



RCNI Agenda for Justice

Discussion Document

April 2009

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Justice Through the Best Possible Care and Support of Victims

In this paper Rape Crisis Network Ireland (RCNI) presents a range of law reforms in terms of practice, policy and legislation. These recommendations and insights are informed by the firsthand expertise of Rape Crisis Centres (RCCs) who have supported thousands of victims of sexual violence crimes. We have also captured a wide range of expertise and best practice both here and abroad in order to arrive at the conclusions contained in this document.

Offences of sexual violence in Ireland **are prevalent and under-reported**. According to the SAVI report (2002),^[1] about one woman in five (20.4%) has been the victim of contact sexual violence as an adult. The impact of sexual violence on the individual victim can be **devastating and far-reaching**. Even when they are reported, there is a very high attrition rate, so that the conviction rate in the case of the most serious of these offences, rape, is about 7% of all rape offences reported to Gardaí^[2].

In order to reduce this attrition rate it is of the first importance that the experience of the official process be the best possible for victims of sexual violence. The systems which are intended to protect victims must not themselves cause further trauma or secondary victimisation amongst those already victimised. Therefore the dignity of the survivor must be respected throughout the process with **an appropriate range of supports from the very earliest stages post-trauma onwards being provided** to them.

There is evidence that the shorter the time between offence and report, the more likely it is that a decision will be taken to prosecute the offender^[3]. Therefore encouraging victims to report early and then keeping them in the system serves the best interests of justice. The best way of achieving this is by making the **support of and respect for the victim paramount**. That is, that the focus must not be on conviction at any price to the victim. Once the cost of reporting and proceeding through the criminal justice process and beyond rises too high, the chances of withdrawal by the victim are greatly increased. Kelly, Lovett and Regan, in their 2005 study "A Gap or a Chasm? Attrition in reported rape cases"^[4] identify factors which victims of rape indicated would encourage them to co-operate with a criminal investigation. These included female police officers, a culture of "**belief, support and respect**", being in control of the forensic examination; access to clear information at various points in the process; being kept informed about the progress of the case, and continuity of police officers and meeting these officers in person.

Research from 2004 found that^[5] **proactive contact and support from support workers**, including Rape Crisis Centre workers, was associated with reduced withdrawals from the criminal justice system.

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1. Multi faceted Support for Victims from Initial Post-Trauma Stage

1.1 Early Assistance, Advice and Information

Statutory and Administrative Provisions:

Responsibility should lie primarily with the member of an Garda Síochána charged with the responsibility of being the support officer for each victim

The HSE and the appropriate staff members have responsibility for ensuring the proper running of SATUs. The District/Circuit/High/Central Criminal Court judge, as appropriate, has responsibility for the correct application of the current bail laws and/or any measures to ensure the safety of the complainant pending, during and after trial. It is also the responsibility of the prosecuting authority, in consultation with investigating Gardaí, to raise issues of victim protection measures, objections to bail and so on, from the earliest hearing in the matter.

The **principal victim support** provisions should include:

- 1.1.1 right of victim to be informed of the availability of health and social services and other appropriate expert **support services**, such as Rape Crisis Centres;
- 1.1.2 right of victim **to be kept informed** at all stages, of the identity and contact details of the member of an Garda Síochána in overall charge of the investigation in their case, the progress of their case itself, the role of the victim within the criminal justice process, court dates, purpose and outcome of each hearing, and likely timelines as they evolve;
- 1.1.3 right of victim in sexual cases to be informed regarding their rights **to be represented** where appropriate and also to access independent legal advice in all cases involving a complaint of sexual violence;
- 1.1.4 right of the victim/survivor to be informed as to the circumstances in which **special measures** may be used such as giving evidence by video link or with the use of screens;
- 1.1.5 right of the victim to make a **Victim Impact Statement**, and have it considered by the court before sentence is passed on a convicted offender;

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- 1.1.6** right of victim **to be treated with courtesy and respect** by all individuals and agencies at all times, and to be consulted on change of plea and informed if charges are not brought, or later dropped, and to be informed, subject to appropriate safeguards, of the reasons why any prosecution has not been brought, or later dropped in their case;
- 1.1.7** right of victim **to be kept informed of any bail applications** and parole hearings and to make representations in either case;
- 1.1.8** right of victim **to be notified of the result of any bail application**, terms of any bail if granted, details of any sex offender order and/or conditions of release, any release date or escape from lawful custody of the accused/offender in their case, notice of any proposal to make a deportation order against the offender, notice of discharge from hospital of the offender if he is there detained, and the date of any court or other hearing in relation to any of these matters;
- 1.1.9** right of victim to appropriate **expert immediate medical treatment and forensic examination**, to be carried out at SATU as near as possible to them, and the right of the victim to refer themselves to a SATU, irrespective of whether a complaint has been made or is intended to be made to the Gardaí;
- 1.1.10** right of victim **to have intimate samples in their case preserved**, at least for a given minimum period, where no decision has yet been made as to whether to make a formal complaint to the Gardaí or not;
- 1.1.11** provision of a **confidential channel of information** through which intelligence relating to a particular suspect might be relayed to the Gardaí by a complainant, without the necessity to make a decision as to whether or not to make a formal complaint;
- 1.1.12** right of victim to such **medical, psychological and social care or help** as he or she may require and to such other help or services capable of meeting his/her needs for shelter and support or for referral to other services better suited to assist him/her;
- 1.1.13** right of victim of sexual violence **to be protected** by Criminal Justice System as far as possible during and after the process, that is, by legislative provisions criminalising intimidation by not only the defendant but those associated with him, stringent bail conditions or custody pending trial, personal protection orders, and so on. While we would endorse such a personal protection provision as a welcome and useful addition to the protections currently

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available to any victim, we submit that the ambit of such a provision should include Personal Protection Orders (PPOs) against any person acting under the direction or on behalf of the alleged offender, and provide protection for family members and others related to the complainant, in addition to the complainant him/herself;

1.1.14 While the provisions of the Criminal Justice Act (CJA) 2007 in relation to the bail laws are broadly welcomed, we would submit that **any proven incident of victim intimidation and/or harassment**, whether or not carried out by the alleged offender or by others acting on his behalf, and whether or not against the victim or against others associated with him/her, should result in for the alleged offender, and that the CJA 2007 should be amended to that effect;

1.1.15 A new specific offence of intimidating or attempting to **intimidate a member of An Garda Síochána** with a view to preventing or ending an investigation.

1.1.16 Rights underpinned by a Victims' Charter which ideally has statutory effect^[6] and which has been compiled following widespread consultation with victim/victim support groups and others with expertise in the area.

The implementation of these provisions should encourage **a culture of belief in, support and respect of the complainant.**

1.2 Provision of Legal Advice to Complainants in Sexual Violence Cases

1.2.1 Legal advice to be available to complainants in sexual violence cases, regardless of means, from the reporting stage^[7].

1.2.2 Legal Aid Board (LAB) could provide outreach clinics to local RCCs, staffed by qualified solicitors with extra training and support from RCCs in the area of sexual violence. Additionally, such a system would enhance feelings of empowerment and safety for victims of sexual violence and would allow LAB staff opportunity to learn about effects of Sexual Violence on their clients. LAB to be responsible for this in partnership with RCCs

1.2.3 Publicly funded full legal representation for complainants in sexual crime cases, whether or not any application is made to bring in evidence of their previous sexual history

1.2.4 There should be a statutory obligation on the defence in a sexual crime case to

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make any application to adduce previous **sexual history** of a witness in writing in advance of trial and to provide in advance written reasons why such an application should be granted.

1.3 Other witness protections within the Courts System

Statutory Amendments and/or New Legislation:

1.3.1 Special measures, such as video link evidence and the use of previously recorded statements, should be extended to all sexual violence complainants. At present, video link arrangements for giving evidence by complainants in sexual cases can only be provided with the leave of the court in the case of complainants over the age of 17^[8].

1.3.2 Previously video recorded statements can normally be admitted into evidence under section 16 of Criminal Evidence Act (CEA) 1992 only if the witness is present in court to be cross-examined. We would submit that as long as a witness is available to give evidence by video link, there should be no necessity for them to be physically present in court, and would propose that section 16 of CEA 1992 should be amended accordingly, and that its provisions should extend to all complainants, not only those under 14 or 17, as at present.

1.3.3 As an alternative to electronic aids, **screens** to be provided in Court so that the accused person cannot see the complainant giving evidence.

1.3.4 Physical setting: separate waiting and conference etc facilities for victims, their witnesses and supporters – Courts Service is responsible for implementation of any improvements in the fabric of court buildings. The current Strategic Plan (2008-2011) has as one of its goals improved facilities for victims and vulnerable witnesses, and also has a target of providing video conferencing facilities in all courtrooms by 2011.

1.3.5 In addition to the anonymity measures for complainants in sexual cases contained in the Criminal Law (Rape) Act 1981 and the Criminal Law (Rape) (Amendment) Act 1990 (as amended both), RCNI recommend that both complainants and witnesses should not have to have any **identifying information** given to an accused/offender, such as home or work address details, where to disclose such information would put the complainant and/or their witness(es) at risk of harm from the accused/offender and/or others acting on his/her behalf, and that to request a direction to that effect should be the

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responsibility of the prosecutor in the case, unless and until such time as the complainant has separate legal representation in court

1.3.6 Also in relation to anonymity, RCNI recommends that it be possible for the complainant to **waive her own anonymity** by written consent at the close of the case. At present, her anonymity can only be lifted by order of the judge

1.3.7 Statutory provisions to prevent all unnecessary and in particular, any **frivolous and/or malicious applications** by the defence team to gain disclosure of confidential personal information of a therapeutic nature, such as counselling notes and medical records. At present, complainants in sexual cases risk being obliged to disclose extremely personal and intimate material in confidential counselling notes and other therapeutic records to the defence team regardless of their relevance to the defence case. In future, it should be up to the Court to decide whether any such document is of such critical importance to the defence that it must be disclosed, and any such disclosure must be strictly limited and subject to reporting restrictions.

2. The Best Investigation Possible

Procuring the best possible evidence as early as possible should be the priority for the Investigation Team of An Garda Síochána

Provision of a complainant's statement which is as fresh and as full as possible. The sooner it is taken, the more details will be remembered and the more weight can be attached to them. It is very important that it is expertly taken by specially trained officers, not only for maximum probative value in court but equally importantly to ensure that the experience of the victim is as positive as possible and has decreased risk of re-traumatisation for him/her. This entails:

2.1 Recruitment and resourcing of specially trained and supported Sexual Violence Officers (SVO) to act as support officers and liaise with other agencies, such as the investigation team. Investigation teams should be led by someone other than SVO. The SVO's primary roles should be to ensure the victim is as well supported as possible and to take victim's statement as early as feasible and in as expert a way as possible with a view to maximising its impact later on in court. The experience gained by those involved in Project Sapphire (run in London by the Metropolitan Police since 2002) is extremely valuable in this regard. This priority could be implemented by Central Training Unit (CTU) together with Regional Training Officers being trained at Police Academy in Hendon (London) and cascading that training through either CTU or Templemore;

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2.2 The SVO to be responsible for providing **information and appropriate referrals** to outside support agencies, such as the Legal Aid Board and RCCs;

2.3 All actions of the SVO and all contacts with the victim to be recorded in **Log Book** specific to each victim;

2.4 The **SVO to be supervised** by the officer in charge of the investigation.

2.5 There should be recognition that this is an **expert job**, and the SVOs who take it on should not thereby lose “status” within the Gardaí. This should be the responsibility not only of the officer with overall responsibility for an investigation unit specialising in combating crimes of sexual violence in a given area (see below), but also of every officer within it;

2.6 There should also be a recognition that all officers involved in crimes of sexual violence need **appropriate support** to remain effective in their role and such support should be promoted and readily available so that take up is maximised;

2.7 Specially trained SVOs should work in **specialised Sexual Violence Teams** alongside Investigating Officers under overall supervision of DVSAIU.

In-service training in the area of sexual violence should be a priority, given the nature and seriousness of these crimes, and should be at different levels.

2.8 Continued and increased RCC involvement in **initial training of Gardaí** at Templemore, so that the outcome is that any newly qualified first-response officer behind the desk of a Garda Station knows how to deal effectively and sympathetically with a victim of sexual violence;

2.9 Such general initial training to be the foundation for **ongoing in service training** at local level, to be provided by local RCC trainers in partnership with local training officers, monitored and evaluated nationally through the RCNI.

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3. Proposed new general provisions in the Scheme for Criminal Procedure Bill 2009

3.1 RCNI welcome the proposed new mechanism **to reverse an acquittal** where compelling **new evidence** of guilt comes to light after conviction, particularly as it is likely that forensic science will continue to improve the quality of physical evidence. It is very important that the welfare of the victim is central to the processing of these and other cold cases, as the passage of time since the offence complicates the issue of investigation for the victim. A dedicated Unit should be established to investigate these and other “cold” cases, and that best international practice be followed with regard to the victim’s viewpoint and also with regard to the strength of the evidence.

3.2 RCNI would also welcome the procedure for **re-opening cases** where there is an acquittal following **an error of law** by the judge, as we are aware of cases where obvious errors of this kind have resulted in grave injustice to victims of sexual violence. This procedure should be accompanied by measures to reduce errors by the judge in the first place, such as increased judicial education, model jury directions, statutory jury direction checklists, or otherwise, as both from the survivors’ perspective and from a public policy perspective, it is better to have one trial only.

3.3 RCNI would also endorse the case for **fresh prosecutions** in cases where it can be shown that the original acquittal was **tainted by interference** with the trial process, including intimidation of witnesses, for similar reasons. Interference or attempted interference with judges and juries should be explicitly included as well.

3.4 There are already some sanctions for defendants who make **“imputations”** against the character of prosecution witnesses. The RCNI would welcome the proposed inclusion of deceased and incapacitated victims or witnesses, and would suggest that any defendant proposing to make imputations should first have to obtain the leave of the judge to do so under the strictest of conditions, and should have to give written notice in advance of trial to the prosecution. There should be stiff penalties for non-compliance, over and above the sanction of having the defendant’s own character put in evidence.

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4. DPP staff, the Chief State Solicitor's Office and local State Solicitors

DPP staff, the Chief State Solicitor's Office and local State Solicitors to work together to reduce attrition rates, by introducing specialised training in the area of sexual violence, also by effective communication with the victim and where appropriate by providing reasons for not proceeding with a prosecution^[9] and by adapting the UK Specialist Prosecutors in Sexual Violence or other similar model.

4.1 DPP Office to take responsibility for the **giving of reasons** for their decisions, particularly where the decision is not to proceed further, subject to safeguards, and for communicating them to complainants normally by letter, occasionally, where warranted, in person

4.2 DPP Office to be appropriately **resourced** to implement same.

4.3 RCNI acknowledges that detailed **Guidelines for Prosecutors** which emphasize provision of information to complainants in timely fashion and which importantly sets out the complainant's right to request a pre-trial meeting with the prosecution team, are already in place, and recommends that these Guidelines be regularly updated in line with international best practice and that compliance and client satisfaction are monitored and evaluated

4.4 DPP Office to be responsible for ensuring that **data on reasons** for which prosecutions are not brought in sexual offences be collected and be made **publicly available**, so that RCNI and others can detect trends and take appropriate action/make submissions/help to determine policy for the future etc

4.5 DPP to organize the provision of **mandatory specialised training** for all those involved in prosecution of sexual violence cases, properly resourced, RCNI to be resourced to provide expert input on the effects of sexual violence on victims.

4.6 Provisions should be enacted to enable the DPP to **appeal District Court sentences** on grounds of undue leniency, as many cases of sexual abuse are heard there.

4.7 RCNI welcomes the current **guidelines for prosecutors** which impose on the prosecuting advocate the obligation of addressing the judge on sentence. This should be in sufficient detail to ensure that the judge is aware of his powers, any proven aggravating factors in the case, the appropriate precedents, and whether any ancillary orders are appropriate. He/she should also ensure that any mitigation put forward by the defence has some evidential basis, and that there is no unresolved factual conflict as to the circumstances of the case, particularly relevant on a guilty plea. Traditionally, it is not the

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role of the prosecuting advocate to recommend a particular sentence, However, in the view of the RCNI it is the role of the prosecuting advocate to do everything permissible under the rules to ensure that the sentence is an appropriate one.

5. The Judiciary

The Judiciary should be very well informed not just on the law and sentencing powers in the area of sexual violence, but also on the effects of sexual violence on complainants

5.1 Judges who preside over sexual violence cases should have available to them **specialised training in sexual violence, as well as expertise in this area of law.** Input by RCNI and/or RCCs on the effects of sexual violence on victims would be an important element of that training.

5.2 Guideline Cases are one clear way forward on consistency of sentencing. Once there are one or two good guideline judgements OR a set of **formal sentencing guidelines**, consistency of sentencing will become the norm. A Judicial Sentencing Commission or Judicial Council could take on either task. That is, selecting suitable cases to be the subjects of guideline judgements on sexual offences, particularly the more serious ones OR, devising after consultation a set of sentencing guidelines for sexual offences. Our view is that the solution to disparity in sentencing would be simple to implement^[10].

6. Revise Existing Statutory Law on Sexual Violence

The priorities for protection of victims and the general public and the reduction of the attrition rate .

6.1 Consent and the related question of honest OR reasonable belief in consent:

6.1.1 RCNI believes that an alternative expanded and more **comprehensive definition of consent** should have as its principal focus the conduct of the accused rather than that of the complainant, as far as possible. A comprehensive definition of consent would:

- Have an impact on avoiding prolonged, aggressive and detailed cross-examination of the complainant on matters which are often of dubious relevance to any real issues in the case. Fairness to the accused is also a vital principle. However, no less important is the framing of our law, as

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far as possible, **to avoid unnecessary re-traumatisation of victims** of sexual violence by cross-examination. Apart from this being an injustice in itself, there can be no doubt that fear of such an ordeal operates to increase the attrition rate.

- Where an accused person's **belief** in the consent of the complainant to a sexual act is not **reasonable**, ensure he/she is allowed to rely on it. In other words, the issue for the decision maker should not be whether the belief of the accused was honest although unreasonable and mistaken, but whether a reasonable person would have come to the same conclusion. The focus would therefore be on the conduct of the accused rather than on that of the complainant.
- Include provisions for the situations where the complainant's **consent is compromised** by their temporary or permanent incapacity^[11].

While an expanded definition is not a cure-all by any means, it should help protagonists and decision makers reach **a common understanding** of whether or not there has been consent in a wide range of situations.

RCNI believes that the current situation where there is no statutory definition of consent to any sexual act which might otherwise be a crime is far from ideal, leading **to a lack of clarity for the complainant, the accused and decision makers**, who are normally a jury of twelve people. The positive impact of a clear definition should also be felt outside the courtroom by contributing to raised awareness, reducing would-be victims' vulnerability, and discouraging would-be perpetrators from making criminal choices. RCNI believe that now is the time to enact a new expanded comprehensive definition of consent, similar to that in use in England and Wales^[12].

It is important to note that the list of situations under the UK Sexual Offences Act (2003) in which consent may not be presumed is a **closed** one. A more useful starting point might be the Criminal Code of Canada definition of consent^[13] and attendant **open list** of situations in which consent is not obtained, adapted to include the situation of the complainant whose capacity to consent is impaired by self-induced intoxication.

6.1.2 Age of Consent.

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RCNI believes that it is appropriate and in the best interests of children and young people in particular, to maintain the **age of consent to sexual intercourse at 17** for both sexes. The medical and social risks to young people, particularly young girls, of premature intercourse are well documented. The psychological and physical risks of being sexually exploited and/or abused by an older person, perhaps in a position of trust and/or authority, are also obvious for young people. Less obvious but very important is the need for our society through our laws to set standards of behaviour which provide at least some shelter for young people under constant pressure from the prevailing culture, from their peers and occasionally from older people, to engage in, or be coerced into engaging in sexual activity for which they may feel unready, and which exposes them to risks which may have very far-reaching negative consequences for them.

6.1.3. Defence of Mistake as to Age.

RCNI believes that in the case of sexual offences involving young people **under the age of 15 years, there should be no defence possible of mistake as to the age** of the young person^[14]. If no such provision is introduced for constitutional reasons^[15], any mistake as to age should be on **objectively reasonable** grounds, rather than simply an honest but possibly unreasonable belief in that mistake.

6.1.4 Enact a specific offence of unlawful sexual activity by person in position of trust and/or authority against minors in their charge.

At present, there is provision only for the seriousness of this kind of sexual offence to be recognized at the level of sentence. RCNI believe that legislation should be enacted to create a specific offence of abuse of position of trust by sexual activity with a child, for example in line with the provisions of the UK Sexual Offences Act 2003 at section 16^[16].

6.1.5 Amend the Punishment of Incest Act 1908 to take account of current and evolving understandings definitions of family members, such as foster-children/parents or step-children/parents, and to ensure that incest by an adult woman carries the same penalty as incest by a man, life imprisonment. This reform is long overdue.

6.1.6 Amend Section 3 of the Child Trafficking and Pornography Act 1998 (as already amended by Section 6 of the Criminal Law (Sexual Offences) (Amendment) Act 2007), to broaden the definition of activity therein to include other non-contact acts also done with the intention of sexual exploitation of a child, such as texting, emailing, buying things including phone credit, alcohol, soft drugs,

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and so on. These and similar activities are often referred to as “grooming”.

6.1.7 Enact specific offence of voyeurism, for example, one along the lines of Section 67 of the UK SOA 2003^[17]. This is the offence of “Peeping Tom” behaviour, where there is no sexual or other physical contact, but nevertheless the person being observed suffers a violation of their privacy and sexual autonomy for the sexual gratification of another. At present, such behaviour is not criminalised by our system.

6.1.8 Enact specific offence of sexual assault upon a person with a disability (other than an offence of rape or buggery)

The Criminal Law (Sexual Offences) Act 1993 criminalises sexual intercourse and buggery involving a person who is “mentally impaired”, with no requirement to prove lack of consent. There is no specific legislation criminalising any other sexual act against a person who is mentally impaired.

The absence of any requirement to prove lack of consent seems attractive, as it avoids the distasteful reality of a prolonged and personal harangue upon a person with a mental disability. However, the difficulty is that it is being argued that since a person with a mental disability cannot give or withhold any form of consent which would be legally meaningful, he/she does not have the mental capacity to testify in their own case. This has resulted in people with mental disabilities suffering sexual assaults and being unable to have their own evidence in the matter taken seriously enough to found a conviction against their assailant.

This law also means that this category of person is legally not entitled to a consensual sexual relationship. This is a violation of human rights.

The RCNI recommend that there should be a presumption that a mentally disabled complainant has full capacity to give meaningful evidence, and also to give or withhold consent to sexual activity, to be rebutted only by expert evidence from a properly qualified and experienced professional which is preferred by the judge to other expert evidence on the same topic. It should be remembered that we do not discount the evidence of children, although their ability to give or withhold consent is not legally meaningful until they reach the age of 17.

6.2 Repeal the anachronistic requirement to seek the consent of the DPP to any prosecution for marital rape under the Criminal Law (Rape) (Amendment) 1990 Act .

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6.3 Enact statutory provisions to prevent direct cross-examination by an accused of a complainant in a sexual case

Unfortunately, it has happened that the accused has used this privilege principally to humiliate and re-traumatise the victim. In the age of legal aid for expert representation before the criminal courts, it cannot be said that any accused person is at a disadvantage if he is represented by counsel or solicitor. See for instance, Conor Hanly's analysis of the extent of this "right" and the need to discard it^[18] "It is incumbent upon the State, however, to provide for an effective remedy for victims that does not require them to be brutalized a second time" by cross examination by the accused in person.

6.4 Corroboration Warning: At present, judges may at their discretion give a warning to the jury in a sexual crime trial about the dangers of convicting on uncorroborated evidence. This warning should only be given when appropriate and not as a matter of course in every case.

7. Court Delays: An Important Procedural Reform

7.1 It is vital to avoid unnecessary adjournments of Court trial dates, not only in the interests of the victim but in the public interest generally. This could largely be achieved by enacting statutory provisions to ensure that every trial in a sexual violence matter, at least at Circuit Court level and above, is preceded by **an obligatory preliminary court appearance** which must be attended by all parties, analogous to the system in England and Wales.

7.2 At such "Plea and Directions" hearings, **trial dates could be fixed, directions on further evidence be given and all preliminary issues raised in advance** of trial, thereby minimising the chances of the trial date itself being adjourned. This is particularly important in cases involving child witnesses, as it is extremely difficult for them and those responsible for them to endure even one, not to speak of repeated, avoidable adjournments caused by matters raised for the first time on the day of the trial. The presumption should be that every fixed trial date should be an effective one, subject only to matters which could not have been foreseen in advance of that date, and there should be consideration given to introducing sanctions in the event of unreasonable default. Such a system would empower judges to manage sexual violence cases proactively. Lessening delays to final hearings in this manner would have the effect that victims would face reduced risk of re-traumatisation by the criminal justice system. This in turn is likely to reduce the attrition rate.

8. Asylum Seekers, Refugees and Other Immigrants

RCNI wishes to acknowledge the trauma suffered by a significant and vulnerable group of victims of sexual violence, namely those who come to Ireland as asylum seekers, refugees or other immigrants.

8.1 Many of these people have suffered severe and repeated forms of sexual violence, and our concern is to ensure that all possible measures are taken to ensure that the nature and gravity of their trauma is recognized and dealt with professionally and sympathetically by all the official agencies responsible for them, and **to avoid any secondary traumatising** of this group while they are in the State, as they pass through the asylum process. We are also very much aware through our work of **the special vulnerability of asylum seekers to sexual predators** during the time that they spend in direct provision accommodation in this country.

Each agency with a nominated role in this regard must have **appropriate policies and protocols in place to prevent any secondary victimisation**. Direct provision contracts must be made subject to guidelines which minimise the risk that the residents will be exposed to any further sexual victimisation.

8.3 Enact more and better provisions in Immigration, Residency and Protection (IRP) Bill 2008, or elsewhere, for the better protection of victims of trafficking.

It should be remembered that the fear of instant deportation arising from the insecurity of their status is the very reason why so few non EEA national victims of trafficking feel able to complain to the authorities. For a useful model of best practice provisions, see for example the Irish Refugee Council's draft amendments to Section 124 of the IRP Bill 2008^[19], in particular in relation to **the need for protection and security independently of whether there is an criminal investigation in place or not**. Also it is important to ensure that trafficking offences are clearly identified as such for data collection purposes, both at An Garda Síochána and at Central Statistics Office levels in order to ensure we fulfill our obligations in relation to identification of victims, international co-operation and monitoring under the Council of Europe Convention on Action against Trafficking in Human Beings.

Other areas of concern with the present IRP proposals are **the exclusion of EU nationals** who have been trafficked, the short duration of the period of "recovery and reflection", and the legal recognition of the victim of trafficking only in cases with an ongoing criminal investigation.

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8.4 Female Genital Mutilation: A specific and brutal form of gender-based violence

RCNI recommends that there should be a specific offence of female genital mutilation similar to the corresponding offence in England and Wales^[20]. It should be specified that there is no possible defence of either consent or custom/tradition/ritual/religious practice and that counselling, procuring, assisting, or performing this procedure outside this jurisdiction under the pretext of school holidays or trips overseas is also an offence. ..

9. Sex Offenders

9.1 After Conviction

The first priority in dealing with sex offenders is the protection of victims, the vulnerable and the general public.

9.1.1 Vetting provisions:

Enactment of statutory vetting provisions, as recommended by the Joint Oireachtas Committee on the Children's Referendum in its Interim Report, published in September 2008 which:

- Capture and use **“soft” information** as well as “hard”, and make use of any parallel lists kept by statutory and/or other bodies, for example the Department of Education^[21];
- Ensure that the Garda Central Vetting Unit (GCVU) is properly **resourced** to carry out vetting quickly and efficiently;
- Ensure that GCVU operates as a “one-stop shop” empowered to provide **vetting services** to any organisation, whether statutory or not, employing people to care for children and/or vulnerable adults, where the person(s) would be employed in roles involving them in direct unsupervised contact with children or vulnerable adults. This is how the vetting system operates in Northern Ireland's Criminal Records Bureau
- Ensure that there is **statutory protection** against proceedings for defamation for any information giver providing information to GCVU in good faith.

9.1. 2 Risk Assessment:

- **Ensure that there is effective pre-release and post-release ongoing risk assessment of convicted sex offenders which is sufficiently resourced.** Post-

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release supervision should address appropriately the protection needs of the public, particularly where high risk offenders are concerned, and should acknowledge the need of victims for protection and information.

- **Victims should also have the right to contribute to the risk assessment** and management processes both before and after release, if they so wish;
- **Victims need to know how they can trigger the response of the risk assessment** and management authorities, if they have concerns about the behaviour of the sex offender(s) in their case post-release, and such responses should be evaluated regularly so that any failure to respond results in improvements to the system;

9.1.3 Offender programmes:

- There is increasing recognition that offender programmes, which hold the offender responsible for his offending, are a very important means of **reducing risk and preventing further sexual violence**. Participation in such programmes coupled with a demonstration of reduced risk, should be incentivized. Mere participation without real progress should not be rewarded on its own.
- **Here**, the courts can and do attach conditions to post release supervision orders, such as attending programme sessions, and penalties are imposed for breach of these conditions. At the **sentencing stage**, it is the responsibility of the sentencing judge to decide not just the sentence but also the appropriate post-release supervision period and whether or not there should be conditions attached to it (attending programmes or otherwise), based on a range of factors which include the need to protect the public from serious harm from the offender. That is the extent of current formal risk assessment by the Courts at present: it will be seen for instance that risk assessments at the time of sentence are likely to be outdated and so irrelevant to the level of risk at the time of release many years later.

9.1.4 Penalties:

- **Increase penalties for the more serious cases of non-compliance with Sex Offender Orders and/or notification requirements under the Sex Offenders Act 2001, (Sections 22 and 26 of SOA 2001 respectively)**. Currently the maximum penalty on indictment for either type of offence is five years, which might not reflect the seriousness of a particular case.

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- The maximum penalty for breach of a post-release supervision order and/or breach of a condition of that, is 12 months (Section 33 (1) SOA 2001). This penalty therefore is unlikely to be a significant deterrent for any offender breaching his supervision order. More generally, there is no incentive to participate in any meaningful way in a treatment programme.

9.1.5 the Northern Ireland Model:

- The well developed Northern Ireland system of risk assessment, monitoring and supervision of sex offenders is regarded as a useful model for this jurisdiction. In addition because of the land border with Northern Ireland parity is desirable, in order to minimize the chances of a sex offender being treated in effect more leniently than he should be (at best) or escaping official scrutiny and reoffending seriously (at worst), in either jurisdiction, precisely because the two systems differ.
- In this jurisdiction there is as yet no formal standardized system of multi-agency risk assessment and management of high risk sex offenders either pre or post-release. In Northern Ireland, the post-release risk assessment and management system now known as Public Protection Arrangements Northern Ireland (PPANI), operating through Local Area Public Protection Panels (LAPPPs), the statutory version of the former Multi-Agency Sex Offender Risk Assessment Management, or MASRAM, is responsible both for initial risk assessment and ongoing risk management, which differs accordingly to the level of risk (high, medium or low risk).
- In contrast, the Northern Ireland system provides not only comprehensive risk assessment but also a **flexible and detailed system of incentives and deterrents**. The newly enacted Criminal Justice Order (Northern Ireland) 2008 (SI 2008 No 1216) and its Explanatory Memorandum refer, in particular **Chapter 3, Articles 12-15** of the Order, (measures for the assessment of dangerous and violent sexual offenders convicted of specific offences) and **Chapter 4**, which provides new powers for:
 - the release of prisoners on licence;
 - Recall of offenders to prison following breach of licence requirements;
 - further re-release;
 - provisions for release subject to a curfew with or without electronic monitoring;
 - risk assessment and management which create a duty on a number of criminal justice agencies and others to assess and manage the risk posed by certain sex offenders^[22].

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- In addition, there are various civil orders available in Northern Ireland to address specific behavioural problems. These include Sexual Offence Prevention Orders, Risk of Sexual Harm Orders, Notification Orders and Foreign Travel Orders. Any breach may result in arrest and a sentence of up to five years.
- **RCNI recommends that the Northern Ireland regime is examined in detail as a possible working model** with the flexibility needed to assess and monitor sex offenders post-release as effectively as possible, in order to protect the public and in order to address the root causes of such offending;

9.1.6 other matters towards developing a best practice model:

- This would involve appropriate **resourcing and training of the Probation and Welfare Service** to carry out more complex supervision and monitoring. The courts would also have a role in providing rewards and sanctions, and where there is any multi-agency involvement, such as risk assessment, the Probation and Welfare Service should have overall responsibility.
- It would also involve adequate **expert resources** such as appropriate staffing and offender programmes, otherwise it could not be effective in preventing further offending.
- RCNI also recommends that such a model be identified and implemented in this country, then **evaluated, at least on a pilot basis**. Account could also be taken of the Northern Ireland experience, particularly of LAPPPs; if the evaluation were positive, that is, resulted in lower rates of breach and/or recidivism, it should be adopted here.
- That model should also include some mechanism to address the necessity for the experience and **ongoing needs of the Probation and Welfare Service to be relayed** both to the **executive** through Cosc: the National Office for the Prevention of Domestic, Sexual and Gender-based Violence and to the **judiciary**.

9.2 Sexually Harmful Behaviour without Conviction

- 9.2.1** The fact that the majority of people who have exhibited sexually harmful behaviour will not be reported and will not be convicted, highlights the importance of programmes for offenders without convictions. There are a range of circumstances in which offenders may participate in assessment and programmes when their offending behaviour has not been reported in any

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official manner to the Gardaí. This is of particular significance as offending behaviour can commence in early life, and early intervention has a highly preventative aspect.

9.2.2 NOTA Ireland, the National Organisation for Treatment of Abusers, has recently made a number of recommendations. These recommendations are based on national research which demonstrated the current scarcity of services and highlighted the inconsistency of approach, the lack of standardised training and the lack of outcome assessment. Current service provision is failing to meet the assessment and treatment needs of those who present significant concerns.

9.2.3 The Northern Ireland LAPPP model is being extended to consider non-custodial offenders. This is very significant, as the majority of offenders will never be convicted.

9.2.4 RCNI recommends that mechanisms for dealing with Offenders in the community who do not have, and are unlikely to have, any criminal conviction must be developed and resourced.

9.2.5 RCNI also recommends that there should be a standardized national model of service delivery in the area of assessment and treatment of services for children, teenagers and adults who have exhibited sexually harmful behaviour. Policies and procedures should be formulated and implemented at a national level to ensure a standardised approach, and should be regularly evaluated so that they can be improved in line with international best practice.

9.2.5 Services should be accessible at several different locations throughout the country, and should be publicly funded and advertised. There should be specialist assessment and treatment teams for children and adolescents, distinct from those for adults. At present, the only HSE funded service is in the North West of the country: NOTA Ireland supports the recommendation that there should be at least one in each of the four HSE areas of the country.

31st March 2009

Rape Crisis Network Ireland

References

“A Gap or a Chasm? Attrition in recorded rape cases”, Kelly & Ors (2005), UK Home Office Research Study

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293

Annual Report of An Garda Síochána 2004

Articles 49-51 Criminal Justice Order (Northern Ireland) 2008 SI 2008 No 1216.

Explanatory Memorandum to CJO (NI) 2006 SI 2008 No 1216 online reference: www.opsi.gov.uk/si/si2008/em/uksiem_20081216_en_1

Civil Law (Miscellaneous Provisions) Act 2008

Criminal Evidence Act 1992

Criminal Law (Sexual Offences) Act 2006

European Commission Report on the measures taken by Member States to comply with the Framework Decision {SEC(2004)102}, dated 16 February 2004

“Finding Space for Victims’ Human Rights in Criminal Justice”, Conor Hanly, page 24: Finding%20Space%20for%20Victim[1].pdf

“Investigating and detecting recorded offences of rape” (2007), UK Home Office Online Report 18/07, Feist & ors

Irish Refugee Council Submissions on Section 124 and Trafficking provisions in the Immigration, Residence and Protection Bill 2008: Online reference: www.IRC.Final.Submission Section 124 and Traf provisions_2008(5).doc.

“Sexual Abuse and Violence in Ireland: the SAVI Report”, (2002) McGee and others, The Liffey Press/ Dublin Rape Crisis Centre

“Sexual Assault Referral Centres: developing good practice and maximising potentials”: UK Home Office Research Study 285 (2004), Kelly & ors

“Sexual Assault: The Role of Prior Relationship and Victim Characteristics in Case Processing”, Kingsnorth et al, (1999). Justice Quarterly 16(2) 275-302

Sex Offenders Act 2001, section 28(2) and 30(1) and (2)

RCNI Agenda for Justice (2009)

UK (England & Wales) final sentencing guidelines on the Sexual Offences Act 2003, online reference: www.sentencing-guidelines.gov.uk/docs/0000_SexualOffencesAct1.pdf

UK Sexual Offences Act (2003), at www.statutelaw.gov.uk

UK Female Genital Mutilation Act 2003, at www.statutelaw.gov.uk

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ENDNOTES

1 “Sexual Abuse and Violence in Ireland: the SAVI Report”, (2002) McGee and others, The Liffey Press/Dublin Rape Crisis Centre

2 See Annual Report of An Garda Síochána 2004

3 see for example, a study carried out in the US: “Sexual Assault: The Role of Prior Relationship and Victim Characteristics in Case Processing” (1999), Justice Quarterly Vol 16 no 2, 275-302. at page 2873

4 UK Home Office Research Study 293

5 UK Home Office Research Study 285 by Kelly, Lovett and Regan entitled “Sexual Assault Referral Centres: developing good practice and maximising potentials”

6 As recommended by the European Commission’s Report on the measures taken by Member States to comply with the Framework Decision {SEC(2004)102}, dated 16 February 2004. The

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reference for the Framework Decision itself is: Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA)

7 Currently, the legislation only covers legal advice “in a prosecution” (section 78 of the Civil Law (Miscellaneous Provisions) Act 2008), that is, only once a prosecution has been brought. However, the same legislation provides for the abolition of the old means test

8 see section 13 of the Criminal Evidence Act 1992

9 Starting 22nd October 2008, the DPP has introduced a pilot project to disclose reasons for his decisions on request to near relatives of four categories of homicide victims, to be reviewed early in 2010. He will then consider whether reasons should be given to victims of sexual crimes

10 See as an example of how sentencing guidelines might be constructed, the UK (England & Wales) final sentencing guidelines on the Sexual Offences Act 2003 at www.sentencing-guidelines.gov.uk/docs/0000_SexualOffencesAct1.pdf

11 See Sections 75 of the UK SOA 2003 (evidential presumptions about consent) and Section 76 ibid (conclusive presumptions about consent), which taken together provide a list of situations in which the absence of consent may be presumed, however this list does not cover the situation where the complainant’s capacity to consent is impaired by **self induced** intoxication

12 See Section 74 of the UK Sexual Offences Act 2003: “.....a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. See definition of consent in UK at note 14 below

13 Part V Sexual Offences, Article 153(2) and (3)

14 See Sections 2 (4) and 3(6) of the Criminal Law (Sexual Offences) Act 2006

15 Following judgment of Supreme Court in the case of C C vs Ireland & ors (2006), 23 May 2006, online version available at www.courts.ie/judgments

16 The elements of the offence are intentional sexual touching by a person over 18 of a person under 18 where that person is in a position of trust in relation to the person under 18

17 The elements of the offence are observing private acts knowing that the person observed does not consent to being observed, for the purpose of obtaining sexual gratification

18 “Finding Space for Victims’ Human Rights in Criminal Justice”, Conor Hanly, page 24: Finding%20Space%20for%20Victim[1].pdf

19 Ref: www.IRC_Final_Submission Section 124 and Traf provisions_2008(5).doc

20 See Section 1, Female Genital Mutilation Act 2003, at www.statute.gov.uk

21 “Soft” information refers to information gathered in encounters with the Gardaí (or others) which do not result in a conviction or other formal record of misbehaviour, while “hard” information refers to convictions, cautions and/or other formal findings of misconduct by e g a former employer

22 Although one has recently been proposed, see “The Management of Sex Offenders”, a discussion document published by the Department of Justice, Equality and Law Reform, January 2009. It can be viewed online at www.justice.ie/prisons

23 Sex Offenders Act 2001, section 28(2) and 30(1) and (2)

24 However, “The Management of Sex Offenders” document cited above does discuss electronic

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monitoring as a deterrent and as a means of gathering evidence to prove a breach of order

25 Articles 49-51 CJO(NI)2008 SI 2008 No 1216. The Explanatory Memorandum thereto can be found at www.opsi.gov.uk/si/si2008/em/ukxiem_20081216_en_1

26 See NOTA Ireland Research Report published December 2008: "Closing the Gaps: Services in Republic of Ireland for Those with Harmful Sexual Behaviour", Corbett, A, Turner, R and Erooga, M

27 In line with the Ferns 5 Report recommendation to that effect, endorsed by NOTA in its own research report cited above (page 35)

28 The recommendation was made in the Ferns 5 Report and was endorsed by NOTA in its own research report cited above (page 35)