the court.

(iv) Statutory presumption in favour of special measures such as video-link, screens, pre-recorded testimony for all survivors of sexual violence;

RCNI recommends that the current patchwork of special measures in Part III of the Criminal Evidence Act 1992 as amended is simplified or even replaced altogether so that all survivors, and at least the most vulnerable witnesses, of sexual violence benefit from a presumption in favour of the use of whichever special measures are identified as those which would most help them to give their best evidence to the court with the minimum risk of being re-traumatised by that process. Our view is that all survivors of sexual violence are vulnerable witnesses per se, and that at least some witnesses of sexual violence, such as children or vulnerable adults, are also intrinsically vulnerable and therefore, should have the benefit of whatever special measure is most appropriate to help them to give evidence insofar as the application of any special measure is not contrary to the interests of justice.

(v) Pre-recorded cross-examination should be piloted;

RCNI recommends that the new Bill should contain a provision allowing pre-recorded cross-examinations – and re-examinations where necessary – to stand as the evidence of the complainant at court, in any case in which his/her statement has been pre-recorded and is allowed to stand as his/her evidence in chief, subject of course to safeguards for the rights of the accused. This would allow the use of pre-recorded cross-examination and re-examination to be piloted and evaluated, as it has been quite successfully already in England & Wales. It would benefit not only survivors who would not have to wait for months or more likely, years, to give evidence at trial, but also the quality of the evidence given, as it would be recorded much closer to the time of the offence itself.

(vi) Prohibition on defence cross-examination of complainants on their clothing and/or demeanour which is likely to imply that they were consenting to the sexual

¹³ Available online via this web-link: <https://www.legislation.gov.uk/ukpga/1999/23/section/22>

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activity at issue because of how they were dressed and/or behaved immediately before or during that activity and is not relevant to any issue of fact;

RCNI recommends that a form of words is found which would have the effect of excluding defence questioning which relies upon “victim-blaming” and essentially irrelevant rape myths to the effect that a complainant is more likely to have consented, and perhaps also to have lied about that consent afterwards, because of the way she was dressed or the way that she behaved. While this is a drafting challenge, it is also time that there were explicit restraints on defence cross-examination which is based not on fact but on nothing more than exploitation of commonly held but wholly irrelevant rape myths. Our view, based in part on the psychological evidence, is that while judicial directions aimed at dispelling rape myths would help, they are not likely to work as well as excluding irrelevant but deeply prejudicial evidence altogether.

(vii) Judicial directions before/after the body of trial aimed at dispelling rape myths;

RCNI recommends, in line with the recommendation to that effect in “The Realities of Rape Trials”¹⁴, that judges should give model directions to the jury in general terms aimed at dispelling rape myths, both at the beginning of the trial and at the end, during the charge. Some members of the jury at least may take them on board. Our concern is that rape myths are so deeply embedded that these directions may be only really effective for many jurors when they are accompanied by strict evidential restrictions as recommended above.

(viii) Evidence based pleas in mitigation and defence “good character” testimonials at sentence

RCNI recommends that consideration be given to a statutory provision outlawing the assertion without any evidential basis of positive aspects of the convicted person’s character and other attributes, in mitigation for the offences on which he was convicted. If this is not acceptable, in our respectful submission it is time to consider putting at least the introduction of defence “character evidence” on a more formal footing. It should not be possible for the defence to introduce character evidence which contradicts the evidence given at the trial or the convicted person’s known antecedents, including any criminal record. Further, it seems to us that no injustice would be done to the convicted person if any proposed defence character reference had to be disclosed to the prosecution and the victim in advance and the person providing that reference had to make him or herself available for cross-examination by the prosecutor during the sentencing hearing.

(ix) Legal Aid Board provision of legal advice to a wider range of complainants and at every stage of the criminal justice process;

¹⁴ Available online via this web-link: <https://www.drcc.ie/assets/files/pdf/leahyrealitiesreport.pdf>

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RCNI supports without reservation the recommendation in the O'Malley Review to the effect that legal advice should be provided to survivors of sexual violence from the earliest stages of a criminal investigation through to sentence (and sometimes, beyond).

RCNI recommends that there should be **no** restriction on the availability of this legal advice service which is based on the nature or category of the sexual offence; and finally,

RCNI recommends that this legal advice service should be available to (non-accused) parents or guardians or other appropriate adults responsible for the care and welfare of any child or otherwise vulnerable survivor.

- (x) Civil restraint orders – a necessary additional protection from sexual harassment behaviours, especially useful in any situation in which an order may not be sought under Domestic Violence Act 2018¹⁵ restraining such behaviour;

RCNI recommends that in line with certain assurances given by the former Minister for Justice to the Oireachtas during debates¹⁶ on the recently enacted Harassment, Harmful Communications and Related Offences Act 2020, a new statutory provision is introduced whereby it is possible for a person subjected to unwanted sexual (or indeed other) attention amounting to harassment to apply to the District Court or Circuit Court for an order restraining that behaviour. These provisions should include a very simple and swift application procedure which allows for ex parte hearings to be held when necessary. Breach of a civil restraint order should be an arrestable offence, just as breach of an order under the Domestic Violence Act 2018 is.

RCNI understands that this forthcoming Criminal Law (Sexual Offences) Bill is focussed on implementing the relevant recommendations of the O'Malley Review on the criminal justice system. However, we respectfully submit that civil restraint orders are an important means of protection from unwanted attention and communication for survivors of sexual violence who have taken the courageous step of reporting the offence to the Gardaí and is likely to have to wait several months for the investigation to be concluded and for the case to be considered by the Director of Public Prosecutions – before there is any possibility that charges will be brought. Meanwhile, the accused person is not under the supervision of the court, ie he is not restrained by bail conditions. Indeed, if there is no decision to prosecute, he never will be.

If he is a former or current intimate partner, a protection order and eventually a safety order, may be sought against him by the complainant under the Domestic Violence Act 2018. However, many survivors of sexual violence have no such prior relationship with the

¹⁵ Available online via this web-link: <https://revisedacts.lawreform.ie/eli/1996/act/1/front/revised/en/html>

¹⁶ Accessible via www.oireachtas.ie

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accused person and so cannot benefit from this Act. They need to be protected from unwanted attention and communication (direct or indirect) emanating from the accused, designed to intimidate or punish them or simply part of a longer campaign of harassment which might be better described as stalking.

For these reasons, we submit that it is appropriate to include civil restraint order provisions in this otherwise criminal legislation, and in support of this admittedly unusual recommendation, we cite the example of the Domestic Violence Act 2018 itself, which though largely civil in its scope, included two new criminal offences and a sentencing provision.

In conclusion: RCNI Legal Policy Director would be happy to supply more information on any point raised in this submission or to discuss any of them further.

Ref: RCNI/LPD/Final 4

Date: 26 July 2021

Updated: 7 September 2021

Rape Crisis Network Ireland clg

Carmichael Centre

North Brunswick Street

Dublin D07 RAH8

Tel: 087 963 5201

Email: legal@rcni.ie

Website: www.rcni.ie