



**RCNI Submission on the
Preliminary Report into the law and procedures
in serious sexual offences in Northern Ireland**

January 2019

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 – Background to This Submission

RCNI welcomes very much the opportunity to make this submission on the Preliminary Report into the law and procedures in serious sexual offences in Northern Ireland, published 20 November 2018 by Sir John Gillen and his team. This Report is extremely interesting, and very valuable to policy-makers in the Republic of Ireland, as it was published just as a senior academic, Dr Tom O'Malley, is conducting a review of the investigation and prosecution of sexual offences in this country at the request of our Minister for Justice and Equality. That review was undertaken in part to address concerns arising out of the Belfast alleged rape trial which ended in March 2018, and in part to consider recommendations made about the treatment of vulnerable witnesses in "Hearing Every Voice"¹, the report of the informal inter-agency group of experts which we put together. As you will be aware, the Criminal Law (Sexual Offences) Act 2017² came into force fully earlier this year. It includes some radical changes to child exploitation offences, the definition of consent, new purchase of sexual services offences, and some enhanced special measures, in addition to those contained in our Criminal Justice (Victims of Crime) Act 2017³.

RCNI broadly agrees with the majority of the recommendations made in the Preliminary Report. However, we have different views on some of them, based on our own research data, our own experiences with our clients, and certain important differences between our two jurisdictions. We have outlined these below in the hope that they will be useful to Sir John Gillen and his team as they prepare their Final Report.

Structure of this Submission

¹ Here is a web-link to the full Report for easy reference: <https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf>

² <http://www.irishstatutebook.ie/eli/2017/act/2/enacted/en/html>

³ <http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html>

We will consider each set of Recommendations at the end of each one of selected Chapters of the full Preliminary Report, in the same order as the Report. Each Chapter is given its own subheading below, and where we wish to include recommendations which are different to those in the Report, these will appear at the end of each subheading.

Chapter 3: Restricting access of the public

RCNI Commentary: We agree with the core recommendation that the public at large be excluded from all serious sexual offence hearings. In this country, the exclusion of the public is not automatic from proceedings in respect of certain more minor sexual offences, being at the discretion of the judge. We think it would be better if such exclusion were automatic for all but the most minor of offences (tried in the District Court), not least because many sexual offences which do not carry the heaviest penalties in law are still devastating in their effects on their victims. These effects should not be made worse by being obliged to give evidence about extremely intimate matters in open court.

RCNI Recommendation: The public at large should be excluded from all but the most minor of sexual offence hearings, automatically, and at the discretion of the judge in these cases.

Chapter 4: Pre-recorded cross-examination

RCNI Commentary: We endorse these recommendations, especially those relating to specialist training for relevant professionals, running a pilot scheme before rolling out pre-recorded cross-examination for use in any suitable case, the use of protocols and manuals by judges and advocates respectively, having obligatory Ground Rules Hearings and being flexible on the setting for the pre-recording of cross-examination of vulnerable witnesses as defined in the recommendations. We also think that it is a great idea to submit defence questions to the judge in advance, and hope that something similar will be accepted here. We further endorse the complainant being entitled to view their pre-recorded police interview, and note that in this country, victims are already entitled to a copy of any written statement of formal complaint to the Gardaí so logically, should also be entitled to access any statement made in electronic form. Finally, RCNI's view is that it is vital that any ruling made at a Ground Rules Hearing on the conduct of a cross-examination to be pre-recorded, should be binding on the trial judge, however this is achieved.

Chapter 5: Separate Legal Representation

RCNI Commentary: We agree with the recommendation that legal advice should be available to complainants at every stage of the criminal justice process up to trial, but wonder whether it should not also continue to be available throughout the trial and beyond (for instance, at sentencing stages and at any further related hearings, e.g. appeals, parole hearings, applications to end sex offender obligations etc). Some free legal advice is available in this country to victims of certain sex offences, once the accused person has been charged. Our experience is that the need for legal advice extends both backwards and forwards from the charging decision. There is much demand for legal advice before victims have made the decision to report, in any case in which the DPP decides not to prosecute, in the period immediately before a significant court hearing, and in the period coming up and after release from prison.

While our own system of separate legal representation for complainants wishing to object to the admission of previous sexual history evidence is not perfect, it is still a significant support. The new right to separate legal representation to object to disclosure of counselling records (only – not medical records, as suggested in the Review) is now being used, as far as we are aware without any major difficulties, but it is too early to say whether it is working for complainants in its current form. The current provisions would work better for complainants, in our view, if there were no way to avoid their application whenever the complainant had “expressly waived” his/her right to object to disclosure of counselling records⁴.

RCNI’s view is that in our system, with its written Constitution setting out the right of the accused to a fair trial, and long line of Supreme Court cases stressing the primacy of the rights of the accused, extending separate legal representation to the examination in chief and cross-examination of complainants would not work. An approach which provides for the pre-recording of cross-examinations in appropriate cases, properly supervised and carried out by specialist lawyers and judges, would work better. Where such carefully overseen and prepared cross-examinations could not (or should not) be pre-recorded, for whatever reason, they should still be the subject of mandatory ground rules hearings which would set the limits of questioning in advance. In Ireland, 24 hour help is available to complainants from rape crisis-run helplines, Sexual Assault Treatment Unit accompaniment volunteers, Garda accompaniment volunteers and Court accompaniment volunteers, and Gardaí are already obliged to tell victims about any legal advice and representation rights they may have.

RCNI Recommendations:

1. Consider extending the right to legal advice further to cover if not the trial period, certainly the period after the trial, where appropriate (ie where there has been a conviction);
2. With regard to disclosure of medical records, consider drafting the relevant provisions to ensure that (as for previous sexual history here) it is not possible to avoid their effect in cases where the complainant has apparently waived his/her right to object to disclosure. The reality is that complainants have little choice but to consent to disclosure.

Chapter 6: Myths surrounding serious sexual offences

RCNI Commentary: RCNI is in broad agreement with the authors of the Review that training of relevant professionals is extremely important to ensure that judges and advocates recognise and confront rape myths. We also agree that judges should not hesitate to intervene robustly to counter-act any attempt to ask questions, comment or make speeches which rely on rape myths to make their case.

⁴ Section 19A(17) Criminal Evidence Act 1992 as inserted by Section 39 of the Criminal Law (Sexual Offences) Act 2017, available online at:

<http://www.irishstatutebook.ie/eli/2017/act/2/section/39/enacted/en/html#sec39>

We further agree that research with actual jurors to examine the influence of rape myths on their verdicts and also, the extent to which these verdicts might be influenced by pre-trial videos confronting rape myths, would be a very valuable first step. Local research will provide information which cannot be gleaned from the available scientific literature on the subject. Finally, we agree that public awareness campaigns and public education generally are vital parts of the fight against the prevalence of rape myths. Such a large-scale public campaign is about to start in Ireland.

Our own understanding from what we have seen with our own clients and what we have read in the available forensic psychology research, is that rape myths are very pervasive and robust. We would expect that judicial directions and pre-trial videos would not be shown to have a significant and robust effect on jury decision-making in any case in which the defence is founded in large part on rape myths. We suspect that a “harder” approach, one which would prevent the admission of evidence about a complainant’s clothing, general appearance and state of intoxication (at least) for the sole purpose of suggesting that s/he is more likely to have consented to sexual activity because s/he wore certain clothes or had a certain appearance or was drunk – would work better.

RCNI recommendation: Consideration should be given to drafting provisions which would exclude evidence adduced for the sole purpose of suggesting that the complainant is more likely to have consented because of the way s/he dressed/looked/drank etc.

Chapter 7: Social Media Issues

RCNI Commentary: RCNI agrees with the authors of the Review that more responsibility should be placed on social media companies with regard to live criminal proceedings whose outcome may be prejudiced by inappropriate commentary. We also agree that there should be a specific offence by a juror of intentionally seeking out information relating to case in which s/he is currently involved, whether online or otherwise.

Chapter 8: Cross-examination on previous sexual history

RCNI Commentary: RCNI agrees with the broad thrust of these recommendations, in particular those on a specialist approach, training requirements, requirements to put late applications and reasons for granting or refusing an application in writing, robust judicial case management in this area and a strict approach both to the grant of leave and to the conduct of cross-examinations once leave has been granted.

RCNI Recommendation: RCNI recommends that care is taken when drafting provisions to allow for separate legal representation for complainants objecting to the admission of evidence of their previous sexual history, to ensure that all sexual offences are included, and that the ambit of any separate legal representation is clear. The test for admissibility should be as high as possible, having regard to the right of an accused to a fair trial.

Chapter 9: Delay Issue

RCNI Commentary: RCNI agrees very much with the general thrust of these recommendations, many of which are specific to the Northern Ireland criminal justice system and could not be transferred directly to its Irish counterpart. Delays are endemic in our criminal justice too, and as in Northern Ireland, need to be counteracted at every stage

of the criminal justice process. It seems to us that the arguments are very strong for fast-tracking cases involving particularly vulnerable groups, such as disabled victims and child victims of sexual offences. The arguments are also strong for a robust approach to requests for adjournments, particularly those made for the first time on the day of the trial. A detailed, clear and unambiguous approach to timetabling and enforcement of orders made in relation to disclosure and other preliminary matters, whether in Court Rules or through some other mechanism, which makes full use of all electronic assistance available (video-link facilities etc) is essential if delay is to be combatted successfully on either side of the Border.

Chapter 10: Disclosure

RCNI Commentary: The Northern Irish criminal justice system differs significantly from the Irish one with regard to disclosure, so that the Review's recommendations could not be transposed unaltered to this jurisdiction. In particular, there is no obligation here on the defence to produce a defence statement. This means that requests for disclosure tend to generate large volumes of personal and often, largely irrelevant material. Investigators and prosecutors have scant resources to comb this data for anything which might hamper the prosecution, help the defence or provide a lead to other information to do either. This is a challenging exercise when the likely defence(s) must be divined from prosecution statements and any explanation given by the accused at interview. Complainants tend to experience the disclosure process as oppressive and sometimes, so off-putting that they would prefer to withdraw charges altogether rather than submit to it.

That said, RCNI also believes that these general principles in the Review are sound: (1) Disclosure should be regarded as a specialist area needing early and intensive attention, because of its importance to the investigation and any prosecution; (2) Disclosure issues should be resolved as early as possible in the criminal justice process; (3) the best possible use should be made of technology to deal with disclosure faster and more effectively; and finally, (4) robust and effective case management is critical to timely, relevant and adequate but not oppressive or irrelevant, disclosure.

We also note with interest the outline procedure at the end of Chapter 9, for dealing expeditiously with disclosure issues. In Ireland, legislation would have to be introduced first to compel the defence to provide at least an outline of its defence at an early stage. However, we think that there may be scope for obliging the defence to provide a rationale for identified documents/other materials to be disclosed, (other than counselling records), again in timely fashion. Where there is disagreement between prosecutor and defender, or between either and a third party, a judge should have explicit powers to resolve the issue at a preliminary hearing.

Chapter 11: Consent

RCNI Commentary: We note with interest that several recommendations in the Review seem intended to replicate the new provisions on consent in Ireland (See Section 48 Criminal Law (Sexual Offences) Act 2017⁵, which introduced a new Section 9 in the existing

⁵ <http://www.irishstatutebook.ie/eli/2017/act/2/enacted/en/print#sec48>

Criminal Law (Rape) (Amendment) Act 1990). We suggest that any provisions include clarification that the list of circumstances in which there is no consent is an open one, as in our [new] Section 9(3). We further suggest that it might also be helpful to include a version of our [new] Section 9(4), in any new provisions drafted for use in Northern Ireland. This clarifies that consent once given may be withdrawn at any time before or during the sexual activity in question.

RCNI has also advocated for an objectively reasonable standard of belief, and against the creation of a “gross negligence rape”. See our recent submission to the Law Reform Commission on Knowledge or Belief concerning Consent in Rape Law (October 2018)⁶.

RCNI Recommendations:

1.It is recommended that consideration be given to including a provision in legislation similar to that in our own [new] Section 9(3) of the Criminal Law (Rape)(Amendment) Act 1990, as inserted by Section 48 of the Criminal Law (Sexual Offences) Act 2017. It reads as follows:

“This section does not limit the circumstances in which it may be established that a person did not consent to a sexual act”.

2.It is recommended that consideration be given to including a provision similar to that in our own [new] Section 9(4) of the Criminal Law (Rape)(Amendment) Act 1990, as inserted by Section 48 of the Criminal Law (Sexual Offences) Act 2017. It reads as follows:

“Consent to a sexual act may be withdrawn at any time before the act begins, or in the case of a continuing act, while the act is taking place”.

Chapter 12: Voice of Accused

RCNI Commentary: While we agree that legislation should be introduced to prohibit the publication of the identity of any person accused of a serious sexual offence, we think that on balance, it is best to preserve this anonymity until the accused is convicted of such an offence (as here), even in Northern Ireland which does not have a formal written Constitution. This is because in a small country, it is easy to find out the identity of anyone accused of a crime, and thereby, the probable identity of the complainant. Our experience is that complainants are extremely concerned that the details of their complaints might be made public, and that they, or their loved ones, will suffer as a result, in the interval between report and final determination (always months, often years). They are generally very glad to be reassured that in this country, the accused’s identity as well as their own, is not made public before conviction.

RCNI does understand the argument that publicising the identity of the accused once charged may help to encourage other victims of the same person to come forward. However, this should be weighed against the possible costs of publishing the accused’s identity to the original victim(s) in any given case. They may include the generation of

⁶ The Submission may be accessed through this web-link: <https://www.rcni.ie/wp-content/uploads/RCNI-LRC-Knowledge-or-Belief-concerning-Consent-in-Rape-Law-Submission-October-2018.pdf>

material in the media which is so prejudicial to the accused that he succeeds in an application to stop all criminal proceedings because he cannot have a fair trial.

Chapter 13 Marginalised Communities

RCNI Commentary: Our criminal justice system provides that investigating Gardaí must carry out an individual assessments of a victims' specific protection needs at an early stage – which may be updated at any point later on. Reports on specific protection needs are supplied to prosecutors, who may use them to found an application for one or more appropriate special measures. See Part 3 of the Criminal Justice (Victims of Crime) Act 2017 generally⁷.

RCNI agrees with the broad thrust of these detailed recommendations and has put forward some similar recommendations at the end of the Report on vulnerable witnesses which we published last year, *Hearing Every Voice*. In particular, we endorse the emphasis in the Review on specialist training for all relevant criminal justice professionals, with input from experts working in each specific field, and on close relationships with NGO specialist groups working with people with specific vulnerabilities. We further endorse holding a mandatory ground rules hearing in any case where a particular vulnerability has been identified, and the use of skilled intermediaries where necessary and appropriate. We also approve the idea of creating a toolkit to help lawyers and others identify vulnerability, and think it is important to base training, materials, protocols and practice on the best available relevant research findings. Any proposal for positive change in this area should be grounded in the daily experiences of members of each distinct vulnerable group, whose voices must be central to decision-making as to the most appropriate supports including special measures, to be made available to them.

RCNI Recommendation: Consideration should be given to making the individual assessment by police of each victim's specific protection needs, a mandatory requirement.

Chapter 14: The Voice of the Child

RCNI Commentary: RCNI endorses the many positive measures set out in the Review recommendations. These include: mandatory training for all relevant criminal justice professionals, including on the dynamics of child sexual abuse, mandatory Ground Rules Hearings at which such matters as in camera hearings, special measures, the intermediary's report, the child giving evidence earlier in the day, adequate breaks for the child, appropriate forms of questioning using simple language, disclosure issues, and so on, would be considered and ruled upon where necessary.

RCNI also approves these general principles in the recommendations: a robust attitude to requests for adjournments and to testing in advance of court technology is tested, but equally, a flexible and sensitive approach to the use of non-court facilities, where appropriate. Further, in our view the idea of a One House pilot is excellent, and we endorse greater use of court familiarisation for child (and other) witnesses, the emphasis on keeping abreast of research developments, and on recording waiting times and creating a feedback system to inform future practice. Finally, we think the suggestion that it should be

⁷ See footnote 3 above for web-link to the whole Act

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professional misconduct for an advocate to question a child inappropriately, is a very interesting one.

Chapter 15: Training

RCNI Commentary: RCNI approves very much the idea of a committee to coordinate subjects for training and multiple stakeholder engagement in various training programmes put forward. We also agree that there should be greater involvement in training by outside (non-State agency) experts, in particular on the traumatic effects of sexual violence, rape myths, and the reasons for reporting to police and also, considering withdrawal later on. Training should include relevant material on research and best practice from outside the jurisdiction.

A consistent approach to police interviewing is important, as is the emphasis on careful, complete and compassionate communication by police officers and prosecutors (in particular) of major developments in the case, the victim's role in it, and the options, if any, open to him/her – in particular in response to an adverse decision (such as an acquittal or decision not to prosecute at all).

We agree that training should be provided regularly to all courtroom advocates, and we suggest, also to judges, on the best way to question vulnerable witnesses, complainants especially, about the circumstances of sexual offences.

Finally, we would endorse the recommendations about timely, sensitive and clear communication between the PPS advocate and the victim, as in our experience, it is very reassuring and empowering for prospective prosecution witnesses first of all to meet the prosecutor in their case in advance of the trial, preferably in court, and later, to be consulted directly by the prosecutor about their wishes in relation to special measures, any pleas offered, and so on.

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