



**RCNI Submission on  
Victims' Testimony in Cases of  
Rape and Sexual Assault  
to the  
Joint Oireachtas Committee on Justice**

**February 2021**

**Supported by Safe Ireland**



## **RCNI Submission on Victims' Testimony in Cases of Rape and Sexual Assault to the Joint Oireachtas Committee on Justice February 2021**

### **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**

RCNI welcomes very much the opportunity to make a submission to the Joint Oireachtas Committee on Justice on victims' testimony in cases of rape and sexual assault. Victims' testimony lies at the heart of the criminal justice process: it is very difficult to convince a jury that a person accused of rape or sexual assault is guilty beyond reasonable doubt if they do not hear directly from the victim of the crime. If no victim gave evidence, no-one could be convicted and thus be held accountable for these extremely serious acts of sexual violence.

However, it is also very difficult for victims of sexual violence to make a formal complaint to An Garda Síochána and sustain it for the many months it will take for the investigation and prosecutorial stages to be completed, and where a decision is made to prosecute, for the many more months it will take to reach court for hearing. Even where the person is convicted following a trial and goes to jail for a long time, victims may have to live with well-founded fears about what that person might do to themselves and to others, once released.

RCNI's view is that the criminal justice system can, and must, support victims of sexual violence in every way possible to give their best evidence, from the time of the offence to trial and beyond, and must ensure that their necessary participation takes place with the minimum risk of their being re-traumatised by the criminal justice process itself. This vital participation on which the whole system of criminal justice depends cannot and should not come at unbearable personal cost to the victims themselves.

RCNI would like to acknowledge the commitment of the current Government, and in particular that of the Minister for Justice and her Department, to making improvements to the protections available to vulnerable witnesses in the investigation and prosecution of sexual offences, on foot of the recommendations made in the O'Malley Report published August 2020. We look forward to continuing to work with Department officials and other agencies to help implement these recommendations.

RCNI recognises and welcomes also the many positive steps taken to improve the experience of victims of sexual offences taken by An Garda Síochána, the Office of the Director of Public Prosecutions, the legal professions, the judiciary, and others, many of

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which predate and will overlap with the implementation of the O'Malley Report recommendations.

In our view, victims of sexual violence who make the difficult decision to report the crime should benefit from world class standards in the range of supports which are specially designed to facilitate them to participate as fully and as safely as possible in the criminal justice process. Each individual professional working within that system should continue the pursuit of excellence in the quality of these supports, not alone because the whole criminal justice system depends on the willing co-operation of victims of crime, but also because victims of crime themselves deserve no less than a full recognition of their own rights under the Constitution and under European law.

### **Structure and Scope of this Submission**

This submission will begin by examining the role of the victim's testimony in the criminal justice system from different perspectives and then attempt a synthesis of these perspectives which is workable within our own criminal justice framework, by describing our own analysis of the difficulties facing victims of sexual violence who are among the most vulnerable witnesses encountered in our criminal courts.

Where possible, RCNI will make recommendations for improvements, focussing mostly on those which were identified through our own research and practical experience but which were not part of the O'Malley Report. RCNI hopes that because a very wide view is being taken in the Implementation Plan, some at least of these supplementary recommendations will also be implemented through the Plan. (A summary of the recommendations made in the O'Malley Report can be found at Appendix 2).

A Checklist of all RCNI recommendations will be found at the end of the document. The Reference list under the Checklist also includes a list of previous RCNI submissions and reports on victims' testimony and web-links to each one.

This submission is not intended to be an exhaustive list of all possible protection measures and special measures available to support various groups of sexual violence victims. These are examined in some detail in other documents, for instance the RCNI Report "Hearing Every Voice" (2018)<sup>1</sup>. A full table of available special measures is also included at Appendix 3.

RCNI understands that this submission should be confined to victims' testimony in the criminal courts. Accordingly, we do not address any issues relating to victims' testimony in civil or non-judicial proceedings where sexual violence is part of the factual background.

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

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However, we would be delighted to address these areas of victims' testimony in a separate submission if requested to do so by members of the Committee.

### **Victims' Testimony in cases of rape and sexual assault:**

#### **I Rape crisis perspective or the "trauma lens" – the criminal justice system can and does re-traumatise victims of sexual violence**

Through research, data collection and daily contacts with our clients, RCNI knows that sexual violence victims are inherently vulnerable and certain groups are even more so. We also know that not only is the experience of sexual violence a devastating trauma in and of itself but that reporting and each stage of the justice process makes demands on victims. These can be onerous and traumatic. The very necessity to speak about the sexual violence can itself trigger the re-living of that original trauma. Other factors which have the potential to re-traumatise victims who make a report to the authorities include: lack of information, advice, skilled and sympathetic support including access to specialist counselling, difficulties in contacting the investigating officers, lengthy delays throughout the process, fear of the perpetrator and of retaliation from him and/or his associates, court dates whose timing clashes with the victim's life events (family events, parenting, holidays, education etc.) as the victim does not control the scheduling of the events of the justice process but instead has to adjust their lives around the dates set for them as and when they are notified of same, fears related to privacy and anonymity, and the fear of the trial process itself, especially the fear of being cross-examined not only on intimate and traumatic events but also on one's entire character, including one's sexual character.

RCNI's view is that every victim of sexual violence who reports the offence to the police should be seen as an intrinsically **vulnerable witness** and as an **individual** whose needs are specific to their situation and their capacity. As far as possible, the criminal justice system should identify and accommodate those needs appropriately. Sexual violence victims need a range of dedicated and specialised supports to engage with criminal justice process so that risks of being re-traumatised by court process are minimised and they are facilitated to give their best evidence.

Some victims of sexual violence have **additional** vulnerabilities because of their young age and/or the nature of any temporary or permanent disability. These vulnerabilities can magnify the re-traumatising effects of taking part in criminal justice proceedings. While there are other factors that can add additional vulnerability, this submission will focus on the gaps in the provision of supports for these groups in particular.

Finally, this submission applies to victims and witnesses giving evidence in respect of **all** sexual offences, not simply rape and sexual assault offences. From the point of view of the trauma they cause and the difficulties of giving evidence for their victims, there is no

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meaningful difference between rape and sexual assault on the one hand and all other sexual offences on the other.

### II The criminal justice perspective – live oral evidence is the best evidence (or is it?)

Our largely oral-based and delay-prone criminal justice process is not designed to deliver the best possible evidence from vulnerable witnesses, or to avoid their re-traumatisation through participation in the criminal justice process itself, as far as possible.

Live oral evidence, especially in response to cross-examination, is still seen as superior to written or otherwise pre-recorded evidence, just as it was when this was written c 1900:

- “Cross-examination is the greatest legal engine ever invented for the discovery of truth” – John H. Wigmore, quoted in “Evidence in Trials at Common Law” (JH Wigmore, J H Chadbourn and WA Reiser), published by Little, Brown USA in 1974), at page 32

This reliance on oral evidence may have made some sense in times past in which more general communication was oral and in which the delay between the offence occurring and the witness having to give evidence about what happened in court was generally much less. The delay point is well illustrated by the Ruth Ellis murder case in England in 1955: the murder was committed on 10<sup>th</sup> April, admittedly in front of several witnesses. Arrested on the spot very soon afterwards, Mrs Ellis was charged in the Magistrates Court within hours. Her trial for murder began in the Central Criminal Court (the Old Bailey) on 20<sup>th</sup> June 1955. After a trial lasting two days, a verdict of guilty was returned and the mandatory death sentence was passed. She did not appeal, but a detailed letter was sent to the Home Secretary on her behalf asking him to commute the death sentence. He refused the request and Mrs Ellis was hanged on 13<sup>th</sup> July 1955, three months after the murder<sup>2</sup>. So short a gap between offence and execution of sentence after trial of so serious an offence would be unimaginable now in either the UK or Ireland.

The reality now is that the gap between offence and trial is very much longer, even in cases of “recent” rape and sexual assault: it is more likely to be measured in years than in months. With the advent of the internet and electronic communications, there is much less reliance on detailed individual memories of events and conversations because they are not needed as they were before, many gaps in recall may now be filled by looking up the internet or consulting other (mainly electronic) records. It is time to ask why our criminal justice system does not ensure that victims of serious offences, including sexual offences, can give their evidence much closer to the time that the offence(s) happened. It is also time to ask whether, at the very least, the most vulnerable of these witnesses should not be able to

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<sup>2</sup> See this online article for a full account of the case: <https://www.capitalpunishmentuk.org/ruth.html>

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avoid the ordeal of giving live evidence at trial at all but should instead have the opportunity to give all of their evidence, including evidence in response to cross-examination, much earlier in proceedings.

Modern cognitive and forensic psychology findings<sup>3</sup> underlie the conclusions of reforming judges such as Lord Carlway, Scotland's current Lord Justice-General (most senior judge), that "a person's memory does not improve over time or being put under stress" [cited in an interview with BBC dated 1<sup>st</sup> May 2018].<sup>4</sup> In short, Wigmore's view of cross-examination as an effective forensic tool honed to elicit the most accurate evidence is psychological nonsense. There is now much more understanding of the negative effects which factors such as the trauma of the offence itself and the delay between offence and trial may have on the accuracy of memory and on the ability of the witness to find the emotional strength to share their memory of what happened in court. It is time for the criminal justice system to adapt its structures and procedures to accommodate the needs of all vulnerable witnesses in line with the findings of the latest and best quality scientific research in this area.

### **III Vulnerable Witnesses – how can they give their best evidence with minimum risk of being re-traumatised by the experience and with due regard to the right to a fair trial?**

For all the reasons above, RCNI has made it a priority to look at ways of reducing both risks of re-traumatisation and delays, and to focus most on the most vulnerable witnesses, in which group we would include **all** victims of sexual violence. Inspired by learning about major reforming initiatives to help vulnerable witnesses take part in criminal justice process in Scotland, England & Wales and elsewhere, RCNI convened a small inter-agency group to examine vulnerable witnesses issue and produce a report summarising its research, findings and recommendations. This was published in March 2018 as "Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings"<sup>5</sup>. A summary of the desktop research conducted on the treatment of vulnerable witnesses in Scotland and England & Wales and reported in this Report may be found at Appendix 1 hereto for easy reference.

#### **"Hearing Every Voice" Report: Principal Conclusions**

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<sup>3</sup> There is a wealth of material on this topic. One very useful compendium of views is "Addressing Vulnerability in Justice Systems" (ed Cooper, Hunting) London (2015), published by Wildys, information is available through this webpage: <http://www.wildy.com/isbn/9780854901968>

<sup>4</sup>available through this web-link: <https://www.bbc.com/news/uk-scotland-43879455>

<sup>5</sup> See footnote 1 above and Reference list at the end of this submission for a full reference

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- Improving experience of vulnerable witnesses who are victims does not have to mean that the right of an accused person to a fair trial is compromised – it is **not a zero-sum** game;
- Understanding why a **specialised and individualised** approach to vulnerable witnesses is needed – is key – therefore the right professional training is vital;
- There is a real risk that serious **additional harm** may be caused to vulnerable witnesses by their participation in the criminal justice process, if their needs are not identified and efforts made to minimise harm;
- While our legislative framework does include many measures (some of them entirely new) which are helpful to ever more victims and other vulnerable witnesses, there are still some significant **gaps**;
- Our procedural provisions need to be overhauled so that they can facilitate use of **special measures**;
- Delays between charge and trial are still inordinately long for many especially vulnerable victims of sexual violence (especially **child victims**); and
- There is a real interest among experienced judges, lawyers and Gardaí in building on their individual areas of specialist knowledge, **to make the system better** for everyone who must use it.

### “Hearing Every Voice” Report: Principal Recommendations

Note: Recent developments are added under each Recommendation in purple type for easy reference.

- The use of **pre-recorded statements** should be increased, though not made mandatory, and pre-recorded cross-examination should be piloted;
- Vulnerable **accused** persons should be able to benefit from special measures when appropriate;
- Training of relevant professionals should include training in **how best to communicate** with vulnerable witnesses when taking Garda statements, assessing cases for prosecution and taking part in court proceedings – and should be resourced adequately. *The need for specialised training is now being addressed through an inter-agency sub-committee as part of the Implementation Plan for the relevant recommendations made in the O’Malley Review.*
- Statutory pre-trial **hearings** should be the primary means through which special measures to address vulnerable witnesses’ individual needs should be raised and

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decided upon. This is being addressed as a matter of urgency also as part of the Implementation Plan, through the Criminal Procedure Bill 2021.

- **Gaps** in the available menu of special measures should be closed, especially in relation to vulnerable witnesses who do not have a “mental disorder” but do have a communications difficulty;
- The role of **intermediaries** with regard to specific groups of vulnerable witnesses should be examined and the relevant legislation amended, to cover answers as well as questions. This is also now being examined by an inter-agency sub-committee as part of the Implementation Plan for the relevant recommendations made by the O'Malley Review;
- A **flexible, innovative and open approach** should be taken with vulnerable witnesses, including children, so that e.g. use of Court dogs might be considered to calm and reassure child victims giving evidence by video-link (a research project using EU funding is envisaged to explore Court dogs); and
- A **national inter-agency steering group** should take the lead on vulnerable witnesses to make sure that their interests get the dedicated attention which they need. This is now effectively in place as the Recommendations of the O'Malley Review are implemented. However, once the current Audit of Domestic, Sexual and Gender-Based Violence services has been completed and the new National Strategy on Domestic, Sexual and Gender-Based Violence is in place, the oversight structures are likely to take on a new shape.

### “Hearing Every Voice” Report: What Happened Next?

**September 2018:** The former Minister for Justice instituted a **Ministerial Review** of the protections for vulnerable witnesses in the investigation and prosecution of sexual offences, on foot of the public outcry after the Belfast rape trial and after publication of “Hearing Every Voice” in April 2018, to be conducted by a Working Group under the auspices of the Criminal Justice Strategic Committee, and chaired by Dr Tom O'Malley, NUIG Senior Lecturer in Law and leading authority on the law on sexual offences and on criminal law generally. Submissions were invited from NGO specialist services and other relevant professionals, with whom some separate consultations were held.

In August 2020, the O'Malley Review was published and made 55 recommendations for improvement of those protections – it goes well beyond the Garda station and the court room, taking a wide view of what is meant by a vulnerable witness. In October 2020, Government published its Implementation Plan for those recommendations, “**Supporting the Victim's Journey**” – this too takes a wide approach, encompassing multi-department and multi-agency tasks.

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### Main Points of Supporting a Victim's Journey:

- Expand existing Victims Charter website (already completed), develop and build on existing consent education initiatives at both secondary and third level as well as general awareness level (under way), map existing sexual violence victim support services across the country (under way);
- Conduct external evaluation of Garda training, ensure good geographic spread of specialist AGS interview facilities (Garda training initiatives were already either under way or completed, roll out of specialist units was already completed by 09/20)

### New legislative provisions needed:

- Priority was given to publishing and introducing legislation on pre-trial hearings to Oireachtas. It took shape as the recently introduced Criminal Procedure Bill 2021;
- Other legislative recommendations, such as those on expanding the reach of "Section 3" to include sexual assault offences, the expansion of the role of separate legal representative, extension of exclusion of the public, extension of right to legal advice, and so on, will be introduced to Oireachtas in a new Bill by end 2021;
- Disclosure: consideration will be given to whether medical and other personal records should be protected as counselling records are at present;

### Training:

- Specific action plans should be devised for each responsible agency/profession besides AGS, and including judiciary, also for counsellors and psychotherapists (many in the area are already specialised under RCNI specialist training and most are already registered with professional bodies . The work of the relevant inter-agency sub-committee on Specialist Training, set up as part of the Implementation Plan for the O'Malley Review Recommendations, has already begun.
- Intermediaries: There is a specific plan to design training for and recruit cohort of intermediaries with right skills to assist vulnerable witnesses in criminal justice process. This is being progressed through the relevant inter-agency sub-committee on Intermediaries, formed as part of the Implementation Plan for the O'Malley Review Recommendations.

### **Outstanding gaps in the protection and support of vulnerable witnesses in our criminal justice system which are not included in the O'Malley Report Recommendations:**

- It should be possible, though not mandatory, for all victims of rape, sexual assault and other sexual offences to have their formal statement pre-recorded and allowed

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to stand as their evidence in chief. At present, this right is confined to victims and some witnesses under 18 and those who are over 18 and have a “mental disorder” as defined in the legislation<sup>6</sup>. From a trauma perspective, there is much to be said for the victim having to relate what happened as few times as possible and from a best evidence perspective, the victim’s memory is likely to be fresher closer to the time of the offence and the jury will have the benefit of viewing this evidence at a time when the effects of the offence were much more likely to be obvious in the victim’s speech and demeanour. However, this is not a solution to suit every victim or witness: where electronic recording itself has been part of the offending behaviour, for instance, in a case of child sexual exploitation through the creation of child sexual abuse material, it may be very harmful to the victim’s psychological health. If the rest of the victim’s testimony is given live through video-link at court, as it must be at present, they still have to face the difficulties of live cross-examination, and of course, the attendant delay before trial. The victim or witness may find it difficult to remember the context of some of her pre-recorded evidence when cross-examined years later about it, and may appear less credible to the jury as a result. For this reason, we recommend the introduction of pre-recorded cross-examination (see further at next point below).

- **RCNI recommends** that the pre-recording of evidence in chief which can be allowed to stand at trial instead of live evidence, is made available to adults who do not have a “mental disorder” as defined in the legislation.
- RCNI’s view is that it would be best to have all the evidence of victims of sexual offences given – and pre-recorded - under the best possible controlled conditions well in advance of trial. This is why in “Hearing Every Voice”, we advocated the piloting of the pre-recording of cross-examinations, as well as examinations in chief, of victims and witnesses in sexual violence cases. Provided that certain practical issues were addressed promptly through robust case management and a statutory preliminary trial framework, such as that envisaged in the new Criminal Procedure Bill, and provided also that there is a mechanism through which any fresh evidence may be put before the court at a later stage, we see no reason in principle why trauma should not be kept to a minimum for witnesses, especially **particularly vulnerable witnesses** such as **children and people of any age with some form of intellectual or learning disability** who may have the most difficulty in recalling the detail of past events after months or years.

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<sup>6</sup> See Section 16(1)(b) Criminal Evidence Act 1992 as amended. Part III deals with special measures for victims and witnesses other than the accused. The whole consolidated statute is accessible online via this web-link: <https://revisedacts.lawreform.ie/eli/1992/act/12/front/revised/en/html>

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- **RCNI recommends** that the pre-recording of cross-examination is piloted in a small number of courts for child victims, child witnesses and victims and witnesses with some form of intellectual or learning disability, and that this pilot should also include the pre-recording of any necessary re-examination, so that all of the victim's testimony has been gathered ahead of trial.
- Such additional pre-recording of cross-examinations should take place after consideration of any special measures needed at a preliminary trial hearing, and the pre-recording itself should be overseen by the trial judge and held in conformity with any directions given at the preliminary trial hearing. Similar procedures are now operating in both England & Wales and Scotland. Please see Appendix for a summary of their respective procedures in this regard;
- **RCNI recommends** also that the current statutory regime of special measures<sup>7</sup> be redesigned and streamlined so that there is a presumption in favour of their being granted to **all victims of sexual offences**, not alone those who are under 18 or who have a "mental disorder" and so that the conditions of eligibility are not different from one measure to another; and
- **RCNI recommends** that serious consideration be given to expanding the current statutory regime of special measures to include vulnerable **accused persons**. The rationale for this recommendation is to counter the prevailing legal cultural norm that a special measure granted to a complainant or other prosecution witness is unfair to the accused person because it signals his probable guilt to the jury – and therefore, must be resisted strenuously. This makes special measures hard to obtain for anyone who is not a child or a person with a mental disorder, in practice. Our view, based on what we have heard from legal professionals in Scotland, is that once special measures become available to vulnerable accused persons also, they lose force as a bone of contention between prosecution and defence and over time, become acceptable and non-controversial and thus, simple to access for those who need them (special measures were extended to certain accused persons in 2014 in Scotland);
- **RCNI recommends** that all victims of sexual offences who must give evidence in criminal proceedings be supported by:
  - Professionalised support and advocacy services run by specialist NGOs, e.g. rape crisis centres, who would provide Garda and Court accompaniment as needed and also be available to provide tailored individual support, both practical and emotional, from first contact to the end of the case and beyond. ([Increased access to free legal advice](#))

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<sup>7</sup> See footnote 6 above for web-link to the relevant Act (consolidated version)

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for victims of sexual offences was recommended by the O'Malley Review and will be implemented).

- **RCNI recommends** that the current law on the use of intermediaries as a special measure in court be amended so that not only questions put to the witness, but also the witness's answers – may go through the intermediary; and
- **RCNI recommends** that the particular difficulties of witnesses who are of age, who do not have a “mental disorder” or mental condition which would warrant use of an intermediary, but who nevertheless have sometimes significant communications difficulties (e.g. people who have a hearing difficulty or speech impediment), are addressed in the proposed amendments to the existing special measures statutory framework; and
- **RCNI recommends** that in any legislation relating to arrangements to be made for special measures, such as the current Criminal Procedure Bill, and any substantive legislation dealing with special measures themselves, care should be taken to ensure that provisions are drafted widely enough to allow for a more open approach to facilitating witnesses with novel special measures suitable in individual cases (such as the use of court dogs).

### **Positive Signs for the future of Victims' Testimony in cases of Rape and Sexual Assault – the Implementation Plan for the O'Malley Review Recommendations:**

- Minister for Justice has repeated that the Implementation Plan for the O'Malley Review Recommendations is an **open document** and that she expects it will be revisited and revised along the way – and invited NGOs to participate (1) in construction of Implementation Plan itself and also (2) in consultation process which will be ongoing throughout the lifetime of Implementation Plan;
- Specialist NGOs have been asked to serve on the three subcommittees: mapping existing services (which feeds into the current Government Audit of Domestic, Sexual and Gender-Based Violence infrastructure), intermediaries, and specialist training, and work has started in earnest on all three.

### **Conclusion**

RCNI's view is the best evidence and analysis from other disciplines can and must inform our approach to supporting victims to give evidence in trials of sexual offences. Practitioners and policy makers alike should be trained to understand the effects of both original and secondary trauma not only on victims' psychological well-being, but also on their ability to recall and recount what has happened to them. Everything possible should be done to shorten waiting times before trial, including measures taken to pre-record the victim's

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entire evidence, where that is both fair and appropriate, and including the introduction of preliminary trial hearings. All of these initiatives should be underpinned by adequate resources, including resources to ensure that there is continuous, personal, individual, independent and professional support available to every victim of a sexual offence. The current positive initiative that is the Implementation Plan of Supporting a Victim's Journey must be resourced adequately, not only financially and through the provision of enough judges, courts, and specialist lawyers and Garda officers, but also through the development of additional perspectives drawn from the findings of the best forensic psychology research in this field. In our view, a close analysis of these additional perspectives will do much to ensure that the current measures being taken to mitigate secondary trauma to victims, reduce impunity for perpetrators and increase public confidence in the criminal justice system, are regarded as successful by victims of sexual offences themselves.

**Ref:** RCNI/LPD/

**Date:** 26 February 2021

**Rape Crisis Network Ireland clg**

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

**This submission is supported by Safe Ireland, [www.safeireland.ie](http://www.safeireland.ie)**



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### Checklist of RCNI Recommendations:

#### I "Hearing Every Voice" Report<sup>8</sup>: Principal Recommendations

Note: Recent developments are added under each Recommendation in purple type for easy reference.

- The use of **pre-recorded statements** should be increased, though not made mandatory, and pre-recorded cross-examination should be piloted;
- Vulnerable **accused** persons should be able to benefit from special measures when appropriate;
- Training of relevant professionals should include training in **how best to communicate** with vulnerable witnesses when taking Garda statements, assessing cases for prosecution and taking part in court proceedings – and should be resourced adequately. *The need for specialised training is now being addressed through an inter-agency sub-committee as part of the Implementation Plan for the relevant recommendations made in the O'Malley Review.*
- Statutory pre-trial **hearings** should be the primary means through which special measures to address vulnerable witnesses' individual needs should be raised and decided upon. *This is being addressed as a matter of urgency also as part of the Implementation Plan, through the Criminal Procedure Bill 2021.*
- **Gaps** in the available menu of special measures should be closed, especially in relation to vulnerable witnesses who do not have a "mental disorder" but do have a communications difficulty;
- The role of **intermediaries** with regard to specific groups of vulnerable witnesses should be examined and the relevant legislation amended, to cover answers as well as questions. *This is also now being examined by an inter-agency sub-committee as part of the Implementation Plan for the relevant recommendations made by the O'Malley Review;*
- A **flexible, innovative and open approach** should be taken with vulnerable witnesses, including children, so that e.g. use of Court dogs might be considered to calm and reassure child victims giving evidence by video-link (a research project using EU funding is envisaged to explore Court dogs); and
- A **national inter-agency steering group** should take the lead on vulnerable witnesses to make sure that their interests get the dedicated attention which they need. *This*

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<sup>8</sup> See full reference and web-link at footnote 1 above and in the References section below

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is now effectively in place as the Recommendations of the O'Malley Review are implemented. However, once the current Audit of Domestic, Sexual and Gender-Based Violence infrastructure has been completed and the new National Strategy on Domestic, Sexual and Gender-Based Violence is in place, the oversight structures are likely to take on a new shape.

### II RCNI Redrafted Recommendations for this Submission

- **RCNI recommends** that the pre-recording of evidence in chief which can be allowed to stand at trial instead of live evidence, is made available to adults who do not have a “mental disorder” as defined in the legislation.
- RCNI's view is that it would be best to have all the evidence of victims of sexual offences given – and pre-recorded - under the best possible controlled conditions well in advance of trial. This is why in “Hearing Every Voice”, we advocated the piloting of the pre-recording of cross-examinations, as well as examinations in chief, of victims and witnesses in sexual violence cases. Provided that certain practical issues were addressed promptly through robust case management and a statutory preliminary trial framework, such as that envisaged in the new Criminal Procedure Bill, and provided also that there is a mechanism through which any fresh evidence may be put before the court at a later stage, we see no reason in principle why trauma should not be kept to a minimum for witnesses, especially **particularly vulnerable witnesses** such as **children and people of any age with some form of intellectual or learning disability** who may have the most difficulty in recalling the detail of past events after months or years.
- **RCNI recommends** that the pre-recording of cross-examination is piloted in a small number of courts for child victims, child witnesses and victims and witnesses with some form of intellectual or learning disability, and that this pilot should also include the pre-recording of any necessary re-examination, so that all of the victim's testimony has been gathered ahead of trial.
- Such additional pre-recording of cross-examinations should take place after consideration of any special measures needed at a preliminary trial hearing, and the pre-recording itself should be overseen by the trial judge and held in conformity with any directions given at the preliminary trial hearing. Similar procedures are now operating in both England & Wales and Scotland. Please see Appendix for a summary of their respective procedures in this regard;
- **RCNI recommends** also that the current statutory regime of special measures<sup>9</sup> be redesigned and streamlined so that there is a presumption in favour of their being

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<sup>9</sup> See footnote 6 above for web-link to the relevant Act (consolidated version)

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granted to **all victims of sexual offences**, not alone those who are under 18 or who have a “mental disorder” and so that the conditions of eligibility are not different from one measure to another; and

- **RCNI recommends** that serious consideration be given to expanding the current statutory regime of special measures to include vulnerable **accused persons**. The rationale for this recommendation is to counter the prevailing legal cultural norm that a special measure granted to a complainant or other prosecution witness is unfair to the accused person because it signals his probable guilt to the jury – and therefore, must be resisted strenuously. This makes special measures hard to obtain for anyone who is not a child or a person with a mental disorder, in practice. Our view, based on what we have heard from legal professionals in Scotland, is that once special measures become available to vulnerable accused persons also, they lose force as a bone of contention between prosecution and defence and over time, become acceptable and non-controversial and thus, simple to access for those who need them (special measures were extended to certain accused persons in 2014 in Scotland);
- **RCNI recommends** that all victims of sexual offences who must give evidence in criminal proceedings be supported by:
  - Professionalised support and advocacy services run by specialist NGOs, e.g. rape crisis centres, who would provide Garda and Court accompaniment as needed and also be available to provide tailored individual support, both practical and emotional, from first contact to the end of the case and beyond. [\(Increased access to free legal advice for victims of sexual offences was recommended by the O'Malley Review and will be implemented\).](#)
- **RCNI recommends** that the current law on the use of intermediaries as a special measure in court be amended so that not only questions put to the witness, but also the witness's answers – may go through the intermediary; and
- **RCNI recommends** that the particular difficulties of witnesses who are of age, who do not have a “mental disorder” or mental condition which would warrant use of an intermediary, but who nevertheless have sometimes significant communications difficulties (e.g. people who have a hearing difficulty or speech impediment), are addressed in the proposed amendments to the existing special measures statutory framework; and
- **RCNI recommends** that in any legislation relating to arrangements to be made for special measures, such as the current Criminal Procedure Bill, and any substantive legislation dealing with special measures themselves, care should be taken to ensure

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that provisions are drafted widely enough to allow for a more open approach to facilitating witnesses with novel special measures suitable in individual cases (such as the use of court dogs).

### Selected References on Victims' Testimony in Cases of Rape and Sexual Assault

**EU Directive 2012/29/EU of the European Parliament and of the Council** establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA: available online at:

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2012:315:FULL&from=EN>

### Principal Irish Statutes and Related Documents:

- Criminal Law (Rape) Act 1981 as amended: available online at: <http://www.irishstatutebook.ie/eli/1981/act/10/enacted/en/html>
- Criminal Evidence Act 1992 – **consolidated version** available online at: <http://revisedacts.lawreform.ie/eli/1992/act/12/revised/en/html>
- Criminal Law (Sexual Offences) Act 2017: consolidated version available online at: <http://revisedacts.lawreform.ie/eli/2017/act/2/front/revised/en/html>
- Criminal Justice (Victims of Crime) Act 2017: available online at: <http://www.irishstatutebook.ie/eli/2017/act/28/enacted/en/html>
- Link to General Scheme (revised) Criminal Procedure Bill (2015) – see Head 2 on Preliminary Trial Hearings: <http://www.justice.ie/en/JELR/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf/Files/Criminal%20Procedure%20Bill%20Revised%20General%20Scheme.pdf>

### Scotland

- Evidence and Procedure Review Report (2015) available through this web-link: <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf.pdf?sfvrsn=2>
- Evidence and Procedure Review - Next Steps Report (2016) available through this web-link: <http://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/evidence-and-procedure-report---next-steps---february-2016.pdf?sfvrsn=2>
- Series of follow-up reports and initiatives in 2017 and 2018: web-links available through this webpage: <https://www.scotcourts.gov.uk/evidence-and-procedure-review>
- 2014: Victims and Witnesses (Scotland) Act 2014, available online through this web-link: <http://www.legislation.gov.uk/asp/2014/1/contents>
- 2019: Vulnerable Witnesses (Criminal Evidence)(Scotland) Bill (as it then was) Information and all relevant documents available through this web-link: <https://www.parliament.scot/parliamentarybusiness/Bills/108702.aspx>
- Vulnerable Witnesses (Criminal Evidence)(Scotland) Act 2019: received Royal Assent June 2019, expected to commence early 2020: <http://www.legislation.gov.uk/asp/2019/8/enacted>
- Web-link to Scottish Courts Services press release about new child friendly building in which pre-recordings can be done: <https://www.scotcourts.gov.uk/about-the-scottish-court-service/scs-news/2018/10/29/new-hearings-facility-for-children-and-vulnerable-witnesses>

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### England & Wales

- The Advocates' Gateway Toolkit: Case management in criminal cases when a witness or defendant is vulnerable <https://www.theadvocatesgateway.org/images/toolkits/1a-case-management-in-criminal-cases-when-a-witness-or-a-defendant-is-vulnerable-2017.pdf> (one of a number of toolkits, sets of guidelines and checklists); and
- Criminal Procedure Rules (2015), available through this web-link: <https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/criminal-procedure-rules-practice-directions-2015.pdf>
- Criminal Practice Directions (2015), available through this web-link: <https://www.judiciary.uk/wp-content/uploads/2015/09/crim-pd-2015.pdf>
- Preliminary report (2018) on the Lighthouse: [https://www.london.gov.uk/sites/default/files/childhouse\\_jan19\\_report.pdf](https://www.london.gov.uk/sites/default/files/childhouse_jan19_report.pdf);
- ppt presentation on the work of the Lighthouse, July 2020: [https://childhub.org/sites/default/files/webinars/lighthouse\\_webinar\\_for\\_childhub\\_-\\_june\\_2020.pdf](https://childhub.org/sites/default/files/webinars/lighthouse_webinar_for_childhub_-_june_2020.pdf)

### Irish Government Response to Sexual Violence starting 2018: Key Documents

- Department of Justice Press Release setting out Terms of Reference for the O'Malley Review in September 2018, available online via: [Minister Flanagan publishes Terms of Reference for review of the investigation and prosecution of sexual offences - The Department of Justice](#)
- O'Malley Review of the protections for vulnerable witnesses in the investigation and prosecution of sexual offences (August 2020), available online via: [Review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences \(justice.ie\)](#)
- Department of Justice-led O'Malley Recommendations Implementation Plan, Supporting a Victim's Journey, published October 2020 and available online via: [Supporting a Victim's Journey - The Department of Justice](#)

### Selected NGO Documents:

- Guide for Lawyers to the Victims' Directive and to the Criminal Justice (Victims of Crime) Act 2017:

<https://www.iccl.ie/wp-content/uploads/2018/11/5871-EU-Victims-Day-Proof-updated-v2.pdf>;

- "Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Criminal Proceedings" – RCNI report covering special measures;

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

- RCNI Submission to the Review of Protections for Vulnerable Witnesses in the investigation and prosecution of sexual offences: <https://www.rcni.ie/wp-content/uploads/RCNI-Review-of-investigation-and-prosecution-of-sexual-offences-autumn-2018-Submission-Final.pdf>
- RCNI Submission on the Criminal Justice (Victims of Crime) (Amendment) Bill 2018: <https://www.rcni.ie/wp-content/uploads/RCNI-Legal-Advice-PMB-Submission-to-JOCJE-dated-29th-March-2019-Final.pdf>

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- RCNI Position Paper on Previous Sexual History Evidence in Criminal Trials: <https://www.rcni.ie/wp-content/uploads/RCNIPreviousSexualHistorySLRPositionPaperMay12.pdf>
- RCNI Policy Paper on Case Management and Pre-Trial Hearings in the Criminal Courts: <https://www.rcni.ie/wp-content/uploads/RCNICaseManagementandPreTrialHearingspositionpaperMay12.pdf>

### Victim Anonymity: Recent Cases and draft Legislation:

1. Anonymity under Section 252 Children Act 2001 – text of consolidated version of Section:
  - <https://revisedacts.lawreform.ie/eli/2001/act/24/section/252/revised/en/html>
  - DPP vs EC & Media Outlets Court of Appeal judgement delivered 29/10/2020, text of lead judgement available at:
  - [https://www.courts.ie/acc/alfresco/b37ccbd-2247-4531-b5af-c2b2ce2f4657/2020 IECA 292%20\(Unapproved\).pdf/pdf](https://www.courts.ie/acc/alfresco/b37ccbd-2247-4531-b5af-c2b2ce2f4657/2020 IECA 292%20(Unapproved).pdf/pdf) - see also:
  - 11<sup>th</sup> November 2020: Hunt J made order allowing child rapist to be named in CCC (unreported)
  - IT report available here: <https://www.irishtimes.com/news/crime-and-law/courts/criminal-court/high-court-judge-differs-with-ruling-on-naming-child-victims-of-crime-1.4406339>
2. Anonymity under Sections 7 and 8 Criminal Law (Rape) Act 1981 as amended:
  - DPP vs DH [2020] IECA (23<sup>rd</sup> November 2020), unapproved judgement available online at:
  - [https://www.courts.ie/acc/alfresco/d7b91c9d-459f-4bc3-90ef-36a2e3192768/2020 IECA 321%20\(Unapproved\).pdf/pdf#view=fitH](https://www.courts.ie/acc/alfresco/d7b91c9d-459f-4bc3-90ef-36a2e3192768/2020 IECA 321%20(Unapproved).pdf/pdf#view=fitH)

### Appendix 1

#### Summary of Hearing Every Voice (RCNI 2018) findings re Scotland and England & Wales:

We found that in Scotland, there is a clear expert and sustained focus on vulnerable witnesses, including vulnerable accused, in the last few years, leading to the introduction of the Vulnerable Witnesses (Criminal Evidence)(Scotland)Act 2019, now mostly in force, which provides for witness testimony to be taken in advance of trial and often much closer to the time of the offence(s), and the establishment of a new Vulnerable Witnesses Centre opened in Glasgow in November 2019 (one of four planned).

Effective inter-agency working on vulnerable witnesses by the Scottish Courts & Tribunals Service, Faculty of Advocates, Judiciary, Procurator Fiscal, police, NGOs [etc] produced the Victims and Witnesses (Scotland) Act (2014), which recognised that accused persons could be children or otherwise vulnerable witnesses too, the Evidence and Procedure Review Report(2015), which looked in detail at special measures both during investigation and court proceedings in Scotland and in other countries, for children and other vulnerable witnesses – this Review includes a close analysis of how the **Barnahus** approach has worked elsewhere, post Norway visit; and in 2016, the Evidence and Procedure Review Next Steps

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Report: looked in more detail at which solutions might work best in Scottish criminal justice system. On foot of that Report, in 2017/2018, two further studies were done on Joint Investigative Interviews and on Pre-recorded Evidence, respectively. In summary, Scottish solutions are: (1) JIIs: have standardised, high quality training, good technology, and professional transcribers – if JII is not possible, interview should be visually recorded; then (2) whichever way interview is pre-recorded, the pre-recording of cross-examination & any re-examination could & should be done by taking of evidence by Commissioner.

Use of Commissioner Hearings has expanded dramatically in last few years (from 50 applications in 2017 to 158 in 2018, following introduction of 2 x detailed Practice Notes by Lord Justice Clerk). Finally, the Vulnerable Witnesses (Criminal Evidence)(Scotland) Act 2019 most of which was commenced 20 January 2020, means that the norm is that interviews with child witnesses, initially to serious offences only, will be pre-recorded, including cross- and re-examination by Commissioner Hearing, that there will be mandatory Ground Rules Hearings before Commissioner Hearings at which duration of questioning, its time, the form of the questions, the need for an additional supporter and/or any other supportive measures, etc will be discussed by judge and advocates, and if not agreed, ruled upon by judge; and it also allows for Commissioner Hearings to take place before indictment is served on accused. In parallel with this legal development, Vulnerable Witnesses Centres are planned, four throughout Scotland, the first of which opened in Glasgow. It provides a child friendly and supportive venue for Commissioner Hearings – staff are trauma-informed – and the building is quite separate from the Court.

More training materials for advocates about the new Act's procedures are being developed, and the Lord Justice Clerk (Chief Justice) is proposing that the **Barnahus** model is adopted for the most vulnerable child witnesses.

In England and Wales, the Advocates' Gateway, originally an informal grouping of specialist lawyers and academics, produced detailed guidelines on legal, psychological and administrative aspects of facilitating vulnerable witnesses to give their best evidence in criminal proceedings. Detailed Rules of Court were introduced which incorporate and refer to TAG guidelines on various aspects of vulnerable victims' testimony and cover such matters as how to ask questions, at what time of day live evidence should be given, the use of an intermediary with a child or other vulnerable witness, and so on. See [www.theadvocatesgateway.org](http://www.theadvocatesgateway.org), an open access website.

Also in England and Wales, we found that there had been a pilot of the use of pre-recorded cross-examination in three Crown Courts (**child witnesses under 16, other vulnerable witnesses**), and that there was a strong emphasis on professional training to help ensure that vulnerable witnesses can give their evidence with minimum risk of being re-traumatised and maximum chance of being heard and understood in Court.

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### England & Wales Investigative Stage:

There is a Pilot similar to Barnahus now running in London for 2 years from October 18, the Lighthouse in Nth London<sup>10</sup> which combines therapy, medical, social care, advocacy, police input into one service. It has been found that referrals are up compared to earlier mostly police-led service – and are from police, social care, parents, schools, and for over 13s, self-referrals. Interviews are pre-recorded and conducted by a **clinical psychologist** with police officer observing, may be attended by children and young people up to 18, and by 18-25s with learning disabilities, and their response time is weeks whereas CAMHS is much longer (due to significant cuts since 2013). It has multi-agency funding – NHS England, Home Office, Mayor's office, Dept Education, NSPCC (with help from private corporate sponsor).

Outside of this pilot, it was recommended that the ABE ("Achieving Best Evidence) recorded specialist interview process training should be repeated to maintain "open interviewing" skills, and that generally there should be more investment in ABE training issues.

### England and Wales: Court Proceedings Stage:

**Ground Rules Hearings (GRHs)** These are preliminary hearings mandated when cross-examination is being pre-recorded, and usually held when there is intermediary – however in sexual abuse cases where there was no intermediary, GRH was not held in c 50% of cases – leaving door open for more "traditional" (and often oppressive) styles of cross-examination. GRHs cover the manner, duration, timing, subject areas and nature of questioning and consider whether any special measures needed.

With regard to Section 28 Youth Justice and Criminal Evidence Act 1999, pre-recording of cross-examination: despite Government commitment made in 2017, the promised roll-out to all Crown Courts has not yet happened across England & Wales, only to 37 CCs to date – evaluation of the pilot and subsequent research on S 28 applications as compared to "regular" cross-examination, showed that suggestive, leading and "tag" questions were used much less frequently by Section 28 defence advocates when questioning children, that questions from defence advocates were simpler and more age-appropriate in Section 28 applications, that children were able to give their evidence much earlier and take much less time to do it, in Section 28 applications than for "regular" cross-examination scenarios; and finally, that children seemed to be "fresher", to give more complete evidence, and to be more confident giving it, with Section 28 applications.

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<sup>10</sup> \*see this link to a promising preliminary report (2018) on the Lighthouse:

[https://www.london.gov.uk/sites/default/files/childhouse\\_jan19\\_report.pdf](https://www.london.gov.uk/sites/default/files/childhouse_jan19_report.pdf); see also this link to a ppt presentation on the work of the Lighthouse, July 2020:

[https://childhub.org/sites/default/files/webinars/lighthouse\\_webinar\\_for\\_childhub\\_-\\_june\\_2020.pdf](https://childhub.org/sites/default/files/webinars/lighthouse_webinar_for_childhub_-_june_2020.pdf)

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### Appendix 2 Principal Recommendations of O'Malley Review published August 2020 – Summarised:

- **General Recommendations – Chapter Two:**
- Increased **public awareness** of the Criminal Justice (Victims of Crime) Act 2017.
- Government-sponsored programme of public education on the **meaning and importance of consent** in the context of sexual relationships and sexual activity.
- Greater **inter-agency communication** to ensure that all state agencies, voluntary organisations (NGOs) dealing with vulnerable victims are fully aware of other services besides their own;
- **Consistent standard of all victim support services** throughout the country.
- Chapters 3 through 10 each have more detailed, specific list of recommendations. **Key** specific recommendations include:
- **Chapter 3: Investigation and prosecution of sexual offences**
- All Gardaí interacting with victims should have appropriate training, not just specialists
- All Garda training in this area should be regularly monitored by external experts;
- DPP should be resourced to establish and maintain new Sexual Offences Unit
- **Chapter 4: Anonymity, public attendance and media reporting of sexual offence trials**
- Legislation should be enacted to ensure that the public are excluded from all trials of sexual offences, not just some;
- Current victim anonymity provisions should be extended to include offences against protected and relevant persons (Sections 21 and 22 Criminal Law (Sexual Offences) Act 2017);
- Anonymity of accused to include offences under Part 2 CLSOA 2017 (child sexual exploitation) and sexual assault;
- Law should be amended to allow for verdicts and sentences to be heard in public.
- **Chapter 5: Preliminary trial hearings**

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- PTHs: statute-based and primary focus for issues relating to special measures, disclosure, "Section 3" notice being given (in relation to other sexual experience of complainant), practical matters which may affect trial, etc;
- **Chapter 6: The trial of sexual offences**
- "S.3" applications to include sexual assault, separate legal representation to include complainant cross-examination;
- Judges and lawyers must be informed about S.21 Criminal Justice (Victims of Crime) Act 2017 (restrictions on defence questioning of victims on their private life which is "unrelated to the offence").
- **Disclosure:** right to object to disclosure of counselling records should be publicised better, Gardai should have protocol on digital disclosure, and organisations/individual professionals holding counselling records should have a duty to hand them over to DPP on request.
- **Chapter 7: Information for victims**
- Dedicated Government-run website for victims with all information about all agencies, services, procedures, rights in one place, and Garda ACTIVE Mobility App to help members access all necessary information about victims' rights, services, so that they have it to hand for victims who need it;
- Victims' rights to legal advice from LAB to be extended (Section 26(3A) Civil Legal Aid Act 1995\*) to run from earliest stages through trial and beyond, and to cover sexual assault offences, new offences under CLSOA 2017;
- Court familiarisation and court accompaniment/support services to be available to all victims of sexual offences
- **Chapter 8: Intermediaries**
- - Creation of a cadre of professionally qualified and trained intermediaries to act as advisors at every stage and as interpreters in court, consideration to be given to "sharing" in NI cadre of criminal justice intermediaries;
- **Chapter 9: Reducing delay**
- Pre-trial hearing framework to aim to deal with as many issues as possible in advance of trial;
- Guidelines on discounts for guilty pleas might be prioritised by Sentencing Guidelines and Information Committee,

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- research to be carried out into causes of delays at each stage of criminal justice process,
- Any proposal to appoint more judges should be preceded by assessment of impact on court "accommodation and facilities";
- **Chapter 10: Training**
- Specialist training for all criminal justice lawyers, judges and other professionals in issues relevant to vulnerable witnesses, and measures, including inspection, to ensure that "appropriate training" is provided to counsellors and other support workers

### **Appendix 3: Table of Available Special Measures in Ireland dated March 2019**

[Note: this is in Landscape format and is added to this document as a separate PDF document]