Reducing Delays in Court

RCNI Policy Paper on Case Management and Pre-Trial Hearings in the Criminal Courts

Expanded Version May 2012

Introduction – Reducing Delay in our Criminal Courts:

In this paper, Rape Crisis Network Ireland proposes an integrated system of Case Management and Pre-Trial Hearings, based on statute, as a meaningful and effective solution to the chronic problem of unnecessary delay in our criminal courts. Unnecessary and inordinate delay has the effect of increasing dramatically the trauma of survivors of sexual violence who report to the Guards, as our own daily experience with our clients and recent research[1] both tell us.

1.0 Rape Crisis Network Ireland is the national representative body for the rape crisis sector**.** It 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 including expert data collection, supporting Rape Crisis Centres to reach best practice standards, legal advice and policy development, and using our expertise to influence national policy and social change**.** We are the representative, umbrella body for our member Rape Crisis Centres who provide free advice, counselling and support for survivors of sexual abuse in Ireland, including a growing number between the ages of 14 and 18.

1.1 The Problem of Delay in our Criminal Courts: The Rape Crisis Community has for decades witnessed first-hand the detrimental impact of delays in the legal system on victims of sexual violence. We have also witnessed the impact of delays on attrition rates when supporting victims who decide that they can no longer be involved with the legal system as the personal cost is too high. Recommendation 22 of "Rape and Justice in Ireland" (RAJI) (2009) states:

"With regard to every stage of the process, but particularly once the case is returned for trial, every possible means of reducing delay should be explored and pursued where appropriate. It is recommended therefore that the National Crime council research recommendations of delay set out in this report are followed."[2]

Two major studies in the last decade have both identified serious delays in our criminal courts as a significant problem: RAJI, referred to above (2009), and the National Crime Council Report (2006)[3]. Since then, it appears that there has been some improvement in the waiting times from return to the Central Criminal Court to trial, but the most up to date available data tells us that the problem of delay is still very much with us[4].

---

[1] "Rape and Justice in Ireland" (2009), Hanly &ors, Liffey Press, a large-scale longitudinal study of the reasons for attrition of rape cases at the reporting, prosecution and trial stages, commissioned by the RCNI and carried out by a National University of Ireland Galway team led by Conor Hanly BL

[2] "Rape and Justice in Ireland"(RAJI) recommendation 22, page xxxiv (2009), see note 1 above;

[3] The Report of the National Crime Council, An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002-2004 (GPO, 2006), available online at http://www.crimecouncil.gov.ie/downloads/Time_Intervals_Research.pdf

[4] In RAJI, the median delay from return to the Central Criminal Court to the date of trial was 16 months, the same as the National Crime Council report found in its data from 2004. "Rape and Justice in Ireland", however, was confined to the Central Criminal Court offences and aggravated sexual assault during the period 2000 to 2004. The Courts Service Annual Report 2010, the latest available at the time of writing, indicates that the average[4] waiting time for murder and rape trials is "10-11 months".[4] However, the average waiting time from return to trial in the Circuit Court during 2010 is longer, at 13.65 months.[4] Note also that the median waiting time **before** return for trial, from arrest to return for trial, is 13 months in the "Rape and Justice in Ireland" study, see pp 334/5 RAJI.

As its authors point out, the National Crime Council Report recommended that the overall delay from initial arrest to return for trial should be no longer than 54 weeks ordinarily, with no more than six months from return for trial to the start of the trial itself. This paper is concerned with reducing the period from return for trial to **effective** trial as far as possible, as this is the part of the overall delay which is the least affected by outside factors.

These reports refer only to the **first** time that a case is listed for trial. However, it is the experience of victims, their supporters, criminal lawyers and Court Service staff alike is that cases are often listed **more than once** for trial. There are no recent published figures which set out the average number of times a case is listed for trial, or which tabulate the recorded reasons for these relistings. The problem is nevertheless real and widespread, and presents continuing difficulties for victims of sexual crime, their family, friends and other supporters, other witnesses, An Garda Siochana, Court Services staff, actual or prospective jury members, and of course, for our judges. Sometimes, of course, a late adjournment or postponement is unavoidable.

These delays have important **additional** consequences, as it is clear from the available research that they **contribute to the attrition of rape cases** from the criminal justice system. As the authors of "Rape and Justice in Ireland" report, "….three-quarters of withdrawn cases, originally directed 'prosecute on indictment', were withdrawn after two years or longer…"[5]. The analysis of the primary stated reasons for withdrawal before trial includes a figure of almost 20% for "did not want to attend court", and the analysis of secondary reasons reveals that 20% of respondents stated "want to move on" as a reason why they were withdrawing from the case. RCNI's view is that these are two reasons which are likely to increase as the delay lengthens before the case comes to trial.

1.2 To help reduce these delays, and therefore the additional stress and trauma they cause to victims, RCNI proposes an organised system of case management and pre-trial hearings in order to prevent as far as possible **late, unnecessary and avoidable** adjournments and postponements which result in cases having to be sent back through the listing system, as this recycling process can add substantially to the overall delay before a case is heard.

RCNI therefore recommends the implementation of an effective Case Management and Pre-Trial Hearing system. Such a system would provide significant additional benefits, including greater clarity and focus on the relevant issues in the trial, shorter and more cost-effective trials, more effective administration of justice, and greater public confidence in the criminal justice system. Of course, reduction of delays after return for trial also depends on the availability of sufficient numbers of judges, essential Court Services staff such as Registrars, and court rooms to accommodate hearings in a timely and efficient manner. Shortages of judges, support staff and court rooms can be solved by appointing more judges and by allocating enough money to allow them to carry out their judicial functions. Whether more money and resources are found for this purpose, or whether the system must make do with what it already has, **an effective Case Management and Pre-Trial Hearing system** can be designed which will help to make the most of those resources.

1.3 Rationale - the RCNI Perspective:

The RCNI sees Case Management and Pre-Trial Hearings as important to the improvement of the criminal justice system experience for survivors of sexual violence. This is a summary of the reasons:

---

[5] RAJI p 248 [full reference at note 1 above]

- To reduce **additional stress and trauma** to survivors and their supporters arising from avoidable delays before and during criminal trials, as far as possible, by reducing delays **before** trials are heard, and eliminating, where possible, or where not, reducing delays **during** trials;

- To reduce **additional stress and trauma** to survivors and their supporters arising from the continuing **uncertainty** before criminal trials, as far as possible, about specific issues such as the timing of the trial, its length, whether there will be more than one trial, and so on;

- To reduce the **number of times cases are listed** for full hearing, are not effective because of issues which could have and should have been resolved well before that date, and are then recycled through the listing systems for another full hearing;

- To reduce the number of cases which are lost to the criminal justice system as delays extend;

- To provide **juries with an uninterrupted flow of evidence**, by eliminating where possible the need for interruptions in the course of the trial arising from legal arguments in their absence;

- To **narrow the issues** and **improve presentation** of cases, thereby

- Improving the **quality of justice** for survivors of sexual violence in our criminal courts,

- Upholding the **public interest** in the running of fair, timely, efficiently- run trials, and improving **public confidence** in the criminal justice system as a result;

- Reducing the number of cases which are **appealed,** and

- Reducing **costs** to the public purse of these avoidable delays.

1.4 Case Management and Pre Trial Hearings in the Criminal Courts: The current practice in Ireland

- No formal Case Management system in the Criminal Courts, but
- Informal ad hoc Case Management system operating in Central Criminal Court

- **Limitations:** this system has no formal basis, is dependant on good will and good behaviour of all concerned, is not **general** around the country in **all Circuit Criminal Courts** as well as in the Central Criminal Court, often witnesses are already present in the Court precincts when Case Management matters are dealt with.

1.5 Support for Case Management and Pre-Trial Hearings.

Many official reports support RCNI's position in recommending some form of Case Management /Pre Trial Hearing process in Irish trials on indictment. These reports include:

- Law Reform Commission in its 2006 Report on Prosecution Appeals (see Ch 4)[6]
- Report of the Working Group on the Jurisdiction of the Courts (On the Criminal Jurisdiction), CS 2003[7]
- Joint Oireachtas Committee on Justice, Equality, Defence & Women's Rights report *A Review of the Criminal Justice System* (2004)[8]
- National Crime Council Report 2006 *An Examination of Time-Intervals in the Investigation and Prosecution of Murder and Rape 2002-2004* (cited in Rape and Justice in Ireland, Hanly et al, Liffey Press, 2009)[9]
- See Rape and Justice in Ireland, the Report of the Research Project on Attrition in Rape Cases commissioned by RCNI and completed by Hanly, Scriver and Healy, Liffey Press, 2009, recommendation 22: **"...every possible means of reducing delay should be explored, and pursued where appropriate..."** [10] and note also that
- Cosc, the National Office for the prevention of Domestic, Sexual and Gender-Based Violence, included an examination of the feasibility of Pre-Trial Hearings in its National Strategy, published 2010 (Activity 12.2)[11]

These reports go back as far as 2003, and their consensus is that some form of pre-trial procedure and case management system is desirable, for various reasons. As the National Crime Council Report referred to above says:

"The Council accepts the professionals' view that there could be benefits to dealing with certain issues through **pre-trial hearings**. In addition to this, the Council notes and endorses the findings of the Working Group on the Jurisdiction of the Courts (the Fennelly report) in relation to pre-trial hearings. The Council is of the opinion that the introduction of pre-trial hearings would lead to shorter and possibly fewer jury trials and would assist in making the court process more efficient for all users. The Council recommends, therefore, that consideration be given to the introduction of pre-trial hearings (p.25, emphasis added)".2

A useful summary of the main points of the three earlier reports can be found at pages 56 through 60 of the Law Reform Commission Report on Prosecution Appeals and Pre-Trial Hearings, (LRC 81-2006) [2006].

1.6 Definitions:

[6] Its full title is: Law Reform Commission Report on Prosecution Appeals and Pre Trial Hearings, LRC 81-2006 (2006), available online at http://www.lawreform.ie/_fileupload/Reports/Report%20Prosecution%20Appeals.pdf

[7] This is the Report of the Working Group on the Jurisdiction of the Courts: the Criminal Jurisdiction of the Courts (often referred to as the "Fennelly Report") (2003), available online http://www.courts.ie/courts.ie/library3.nsf/(WebFiles)/92E26C80227460428025788800 3CFD32/$file/WGJC%20Report.pdf

[8] This is the Report of the Oireachtas Committee on Justice, Equality, Defence and Women's Rights: A Review of the Criminal Justice System (GPO, 2004), available online at http://www.oireachtas.ie/viewdoc.asp?DocID=3067&CatID=78&StartDate=01%20January%202004&OrderAscending=0

[9] This is the Report of the National Crime Council, An Examination of Time Intervals in the Investigation and Prosecution of Murder and Rape Cases in Ireland from 2002-2004 (GPO, 2006), available online at http://www.crimecouncil.gov.ie/downloads/Time_Intervals_Research.pdf

[10] cited above at note 1

[11] See Cosc National Strategy, March 2010, available online at http://www.cosc.ie/en/COSC/Final%20Electronic%20NS%20full%20doc%203%20March.pdf/Files/Final%20Electronic%20NS%20full%20doc%203%20March.pdf

- **Case Management:** Refers to the supervision by a judge of the overall conduct of a criminal trial, including the determination of certain administrative and discrete legal issues by pre-trial hearing, in such a way as to improve the administration of justice generally while having regard of course to the paramountcy of the rights of the accused, as well as to the rights of others concerned.
- **Pre Trial Hearing:** Refers to a pre-trial court appointment where administrative matters and certain discrete legal issues are settled as far as possible in advance of a criminal trial by the trial judge, so as to increase the overall efficiency of the trial itself, in a manner which is compatible with the paramountcy of the rights of the accused, and indeed, with the rights of others concerned in the criminal justice process. The **administrative matters** include such things as availability of witnesses, estimated length of the trial, practical arrangements re communications technology, need for any interpreters, and so on. The **discrete legal issues** include e g, issues in relation to the validity of any warrant, whether there are any admissions of fact, any witness statements which can be read out, applications to sever an indictment, and disclosure. Neither list is intended to be read as exhaustive. **Note that** many matters, especially administrative ones, are capable of **agreement** pre-trial between the parties, and that a Pre-Trial Hearing system provides a convenient early focus point for such agreements to be made and recorded.

1.7 Implementation of an effective Case Management System including Pre-Trial Hearings: RCNI submits that an effective Case Management and Pre-Trial Hearing regime can only be implemented by a clear and detailed **statutory regime** which deals not only with the legal framework but also with the procedural rules needed to implement that framework. Further, this legal framework should provide for a **mandatory pre-trial hearing** at which the court could check on progress towards readiness for trial, hear submissions, and give directions and rulings as necessary, in those administrative and discrete legal areas where no issue of admissibility of evidence arises[12]. In other words, the court should have the statutory power and duty to identify the remaining issues between the parties, and settle them as far as they concern administrative and/or discrete legal issues which are outside the scope of the jury's decision making. The case management of the whole trial process from return for trial stage through to the Pre Trial Hearing and the trial itself, should be founded on statute, supported by detailed Court Rules, and controlled by the Trial Judge.

1.8 Victims have Rights in our Criminal Justice System which should be upheld by our Criminal Justice Law and Procedure:

(1) Victims' rights cannot be ignored by our criminal justice system, although the rights of the accused in the trial process are held to be paramount[13]. Indeed, since the European Council Framework Decision on the Standing of Complainants in Criminal Proceedings was issued in March 2001, Ireland has taken on international law obligations in relation to complainants' rights. The Decision obliges the Irish government to ensure that complainants are treated with respect and dignity, that their rights and interests are recognized, and that they are assisted in various areas,

[12] Other than the " Section 4E" [Criminal Justice Act 1999] situation described above, that is, where there is an application by the defence to stay the proceedings before trial, and where the entire case falls or stands on admissibility or otherwise of a single pivotal piece of evidence, ie a ruling in favour of the defence would effectively end the proceedings.
[13] see DPP vs D cited above

including information, protection, compensation and participation in the criminal justice process[14]. Article 2 (1) on "Respect and recognition" states:

"Each Member State shall ensure that complainants have a real and appropriate role in its criminal legal system. It shall continue to make every effort to ensure that complainants are treated with due respect for the dignity of the individual during proceedings and shall recognise the rights and legitimate interests of complainants with particular reference to criminal proceedings", and Article 3 states: "….Each Member State shall take appropriate measures to ensure that its authorities question complainants only insofar as necessary for the purpose of criminal proceedings".

(2) Further, there are a number of European Court of Human Rights cases which make it clear that the rights of victims have their place, and in appropriate cases, must be considered alongside those of the accused. See for example the judgement in the case of Doorson vs the Netherlands[15], (1996) 22 EHRR 330, at paragraph 70:

"It is true that Article 6…..does not explicitly require the interests of witnesses in general, and those of complainants called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8.. of the Convention. Such interests of witnesses and complainants are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or complainants called upon to testify".

(3) Victims of crime, as well as those accused of it, have **general rights** under both the Irish Constitution and the European Convention on Human Rights, which should be upheld as far as possible under our system of criminal justice. These include Article 40.1, which guarantees equality before the law of "human persons", Article 40.3.1 which says in effect that the State should uphold the "personal rights of the citizen" and Article 40.3.2 which lists the "life, person, good name, and property rights of every citizen", saying the State shall protect these "as best it may from unjust attack..".[16] Some significant ECHR rights of victims in the criminal justice context, as Doorson

[14] See online link to the FD: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:082:0001:0004:EN:PDF

[15] Online link for judgement report: http://www.cassatie.eu/documenten/doorson.htm

[16] Irish Constitution Article 40.1: All citizens shall, as human persons, be held equal before the law. ….

Irish Constitution Article 40.3.1: "The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen".

Irish Constitution Article 40.3.2: "The State shall, in particular, by its laws protect as best it may from unjust attack and […..] vindicate the life, person, good name, and property rights of every citizen.

Irish Constitution (Bunreacht na hEireann), available online at: http://www.taoiseach.gov.ie/eng/Youth_Zone/About_the_Constitution,_Flag,_Anthem_Harp/Constitution_of_Ireland_March_2010.pdf

suggests, are the right to life, liberty and security of the person[17]; others which are relevant in this context are the right to freedom from "..inhuman or degrading treatment…" and the "right to respect for privacy and family life"[18]

1.9 Rights of the Community in Relation to the Criminal Justice System: these should also be reflected in our Criminal Law and Procedure.

(3) **The community** in general has the right to conduct prosecutions **for the common good**. This principle is expressed fully in the case of S H vs DPP[19]:

"Article 30 of the Constitution specifies that prosecutions for serious crimes *"shall be prosecuted in the name of the People …"* This provision reflects the fact that the prosecution of serious crimes is vital to the public interest. The State can only initiate a prosecution when it is aware that a crime has been committed and there is sufficient evidence available to charge somebody with it. Once that happens the State has, in principle, a duty to prosecute. Although the bringing of a prosecution may undoubtedly be central to vindicating the rights or interests of a victim of a crime the interests of the People in bringing a prosecution is, in the interest of society as a whole, of wider importance".

(4) There is another public interest involved here: **public confidence in the criminal justice system and the rule of law**. If the criminal justice system is seen to work better by and for all who are obliged to use it, that means that the rule of law itself would be taken more seriously by the whole community. To give one concrete example: at present, juries may be sent out while legal issues are determined in their absence, more than once during the course of the evidence in a criminal trial. If the flow of a trial is interrupted by repeated applications from which the jury is excluded, the evidence will be harder for the jurors to recall as a result of these interruptions, and so harder for them to analyse as they should. The unity of the trial is greatly enhanced when the process is not continually fractured by interruptions. This view is supported by Hardiman J, in his judgment in Cruise v O'Donnell [2007][20]:

"..Disposing of evidential issues before the jury is sworn will assist and emphasise, rather than detracting from, that unity and continuity [of the criminal trial]. In other jurisdictions where pre-trial motions to suppress evidence and similar procedural devices are well established, the fundamental nature of a jury trial is not considered to be trenched upon".

(5) There is a clear strong public interest in finding ways to reduce unnecessary costs to the exchequer caused by lengthy trials, particularly those which end up being adjourned and recycled through the listing process all over again, because an obvious issue could have been, but was not, identified and addressed well before the trial. The **cost implications** of multiple full trial listings, with numbers of cases being recycled through the listing system, are enormous**,** and for reasons of

[17] Articles 2 and 5 ECHR respectively; the convention is available online at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf
[18] Articles 3 and 8 ECHR respectively
[19] S.H vs DPP [2006] 3 IR 575, see dicta per Murray CJ at p 619; see also DPP v WD [2008] 1 IR 308 (judgment of Charleton J)
[20] Cruise v O'Donnell [2007] IESC 67 (Supreme Court case)

economy alone, measures to reduce overall delays such as those proposed herein, deserve urgent attention.

(6) Finally, efficient case management and pre-trial hearing systems would give all the lawyers concerned in an individual case an early opportunity to **focus on the real issues** in the case, and narrow these where possible through agreement, and where not, by asking the judge for a ruling on a particular administrative or legal issue.

1.10 Rights of the Accused would in fact be upheld by an effective Case Management and Pre-Trial Hearing system

1. The principle of fairness to the accused includes his/her right to be tried **without undue delay.** Under Article 6(1) of the European Convention on Human Rights, the accused person is entitled not only to a "fair and public hearing" but one which is held "within a reasonable time".[21] Case Management, including Pre-Trial Hearings, can shorten the wait for that trial and therefore should be viewed as structures with the power to uphold rather than deny the accused his rights. In addition, the accused person can benefit from the opportunity to have any concerns re issues such as prosecution disclosure, resolved in good time before trial at a Pre-Trial Hearing.

2. Efficient case management and pre-trial hearing systems would provide the accused person with opportunities for **co-operation with the prosecution**, which s/he could use to his/her advantage as mitigation in the event of a guilty plea or conviction after a jury trial.

3. Clearly any pre-trial hearing or other procedure must be conducted fairly as far as the accused is concerned. S/he must know the full extent of the case against him/her/her in advance of such a hearing. This means in practice that **disclosure obligations** should have been complied with before the Pre Trial Hearing, and any Court Rules should cover this area clearly and fully.[22]

4. The Law Reform Commission in its Report on Prosecution Appeals and Pre-Trial Hearings in 2006, also raised the issue of the cost of **legal advice at the pre-trial stage**[23], and proposes as a solution that there should be a separate fee payable to lawyers appearing for the defence to cover pre-trial consultations and hearings. With this we agree.

---

[21] Article 6.1 of the European Convention on Human Rights reads as follows: **"Article 6 . Right to a fair trial**

1 In the determination of his civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice..."

[22] A procedure for non-party disclosure could be included in any Court Rules for determination pre-trial, as at present there is no such procedure (see Sweeney vs DPP, judgement of Geoghegan J 9 October 2001, and DH v Groarke and ors, Keane CJ 31 July 2002);

[23] LRC on Prosecution Appeals and Pre-Trial Hearings (LRC 81-2006), cited above, available online at http://www.lawreform.ie/_fileupload/Reports/Report%20Prosecution%Appeals.pdf paragraph 4.61 at page 79 ibid

5. **Reporting restrictions** are vital to the fair conduct of any pre-trial hearing. RCNI submits that reporting restrictions should cover any pre-trial hearing and any rulings made, unless of course the pre-trial hearing becomes a guilty plea.

1.11 Additional Benefits of Case Management outside Pre-Trial Hearings:

During the Trial

Case Management should also operate during a trial, to ensure that the proceedings are conducted with fairness to all concerned. The role of the judge here is to ensure that pre-trial rulings are complied with, and to oversee the manner in which the parties conduct their cases. S/he should be robust to prevent any deviations into irrelevance, discourtesy to witnesses and/or officials, and unnecessary prolongation of submissions or examinations.

State Obligations

Another additional benefit is that legislation to address this situation would also go some way to fulfilling the State's new obligations under Article 1 of the draft Directive of European Parliament establishing minimum standards on the rights, support and protection of victims of Crime (May 2011), to "ensure that all victims of crime receive appropriate protection and support and are able to participate in criminal proceedings and are recognized and treated in a respectful, sensitive and professional manner, without discrimination of any kind, in all contacts with any public authority…"[24]

New, Effective Case Management and Pre-Trial Hearing system: How could this be incorporated in our criminal justice procedure?
Procedure: Pre Trial Questionnaires and Appointments – Will these work without new legislation?

The Law Reform Commission Report on Prosecution Appeals and Pre-Trial Hearings, (LRC 81-2006) [2006][25] considers in detail the system in operation in England & Wales in particular. There, most pre-trial matters are now dealt with at just one hearing, the Pleas and Case Management Hearing (PCMH). This hearing follows completion of a detailed questionnaire containing information about the case and the trial from both parties. This hearing is only one element in a case management strategy (the Criminal Case Management Framework or CCMF), underpinned by statute and by detailed rules. Efficient and fair case management is the responsibility of all concerned**:** judge, parties, their lawyers, the court staff, witnesses, and the Case Progression Officer.

The LRC Report does not go as far as this model, but it does consider that "sensible reforms to the pre-trial process could produce real benefits for defendants, complainants, witnesses and the public. Proper preparation and identification of issues through case management could improve the quality of trial rulings and the jury's appreciation and understanding of the evidence".[26]In general, it considered that changes could be made to the criminal justice process to ensure that, among other things, "the jurors have a clear understanding of the main issues involved".[27] We would add that

[24] available online at: http://ec.europa.eu/justice/policies/criminal/victims/docs/com_2011_275_en.pdf
[25]available online at http://www.lawreform.ie/_fileupload/Reports/Report%20Prosecution%20Appeals.pdf
[26] Paragraph 4.54, page 76 of LRC Report on Prosecution Appeals and Pre-Trial Hearings (LRC 81-2006), available online at http://www.lawreform.ie/_fileupload/Reports/Report%20Prosecution%Appeals.pdf
[27] ibid.

proper preparation and identification of the issues would also shorten trials and thereby reduce costs.

The LRC proposes a pre-trial questionnaire, like the one in use in England and Wales, to be completed by lawyers for each side. A **"**requirement that the questionnaire be completed could be introduced by practice direction of the Presidents of the High Court and Circuit Court"[28].

The full list of matters which the LRC feels could be included in such a questionnaire (in summary form) is:[29]

- Whether it is intended to make application for separate trials for any co-accused and/or any count(s) on indictment;
- Whether it is intended to make application for dismissal of any charge;
- Applications for prohibition or stay
- Whether it is intended to challenge the validity of a warrant
- A Statement of Compliance with Judges' Rules, and whether defence will seek to challenge it;
- Whether notice has been given of any alibi (as already required by statute)
- Whether legal representation is required for a complainant in a sexual trial
- Whether it is intended to apply for attendance before court of someone who has made a written statement
- Whether prosecution has made full disclosure statement
- Whether there any issues as to the medical/psychological condition of defendant
- Estimated length of trial
- Statement of readiness for trial
- Whether any admissions (facts or documents) have been made by either party, and whether there is any agreement on the facts or evidence which can be admitted either by written statement or by formal admission (including expert reports)
- Whether all witnesses in Book of Evidence are required by prosecution
- Whether the attendance of witnesses can be staggered over course of trial
- Whether any evidence needs to be taken by video link
- Whether any interpreters are required
- Applications to take evidence on deposition
- Applications for transfer of trial
- Arrangements regarding communications technology, in particular whether there is agreement as to the relevant sections of the recorded interview to be replayed in court
- Whether defence will try to establish a failure to fulfil entitlements as to treatment in custody by An Garda Siochana
-

1.13 Evaluation of PTH/CM Questionnaires: Case Management System to include Pre-Trial Procedures – Statutory Provision as Preferred Solution

(1) RCNI agrees with the LRC that "sensible reforms to the pre-trial process could produce real benefits for defendants, complainants, witnesses and the public [and that] proper preparation and identification of issues through case management could improve the quality of trial rulings and the jury's appreciation and understanding of the evidence".[30] The LRC list

[28] Paragraph 4.59, page 78, ibid
[29] paragraphs 4.55-8, pages 76 through 78, ibid
[30] Paragraph 4.54, page 76 of LRC Report on Criminal Appeals and Pre-Trial Hearings (LRC 81-2006), available online at http://www.lawreform.ie/_fileupload/Reports/Report%20Prosecution%Appeals.pdf

of issues which could be settled before the trial starts, while very useful, does not include issues of admissibility of evidence, but matters which are either administrative in nature, or which are essentially discrete matters of law (such as severance and joinder). The determination before trial of admissibility of evidence issues is considered separately above.

(2) The RCNI view is that an effective Case Management and Pre-Trial Hearing regime can only be implemented by **a clear and detailed statutory regime** which deals not only with the legal framework but also with the procedural rules needed to implement that framework. These rules could incorporate an administrative procedure based on the completion and submission of questionnaires by prosecution and defence, with clear provisions obliging both prosecution and defence to fill in a pro forma set of questions and submit them to the trial court within a fixed time limit**.** Further, this legal framework should provide for a mandatory pre-trial hearing at which the court could examine both questionnaires, hear submissions, and give directions and rulings as necessary, in those administrative and discrete legal areas where no issue of admissibility of evidence arises[31]. In other words, the court should have the statutory power and duty to identify the remaining issues between the parties, and settle them as far as they concern administrative and/or discrete legal issues which are outside the scope of the jury's decision making. The case management of the whole trial process from return for trial questionnaire stage through to the Pre Trial Hearing and the trial itself, should be founded on statute, supported by detailed Court Rules, and controlled by the Trial Judge. A questionnaire is one practical way to make the Pre Trial Hearing as efficient as possible**.**

1.14 The Law: This solution is feasible and constitutional

There is a traditional view that the defence have and should retain, an unqualified right to bring in any evidence in the trial without any advance notice to the Court and/or the prosecution, - and that to qualify this right in any way is to run the risk of the trial being unfair to the accused and being in breach of his Constitutional and Convention rights[32]**.**

Our view is that it is time that this traditional view was challenged, and in this we are supported by the findings of the "Balance in Criminal Law" Review Group. Their 2007 Final Report stated that

"The Group after careful consideration is of the view that the current arrangements [in relation to advance disclosure of the defence case] are imbalanced and unsatisfactory".[33]

[31] Other than the " Section 4E" [Criminal Justice Act 1999] situation described above, that is, where there is an application by the defence to stay the proceedings before trial, and where the entire case falls or stands on admissibility or otherwise of a single pivotal piece of evidence, ie a ruling in favour of the defence would effectively end the proceedings.

[32] Subject of course to the alibi notice requirements under section 20 of the Criminal Justice Act, 1984, the obligations on an accused to provide advance disclosure of the intention to seek to call expert evidence under section 34 of the Criminal Procedure Act, 2010, and the obligation to give notice of the intention to apply for leave to cross-examine a complainant about other sexual experience under section 4A of the Criminal Law (Rape) Act, 1981.

[33] Balance in the Criminal Law Review Group Final Report 2007, online at: http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf

They made two important recommendations, first, that defence expert evidence should be disclosed in advance of trial[34], and second, that all admissibility issues should be determined before a jury was sworn in – but on the first scheduled day of the trial[35].

Following the Report, the Criminal Procedure Act 2010 came into force at the end of 2010. It says that defence expert evidence cannot be called without the leave of the Court, and sets out the process whereby such leave should be sought (Section 34 CPA 2010) and provides also for an advance notice procedure. The Section provides also for the requirement to give advance notice to be dispensed with if it would not in all the circumstances, have been reasonably possible for the defence to have given such notice. It remains to be seen whether the recent defence challenge to the constitutionality of this Section is successful[36].

This Act is only the most recent of several putting an obligation on the defence to give advance notice of particular issues, long before the CPA 2010 came into force. The two obvious longstanding defence obligations to give notice are notice of alibi, and the requirement to give advance notice of issues regarding fitness to plead.[37] Note also that Section 4A of the Criminal Law (Rape) Act 1981[38], provides for a defence obligation to give advance notice of its intention to seek leave to adduce evidence of other sexual experience of the complainant. Such notice of intention to seek leave to make such an application is often given in advance of the start of the trial, although the legislation merely requires that the notice be given "before, or as soon as is practicable after, the commencement of the trial for the offence concerned".

There is also a popular view that the fact that the accused is under no obligation to disclose the nature of his/her defence in advance, necessarily confers an additional advantage on him/her. In fact, it has been argued that early disclosure may enhance the credibility of an accused person's defence at trial. Note that there has been an erosion in the defence right to silence in recent times; in many cases, the accused may have had no effective option but to disclose his/her defence at an early stage of an investigation, as adverse inferences may be drawn from his/her silence or failure to provide an explanation. It should be noted that the existing provisions on adverse inferences from silence may be much more draconian in their effect than any advance notice or disclosure made by the defence when the prosecution has served its evidence and legal advice has been given. That said, an early investigation of a timely explanation may result in the investigation or prosecution being stopped entirely, or the proposed charges being reduced. Where an accused decides to run a positive defence but s/he also decides not to disclose the nature of that defence until the trial, s/he runs the risk that the prosecution will not be able to examine that defence carefully and fully. This has the potential to work to the disadvantage of the accused, as the authors of the Balance in the Criminal Law Final Report point out, and to the disadvantage of the system as a whole: if the particular defence transpires to be very unconvincing only half-way through the trial, the defence

[34] Now provided for in section 34 of the Criminal Procedure Act, 2010.
[35] see pp 172 – 175 ibid
[36] Markey v Minister for Justice and Law Reform and Ors, Kearns J, 4 February 2011. The challenge to the constitutionality of the CPA 2010 provision on expert evidence was unsuccessful, but the case is now under appeal to the Supreme Court (awaiting hearing at the time of writing, January 2012)
[37] These obligations do not preclude the defence from making a fresh application on the day of the trial, and there is at present no real sanction for failure to give the required notice. However, an effective sanction might be to give the judge the power to comment on this failure in his charge to the jury.
[38] As inserted by Section 34 of the Sex Offenders Act 2001

has foregone the advantages of an early guilty plea. If the defence is discovered at that stage to be convincing, an enormous amount of public resources and private trauma and distress (the victim's) will have been expended for nothing.

The RCNI view is that it would not be necessary to go quite so far as compelling the defence to make full disclosure of his/her defence in advance of trial, in order to achieve effective time and cost savings by an efficient Case Management System working in tandem with Pre-Trial Hearings.

1.15 Status of the Pre Trial Hearing Rulings.

Whilst a pre-trial ruling on many administrative matters may ultimately be a final ruling on that matters, there can be a number of situations where discrete legal issues, already ruled upon pre-trial, may have to be revisited at the trial, with the leave of the trial judge, and where the interests of justice so require. Our view is that a trial judge must be nominated for the pre-trial hearing, so that that judge has a grasp of the essence of the case from an early stage, and faces the trial knowing that administrative matters and discrete legal issues have been regulated as far as possible in advance of trial. Indeed, if the judge is familiar with the case from an early stage, s/he is in the best possible position to judge whether it would be in the interests of justice to revisit a particular issue at trial.

1.16 Preliminary Rulings on Admissibility of Evidence – a possible obstacle?

Historically, there has been a certain judicial reluctance in this country to deal with issues of admissibility of evidence in advance of the trial itself, often on the basis that to do so would be to "entrench on the unitary nature of a criminal trial"[39]. The Law Reform Commission's Report on Prosecution Appeals and Pre-Trial Hearings[40] cites Cruise v O'Donnell [2004] IEHC 376, as a recent case in point, where Mr Justice Quirke refused to set aside the Circuit Court Judge's ruling that he had no jurisdiction, on a pre-trial application to stay the proceedings, to decide on the admissibility or otherwise of a search warrant, as that was a matter which in his view, should properly be dealt with by the trial judge. However, this situation is now changing: since the Commission report was drafted, this decision was quashed by the Supreme Court: see Cruise v O'Donnell [2007] IESC 67.

It should be for the trial judge to decide whether it is appropriate to hold a Pre Trial Hearing on any issue of admissibility of evidence. In our view, where an entire case stands or falls on the admissibility or otherwise of a single piece of evidence, a judge conducting a Pre Trial Hearing should have the power to hear witnesses as well as submissions, but this power should not be extended further than strictly necessary to determine the individual preliminary issue. The formula adopted in Section 4E[41], "oral evidence may be given on an application [to dismiss a charge] only if it appears to the trial court that such evidence is required in the interests of justice", could be very useful here. We note however the concern expressed by the Balance in the Criminal Law Review Group in their Final Report that pre-trial hearings would result in duplicated hearings, with no saving in time or costs. The aim of an effective pre-trial hearing is not to duplicate the evidence to be heard at the

[39] Cruise v O'Donnell [2007] IESC 67, cited below
[40] Law Reform Commission Report on Prosecution Appeals and Pre-Trial Hearings (LRC 81-2006), available online at http://www.lawreform.ie/_fileupload/Reports/Report%20Prosecution%Appeals.pdf Paragraph 4.67, page 80 ibid
[41] of the Criminal Justice Act 1999

trial itself but to decide those issues which are not the province of the jury. The solution they propose may be the simplest in any case where there are admissibility issues but the whole case does not stand or fall on whether one piece of evidence is admitted, namely:

"We recommend that legislation provide that admissibility issues may be determined prior to the swearing in of a jury, on the first day or days of a trial" [42]

This would avoid the necessity to swear in a jury prior to the determination of issues of admissibility.

The primary solution is to empower judges by statute and Court Rules to operate a Case Management System for all criminal cases on indictment, and in order to do that, conduct Pre Trial Hearings, examine the administrative and discrete legal issues between the parties, and make rulings where appropriate in advance of trial, in order to ensure that the conduct of the trial itself is as timely and as free of obstacles as possible, in the interests of all concerned.

1.17 Conclusion - The Way Ahead for Now – what should be done?

RCNI recommends the implementation of an effective Case Management and Pre-Trial Hearing system. Such a system would provide significant benefits, to include a greater clarity and focus on the relevant issues in the trial, shorter and more cost-effective trials, an augmentation of the effective administration of justice, and greater public confidence in that administration.

It is clear that Pre-Trial Hearings, as part of a Case Management system based on statute and underpinned by detailed Rules, with appropriate safeguards, can function without any undermining of the Constitutional and Convention rights of the accused to a fair trial.

It is also clear that the cost savings could be made to our legal system through much greater efficiency and the demonstrated successes in other countries.

The RCNI view is that:

- There is no necessary or unavoidable conflict between the rights of the accused and the rights of complainants, as far as Case Management Systems and/or Pre Trial Hearings are concerned: there are also a number of existing statutory provisions obliging the defence to give notice of his/her intentions in advance of the trial, for instance, defence expert evidence provisions in the new Criminal Procedure Act 2010, cited above, and also, there are a number of provisions allowing adverse inferences to be drawn at the early stages of an investigation;
- any such fundamental change in our legal culture requires the full support of our judiciary – our judges are very much aware of the European dimension to our law, such as how the ECHR provisions are interpreted in European case law on the rights of complainants in the criminal justice system (see Doorson e g, cited above)
- the safest way forward is to proceed by legislation**,** underpinned by detailed Rules of Court;
- There is already a degree of ad hoc Case Management in the criminal justice system, which could be built on, although it does vary from Circuit to Circuit; there is also the precedent of the efficient operation of Commercial Court Rules (RSC 63A), albeit in a non-criminal setting, which could be adapted for use in the higher criminal courts. Note that the Commercial

[42] Page 174 of "Balance in the Criminal Law Review Group Final Report" (2007), available online at http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf

Court has been found to work extremely well, and is viewed as a resounding success, not least because of its very comprehensive case management rules.

- There are useful precedents to be adapted from elsewhere, notably in England & Wales, as set out above;
- RCNI's considered view is that such a system should be introduced at once for **all** trials on indictment

RCNI

Revised and Expanded March 2012