RCNI Briefing Note on the Criminal Justice (Victims of Crime) Bill 2016

Updated Version 5: September 2017

(Post Second Stage Debate in Seanad)

1.0 Introduction

Rape Crisis Network Ireland is the specialist sexual violence national policy body of the Rape Crisis sector, informed, owned and governed by our member Rape Crisis Centres. Its work includes policy development, prevention, advocacy, data collection and direct legal services to survivors of sexual violence and Rape Crisis staff and volunteers. It aims to prevent sexual violence through education at all levels, awareness raising and training, and to improve responses and services to survivors of sexual violence. Its work in every area is informed by the best national and international evidence available, and also by the daily experiences of survivors and Centres supporting them across a wide range of issues.

RCNI welcomes very many of the provisions in the Criminal Justice (Victims of Crime) Bill 2016 and is glad to see that several of the recommendations made in the original version of this Briefing Note have been either accepted in full, or accepted in a modified form. In this Briefing Note, we would like to draw your attention to certain aspects of the Bill which we think could still be improved.

1.1: Structure of this Briefing Note Updated Version 3 following 2nd Stage Debate in Seanad

This Briefing Note will comment on several Sections from the Bill, in the order in which they appear. Where appropriate, recommendations for change, and draft amendments are made under each Section discussed to the Bill as it was passed by Dáil Eireann[1]. There is a checklist of all proposed draft Amendments in the Appendix.

1.2: Referral: Section 6(9) in relation to referral, says that where the victim consents, the Garda "may" arrange for him/her to be referred to a victim support service. In our respectful submission, the wording should be expressed as "shall" rather than "may", in order to transpose accurately the wording of Article 8(2) of the Directive: "Member States shall facilitate the referral of victims……to victim support services". RCNI as a member of the Victims' Rights Alliance, also supports their submissions in favour of making the same change.

Recommendation: Section 6(9) should be amended to replace the word "may" with the word "shall".

Draft Amendment 1:

Part 2, Page 11, Section 6, Subsection 9, line 7:

Replace "may" with "shall"

[1] Available through this weblink: http://www.oireachtas.ie/documents/bills28/bills/2016/12116/b121b16d.pdf

1.3: Sufficient Information: With regard to Section 7, subsections (2) (c), (d), (e) and (f), RCNI submits that in order for the Directive to be transposed accurately, these rights to be given a "brief summary of the reasons" for discontinuing or not initiating a prosecution respectively, should be qualified so that it is clear that any victim receives (in the words of the Directive at Article 11(3)) "sufficient information to decide whether to request a review of any decision not to prosecute upon request". The DPP does not prosecute the majority of sexual crimes identified in the Garda files it receives. At present, victims of sexual crime receive only a brief and general letter from the DPP in response to their request for reasons why the decision not to prosecute was made. There is no reference to the individual circumstances of their case. This cannot be said to be "sufficient information" for victims to decide whether to request a review of the decision.

It is understood of course that it is not practicable, or always advisable, for the DPP to disclose every detail of their decision making process. Such full and uncensored disclosure is not necessary in order for victims to be able to decide whether to request a review of the decision. An individualised response is necessary and desirable, so that victims can decide whether to request a review, and also, so that they can be helped to understand why and how it is that events which have had such serious consequences for their lives, may not ever be prosecuted.

It is possible to do this without infringing the rights of others concerned, such as accused persons. It is now being done for example in England & Wales, where victims of sexual crime and other victims entitled to "enhanced measures", may request a meeting with a representative of the Crown Prosecution Service in order to ask questions and find out face-to-face why their case was not prosecuted. Requests for reviews are not often successful there – about 1 in 10 cases is prosecuted following a review. Rates of prosecution following a request for a review of a decision not prosecute are lower still. Because rates are so low, it is very important that victims are given a real opportunity of understanding the reasons for decisions not to prosecute.

Recommendation: Section 7 (2)(c), (d) (e) and (f) should be amended by the addition of a qualifying subparagraph to the effect that sufficient information should be provided in any brief summary of reasons sought for non-prosecution for victim to decide whether to request a review of that decision [not to prosecute or to discontinue a prosecution, as the case may be].

Draft Amendment 2: Part 2, Page 12, Section 7, subsection 2 (f), insert after line 10:

"(f)(a): any summary of the reasons for a decision under any one or more of subpagraphs 2(c), (d), (e) and (f) in this Section shall contain sufficient information to enable the victim to decide whether to request a review of the decision, in any case in which such a review is possible"

1.4: Consideration of specific protection needs: There should be an obligation on the prosecutor to bring any specific protection needs identified to the attention of the court. If the court hears about any such needs from the prosecutor, it means that the victim's perspective cannot be overlooked. In the Directive, the only restrictions on the rights of a victim to appropriate special measures in court relate to the "rights of the defence" and "the rules of judicial discretion".

Recommendation: There should be an obligation on the prosecutor to bring any specific protection needs identified to the attention of the court.

Draft Amendment 3: Part 3, Page 23, Section 18, line 34: add the following

"(3) Where a victim of an alleged offence has been assessed under section 14 and the Garda Síochána or the Garda Ombudsman Commission, as the case may be, has identified specific protection needs in relation to the victim which are special measures within the meaning of this Section, the prosecutor shall inform the Court of the outcome of that assessment at the beginning of the trial of the offence at the latest".

1.5: Section 29: Amendments to Criminal Evidence Act 1992

Under this section heading it is necessary to replicate the text of one of the proposed amendments, as follows:

"(c) in section 14—

(i) in subsection (1)(a), by the substitution of "a relevant offence" for "an offence to which this Part applies",

(ii) by the insertion of the following subsection after subsection (1):

"(1A) Where—

(a) a person is accused of an offence, other than a relevant offence, and

(b) a victim of the offence who is under 18 years of age, is giving, or is to give, evidence through a live television link, the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the matters referred to in section 14B, the interests of justice require that any questions to be put to the victim be put through an intermediary, direct that any such questions be so put", and

(iii) in subsection (3), by the insertion of "or (1A)" after "subsection (1)","

It appears that the effect of this is to allow for victims under the age of 18 only, or victims who have a "mental disorder" within the meaning of the CEA 1992 as amended, to have **questions** put to them through an intermediary, if they are giving evidence through a live television link – provided that the offence concerned is not a "relevant offence" ie which

broadly speaking, is either sexual or otherwise of a violent nature. While there is nothing wrong with this in principle, it does not go far enough, in exactly the same way that Section 14 of the existing Criminal Evidence Act 1992 as amended, does not go far enough, either. Neither this proposed new subsection nor the existing Section 14 allows for the **victim's responses** to be mediated by the intermediary. This means that a witness in need of an intermediary is immediately put at a disadvantage, as his/her ability to communicate her testimony will depend on his/her ability to respond to the mediated questions without the benefit of having those responses translated for the decision makers.

In our respectful submission, this new version of Section 14 should be amended to cover not just the questions to the victim, but also the **responses**. In this we are following the recommendation made by the Law Reform Commission in its Report on Sexual Offences and Capacity to Consent[2]. Further, we submit that the inclusion of the responses in the remit of the intermediary is in line with international best practice on how to treat vulnerable witnesses[3].

Recommendation: The remit of any intermediary used in Court should be broadened in this Section to include the responses of any witness who is deemed to be in need of an intermediary's services in order to give his or her best evidence in court, in the interests of justice.

Draft Amendment 4: Part 4, page 31, Section 29, line 1:

Insert into line 1 after the word "questions" the following two words: "and responses"

1.6: Evidence by Video-Link:

RCNI notes that this Bill does not include any universal right for victims over the age of 18 and who do not have a "mental disorder", and who made a complaint to An Garda Síochána while they were under 18, to give evidence by video-link. In our respectful submission, victims who are over 18 at the time of the trial but who made a formal complaint while under the age of 18, should retain the right to give evidence by video-link.

Recommendation: Accordingly we propose that Section 13 of the Criminal Evidence is amended to allow this protection to be afforded to prosecution witnesses who made their statement to An Garda Síochána in the legitimate expectation that it would be available to them at trial.

Draft Amendment 5: Part 4, page 30, Section 29 (b), after line 20:

[2] Available online through this weblink: http://www.lawreform.ie/_fileupload/Reports/r109.pdf. In the UK, it is the norm that the use of intermediaries is considered for all child witnesses, for example.

[3] See for example, the relevant guidelines on the use of intermediaries in court in the UK: http://www.theadvocatesgateway.org/images/toolkits/16-intermediaries-step-by-step-2016.pdf

(i a) by the insertion of the following words after "the relevant offence": "or was under 18 years of age at the time that he or she made a formal statement to a member of An Garda Síochána in respect of a relevant offence"[4]

1.7: Pre-recorded Evidence:

We note that this Bill does not include any universal right for victims to have their Garda statement pre-recorded and allowed to stand as their direct evidence (evidence in chief) in Court.

RCNI submits that at least in the case of victims of sexual violence over the age of 18 (in particular those who suffered sexual violence as children, reported it as children, and are now adults), there should be a presumption that direct evidence at least should be recorded by An Garda Síochána and played to the Court in place of their giving live evidence.

While it is recognized that it may not be practicable to implement this extension of the use of Section 16 (1)(b) CEA 1992 to large new categories of victims of sexual (and perhaps other) violence immediately, it is submitted that this Bill represents an opportunity to ensure that the appropriate legislative powers are in place in the event that the use of pre-recorded evidence does become more widespread, in line with the pervading trend in that direction in other common-law jurisdictions, as understanding of the needs of victims and more generally, the need to update criminal procedure in line with recent scientific developments, increases[5].

Recommendation: RCNI recommends that the proposed new Section 16 of CEA should be re-amended to allow for the pre-recorded statements of all victims of sexual violence, to stand as their direct evidence in any case where the pre-recorded statement was made when the witness was under 18, "unless the Court sees good reason to the contrary", and to allow for the pre-recorded statements of any other victims of sexual violence to stand as their direct evidence regardless of their age or capacity,

Draft Amendment 6: Part 4, Section 29, pages 32/33, after line 39 insert:

[4] See Appendix for copy of relevant amendments in the Criminal Justice (Victims of Crime) Bill 2016 to Section 13 of the Criminal Evidence Act 1992 as amended (A) and also, a consolidated version of Section 13 CEA 1992 as amended incorporating all amendments thereto proposed by CJ VoC Bill and also, by RCNI Amendment 5 herein (B).

[5] See for example, The Advocates' Gateway series of Guidelines on the treatment of various categories of vulnerable witnesses in Court, at www.theadvocatesgateway.org. (England & Wales); a sample general Guideline therefrom may be viewed at http://www.theadvocatesgateway.org/images/toolkits/1-ground-rules-hearings-and-the-fair-treatment-of-vulnerable-people-in-court-2016.pdf, and see also the England & Wales Court Rules setting out procedure where vulnerable witnesses will give evidence, which may be accessed via this weblink: https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/crim-proc-rules-2014-part-03.pdf

(iii) in paragraph (b), by the addition of the following subparagraph (iii) after subparagraph (ii):

"(iii) by any person over the age of 18 in any case to which this Part applies, in which that person has made a statement in pre-recorded form to An Garda Síochána while under the age of 18, unless the Court sees good reason to the contrary"; and

(iv) by any person over the age of 18 in any other case to which this Part applies, with the leave of the Court"

1.8 Section 35: Non-compliance with Act

There is no sanction and/or any meaningful means of redress for breach of any provision of the proposed Criminal Justice (Victims of Crime) Act included here.

Recommendation: There should be a dedicated structure, such as a Victim Ombudsman Office whose sole remit is reception and investigation of transgressions of the Act. Its procedures should be simple, free, easy to use and swift. RCNI as a member of the Victims' Rights Alliance, which also recommends the establishment of such structure, supports their submissions in this regard.

Draft Amendments 7 & 8: [extracted from the Report Amendments list dated 4th July 2017]

5A. In page 37, after line 32, to insert the following new Section:

"Complaints Procedure

36. If a victim has reason to believe that a member of the investigating authority has failed to
observe any provision of this Act a complaint may be forwarded to the Ombudsman for Victims of Crime, when established, for investigation"

5B. In page 37, after line 32, [and after draft Amendment 5A above if accepted] insert the following new Section:

"37. Not later than two years after the passage of this Act, the Government shall establish an Ombudsman for Victims of Crime empowered to investigate complaints under *section 30(1)*."

1.9 Training of Criminal Justice Professionals

RCNI agrees with the Victims' Rights Alliance that it is vital that the full implementation of the training obligations set out at Article 25 of EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, should be monitored. Accordingly it supports the VRA in its advocacy for the introduction of reporting obligations, and proposes the following new amendment [adapted from that in the Report Amendments list dated 4th July 2017] to put this into effect.

Draft Amendment 9: In page 37, after line 32, to insert the following [if draft amendments 5A and 5B above are both accepted], the following new Section:

"Reporting on Training Provided

38. Within 60 days after the end of each calendar year those responsible for the training within an Garda Síochána, the Ombudsman Commission, the Director of Public Prosecutions, the Irish Prison Service, the Court Service, the Bar of Ireland, the Law Society of Ireland and the Judicial Studies Institute shall publish in written form a report of any general and specialist training which has been provided in accordance with the provisions of this Act and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.".

RCNI

Carmichael Centre

North Brunswick Street

Dublin 7 D07 RHA8

September 2017 Version 5

LPD/CC

legal@rcni.ie

tel: 087 963 5201

Appendix

A: The existing proposed Bill - [Part 4 CJ VoC Bill 2016 as passed by Dail Eireann]

[Section 29] [Amends Part 3 of Criminal Evidence Act 1992 by substituting inter alia at page 30]

(b) in section 13—

(i) in subsection (1), by the substitution of "a relevant offence" for "an offence to which this Part applies",

(ii) by the insertion of the following subsection after subsection (1):

"(1A) In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act 1967) relating to an offence, other than a relevant offence, a court may, subject to section 14B, grant leave for a victim of the offence to give evidence, whether from within or outside the State, through a live television link.",

(iii) in subsection (2), by the insertion of "or (1A)" after "subsection (1)", and

(iv) by the deletion of subsection (3),

B: Section 13 CEA 1992 as it would be if amended by CJ VoC as passed by Dail Eireann [consolidated text taken from www.lawreform.ie Revised Acts, updated to 27 March 2017], and also, as it would be if further amendment proposed by RCNI were adopted:

CJ VoC Bill amendments are in purple below, except the last one (a deletion):

RCNI proposed further amendment is in green below:

"Evidence through television link.

13.— (1) In any proceedings F11 **[** (including proceedings under section 4E or 4F of the **Criminal Procedure Act, 1967**) **]** for a relevant offence a person other than the accused may give evidence, whether from within or outside the State, through a live television link—

(*a*) if the person is under F12 **[** 18 years **]** of age, or was under 18 years of age at the time that he or she made a formal statement to a member of An Garda Síochána in respect of a relevant offence, unless the court sees good reason to the contrary,

(*b*) in any other case, with the leave of the court.

"(1A) In any proceedings (including proceedings under section 4E or 4F of the Criminal Procedure Act 1967) relating to an offence, other than a relevant offence, a court may, subject to section 14B, grant leave for a victim of the offence to give evidence, whether from within or outside the State, through a live television link.",

(2) Evidence given under *subsection (1)* or (1A) shall be video-recorded.

~~(3) While evidence is being given through a live television link pursuant to *subsection (1)* (except through an intermediary pursuant to ***section 14*** *(1)*), neither the judge, nor the barrister or solicitor concerned in the examination of the witness, shall wear a wig or gown~~".

Annotations:

Amendments:

F11 Inserted (1.10.2001) by *Criminal Justice Act 1999* (10/1999), s. 18(3), S.I. No. 193 of 2001.

F12 Substituted (1.05.2002) by *Children Act 2001* (24/2001), s. 257(3), S.I. No. 151 of 2002.

F13 Deleted by *Criminal Law (Sexual Offences) Act 2017* (2/2017), s. 35, not commenced as of date of revision.