



**RCNI Submission to the  
Review of Protections for Vulnerable Witnesses  
in the Investigation and Prosecution of  
Sexual Offences**

**November 2018**

# RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences Autumn 2018

## 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.

## Background to This Submission

In 2017, RCNI convened four meetings of an informal multi-agency group of experts in different disciplines to examine what more could be done to support vulnerable witnesses giving evidence in trials of sexual offences, among others. Following a desk top review of special measures in other jurisdictions and attendance by three group members at a conference in London on access to justice for vulnerable witnesses, the group's research, conclusions and recommendations were collated in a report entitled "Hearing Every Voice – Towards A New Strategy on Vulnerable Witnesses in Legal Proceedings"<sup>1</sup>, published in April 2018. The recommendations in this Report are to be considered as part of this Review under its Terms of Reference<sup>2</sup>.

This Submission does not seek to repeat these recommendations, but to draw attention to a small number of discrete issues which affect large numbers of survivors of sexual violence who wish to pursue a complaint to An Garda Síochána and which were not addressed, or not addressed in great detail, in "Hearing Every Voice", for reasons to do with constraints of time and resources. The views presented in this Submission are those of RCNI, not necessarily those of any other members of the Vulnerable Witnesses informal group.

## Structure of this Submission

Each issue is discussed in turn in a separate section, and any relevant recommendations from RCNI are to be found at the end of each section.

## "Aged Out" Minor Witnesses

It often happens that child complainants provide a statement to the Gardaí soon after the sexual assault or rape which is likely to be video-recorded, but by the time the case comes

---

<sup>1</sup> Available online at: <https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf>

<sup>2</sup> Press release setting out Terms of Reference for Review dated 7 September 2018 – available online at: <http://www.justice.ie/en/JELR/Pages/PR18000279>

## RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences Autumn 2018

up for trial, that complainant is over the age of 18 and therefore, will not be able to have the pre-recording stand in lieu of their evidence in chief<sup>3</sup>. Nor will they be able to benefit from the presumption that they can give their evidence by video-link, if they so wish, - which would have been available to them if they had still been under 18 at the time of the trial. They can only benefit from video-link facilities over the age of 18 if the Court grants leave, and it appears that in practice, the Court does not often give leave in these circumstances.

Delays between initial report and statement taking and the effective court date are rarely the fault of the child complainant, who has given a statement in the legitimate expectation that s/he will be able to give their evidence in court by video-link<sup>4</sup>. In the case of child complainants whose evidence has been pre-recorded, they have provided a statement in the legitimate expectation that while they may have to face live examination in chief if the pre-recording is not allowed to stand as their direct evidence, and certainly will have to face live cross-examination and re-examination, they will be able to give all their evidence by video-link.

Apart from child complainants who have “aged out” between complaint and effective hearing date, there are other groups of adult complainants who would benefit from a presumption that they are entitled to give evidence using special measures, such as elderly complainants giving evidence about historic child sexual violence, those who have been or are being threatened by the accused and/or his associates, and (in the case of video-link evidence) those who are now living abroad, though the crime happened in Ireland. Accordingly:

RCNI recommends that it should be easier for adult complainants to access video-link facilities. At a minimum, there should be a presumption in favour of allowing complainants to give evidence if the case relates to child sexual violence, and if s/he has been or is being, intimidated or harassed by the accused or his associates. It may be helpful to look at the relevant provision in the UK Youth Justice and Criminal Evidence Act 1999 as amended, Section 22<sup>5</sup> with a view to using it as a model for reform of the current Irish provisions to benefit complainants who are adults at time of trial but made police statements as children.

---

<sup>3</sup> See Law Reform revised version of the relevant Section 16 (1) (b) of the Criminal Evidence Act 1992 as amended, incorporating all changes up to and including 30 May 2018 via this web-link: <http://revisedacts.lawreform.ie/eli/1992/act/12/section/16/revised/en/html>

<sup>4</sup> See Law Reform revised version of the relevant Section 13 of the Criminal Evidence Act 1992 as amended, incorporating all changes up to and including 30 May 2018 via this web-link: <http://revisedacts.lawreform.ie/eli/1992/act/12/section/13/revised/en/html>

<sup>5</sup> Available online at: <http://www.legislation.gov.uk/ukpga/1999/23/section/22>

## RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences Autumn 2018

### Legal Representation for Complainants

At present, complainants in criminal proceedings relating to sexual offences are entitled to independent legal representation in two situations only: (1) on any application by defence for leave to adduce evidence of their “other sexual experience”, under Section 3 and Section 4A of the Criminal Law (Rape) Act 1981<sup>6</sup> as amended, and (2) in order to object to the disclosure of their counselling records to the prosecution or defence, under Section 19A of the Criminal Evidence Act 1992<sup>7</sup> as amended by Section 39 of the Criminal Law (Sexual Offences) Act 2017.

In each of these discrete and limited situations, a separate pre-trial hearing is envisaged as the usual procedure, though it is possible for the relevant applications to be made during the course of the trial also. Neither one of these pre-trial hearings is held in public or in front of a jury. Essentially, they are both procedures by which disagreements either between the parties themselves, or the parties and the complainant or (in the case of counselling records) the third party holding those records, about the admissibility of certain kinds of evidence, may be resolved through legal argument. The separate identity, interests and to a limited extent, rights of the complainant (and/or the third party holding his/her counselling records in the disclosure case) are recognised by providing for their independent legal representation.

This means that the complainant has no independent legal representation during the whole course of the trial itself, where the central issue is not admissibility of evidence but whether the offence(s) on the indictment or charge sheet can be proved beyond reasonable doubt against the accused. This is logical in our adversarial system, a contest between two parties each putting forward a different version of the events at issue where the status of the complainant is that of principal prosecution witness.

It has been suggested in the media in particular since the notorious Belfast trial ended in acquittal in March 2018 – that it would be desirable to allow complainants to have their own independent and continuous legal representation throughout the whole course of the criminal proceedings, including the trial. This is the case in certain Continental countries in which there is no common-law, adversarial criminal justice system but rather a more judge-led, inquisitorial approach, and where, importantly, the complainant has the status not of a witness for the prosecution but of a party in his/her own right.

---

<sup>6</sup> Section 3 may be accessed via this web-link:

<http://www.irishstatutebook.ie/eli/1981/act/10/section/3/enacted/en/html#sec3>

<sup>7</sup> The relevant Section 19A may be accessed via this web-link:

<http://revisedacts.lawreform.ie/eli/1992/act/12/section/19A/revised/en/html>

## RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences Autumn 2018

In the course of the desktop research on practice and procedure in relation to vulnerable witnesses in other jurisdictions for our recent Report,<sup>8</sup> we did not come across any common-law country in which independent legal representation was available to complainants throughout criminal proceedings. Where it was available, it was so in relation only to specific discrete issues, such as disclosure (as here). We are not convinced that its introduction here would work, either for complainants or for the criminal justice process itself, for the following reasons:

- Generally, its addition would prolong and complicate criminal trials, already subject to inordinate delays beforehand and already prone to interruption by the need to decide certain legal issues as they arise – as the Court would be obliged to listen to the interjections, objections and submissions of three lawyers instead of two;
- What would happen if the interests of the complainant and the prosecution were opposed to each other? For example, suppose the complainant instructs her lawyers that she wishes them to argue for certain charges against the accused to be pursued, not dropped, and the prosecution’s view is that it is in the public interest that these charges should not be pursued (for whatever reason)? At present it is clear that the prosecutor, though s/he can and does take the views of the complainant into account, - has the last word. If counsel for the prosecution and counsel for the complainant cannot find an accommodation which satisfies both, - should the Court have to decide? If this is to be the case, does it not follow that the independence of the prosecution, a fundamental principle of our system, is undermined?
- At present, investigating Gardaí, prosecutors and judges have clear responsibilities with regard to individual needs assessment and provision of protective measures and special measures to make it easier for certain complainants and (sometimes) other prosecution witnesses to participate in the criminal justice process. Gardaí and prosecutors are each bound not only by victims’ rights legislation<sup>9</sup> transposing the EU Directive 2012/29<sup>10</sup> establishing minimum standards on the rights, support and protection of victims of crime [etc], but also by their own internal organisational standards (the Garda Síochána Policy on the Investigation of Sexual Crime, Crimes against Children and Child Welfare, and the Guidelines for Prosecutors respectively). In our view, investigators, prosecutors and judges should continue to hold these

---

<sup>8</sup> “Hearing Every Voice: Towards A New Strategy on Vulnerable Witnesses in Legal Proceedings” – see Note 1 above for reference and web-link

<sup>9</sup>Transposing statute is: Criminal Justice (Victims of Crime) Act 2017, available online at: <http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html>

<sup>10</sup> Available online through this weblink: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>

## RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences Autumn 2018

responsibilities towards victims, and if anything, to take on more responsibility for ensuring that complainants, especially the most vulnerable among them, are facilitated to give their best evidence and incur as little risk as possible of being re-traumatised by the justice process itself.

- The last point made above is related to this one: should not the whole criminal justice process be altered to make it easier for victims of crime and other prosecution witnesses to give their best evidence, with minimal risk of being re-traumatised by the experience? It seems to us that the addition of a new cadre of victim representatives to the existing cast members in a criminal trial – would not tackle the problem of ensuring that a victim can give his/her best evidence with minimal risk of being re-traumatised, at source.
- Having three “sides” represented instead of two would not just lengthen hearings but also run the risk of making them more, rather than less, adversarial. We suspect that any defence lawyer faced with an additional opponent making a case for a specific special measure would be more, not less, inclined to resist that application, from fear that the prosecution’s interests would be perceived by the jury as more important or valid than those of the defence, because at least some of these interests are represented by a second advocate.
- In our view, it would be better to realise these twin aims of enabling victims to give their best evidence and to do with so with the minimum risk of additional trauma, - through appropriate continuing professional education (1), effective and continuing inter-agency oversight of the current system in operation (2), - and a joint commitment, shared with the executive, to swift action to tackle difficulties as they arose(3).
- In sum, it seems to us that there is no obvious or desirable role for a dedicated victim’s lawyer to represent their client’s interests at every stage of the trial – in our criminal justice system as it is now constituted. If that system were to be made less adversarial and more inquisitorial, and complainants were allowed to join themselves as parties to proceedings, such a role might be appropriate.
- RCNI does recommend, however, that complainants in sexual cases be given access to legal advice at the earliest possible stage of any contemplated criminal justice proceedings, and that that advice remain available to him/her as long as necessary (in some cases, till after the accused person is released from prison), and that this advice be provided at public expense. At present, advice is only available from the Legal Aid Board once someone has been charged with a sexual offence. It is often most necessary before a victim reports and once a report has been made, whenever the DPP decides not to prosecute in his/her case (about two-thirds of cases).

## RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences Autumn 2018

### Support and Advocacy Workers

At present, victims of sexual crime can be accompanied to SATUs (Sexual Assault Treatment Units), to any encounter with a member of An Garda Síochána, and to any Court hearing, by trained accompaniment volunteers, thanks to funding made available through the HSE (SATU) and the Commission for the Support of Victims of Crime (Garda and Court Accompaniment). However, we are very much aware that victims' needs for support from the incident onwards are multi-faceted. They extend to advice, information and support on many practical matters including referrals to specialist outside professionals or organisations, as well as legal advice, accompaniment itself, and where appropriate, in-depth individual counselling. Rape Crisis Centres are called on to provide support at every stage of the client's recovery and at every stage of the criminal justice process. In our view, it is time that this general supporting role was professionalised and extended to absorb the various accompaniment roles. (Legal advice and in-depth specialist counselling are excluded). In this way, victims of sexual violence could be provided with continuous care and support from the very day of the incident - generally from the same person, who would be trained and supported herself in this role. Victims of sexual crime would have available to them a single person who would be able to supply information, support and referrals on the wide range of issues with which they must grapple – and who would work independently of any State agency, that is, s/he would be based in, employed, supported and supervised by Rape Crisis Centres.

Accordingly, RCNI recommends that a Support and Advocacy Worker programme is piloted in at least two urban and three rural Rape Crisis Centres, over the course of a year, and if this results in positive outcomes for victims, that it should be extended countrywide. The blueprint for this idea exists in Scotland, where Government funding was made available to pay for a cohort of full-time 15 Support and Advocacy Workers (about one per Rape Crisis Centre) for an initial period of 18 months, starting in February 2016 and co-ordinated by Rape Crisis Scotland (the equivalent of the RCNI in Scotland). Its first formal independent evaluation reported very positive outcomes<sup>11</sup>. Funding has now been renewed for a further period and the number of workers has been increased to 23.

### Other “Sexual Experience” Evidence

This topic needs attention. No clear procedure with time-lines, no explicit limits on the range of possible grounds on which an application may be brought, no list of factors to be taken into account by the judge when exercising his or her discretion in relation to whether any “sexual experience” evidence should be allowed, and no clear definition of what “sexual experience” is, now exist. While we understand of course that very late applications (even

---

<sup>11</sup> See this web-link to the full text of the evaluation [2018]: [http://www.sccjr.ac.uk/wp-content/uploads/2018/06/RCSNAP-Evaluation-Final-Report\\_2018.pdf](http://www.sccjr.ac.uk/wp-content/uploads/2018/06/RCSNAP-Evaluation-Final-Report_2018.pdf)

## RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences Autumn 2018

during trials) are sometimes necessary, they should not be the norm. They should be decided during a pre-trial hearing if at all possible.

It is also time for the legislation to be amended to disallow some rape myths: it should not be possible for the defence to rely on evidence that a complainant has had many sexual partners, or many sexual encounters with a smaller number of them, or has been paid for sex in the past, to put forward the argument to the jury that her history makes it more likely that she was consenting to sexual activity on the occasion(s) now at issue in the trial.

A fuller discussion of this topic together with a list of recommendations may be found in our Position Paper on Previous Sexual History (2012)<sup>12</sup>.

### Conclusion

In summary, we think that the criminal justice system could and should be improved to make it easier for victims of sexual crime to give their best evidence and also to minimise the risk of additional trauma to them when they do so, and we assert as we did in *Hearing Every Voice*, that it is not necessary to diminish the rights of the accused in order to achieve this.

**Specialist training** in sexual violence appropriate to each professional's role, for all judges, prosecutors, defenders, and Garda officers engaged in the investigation, prosecution and trial of sexual offences is central to all our recommendations, both those in this Submission and those in *Hearing Every Voice*.

Finally, we would see the establishment of statutory **Pre-Trial Hearings** as the essential underpinning for the effective implementation (and expansion) of special measures to benefit complainants, the reduction of unnecessary delays, the smooth running of trials, and the efficient determination of net issues which do not have to be decided during the trial itself.

We would be happy to do our best to provide further information on any topic we have outlined in this Submission, if so requested.

**Ref: RCNI Legal Policy Director**

**Date: 5 November 2018**

**Rape Crisis Network Ireland clg**

**Carmichael Centre**

---

<sup>12</sup> Available through this web-link: <https://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>

## RCNI Submission to the Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences Autumn 2018

North Brunswick Street

Dublin D07 RHA8

Tel: 01 865 6954

Email: [admin@rcni.ie](mailto:admin@rcni.ie)

Website: [www.rcni.ie](http://www.rcni.ie)