



RAPE CRISIS
NETWORK
IRELAND

Agenda for Justice: Towards Ending Injustice for Survivors of Sexual Violence

RCNI Legal Position Paper

Forward

This paper is the culmination of the experience and courage of survivors, staff and volunteers of Rape Crisis Centres (RCC) across Ireland. Survivors of sexual violence who have brought their experiences, their courage and their wisdom to RCCs, coupled with the staff and volunteers of our 16 Rape Crisis Centres who have gained and shared their resulting expertise, have facilitated this paper.

It has been my great pleasure, in conjunction with my colleagues at the Rape Crisis Network Ireland (RCNI), to translate that experience, courage and wisdom into this Agenda for Justice. Additionally I am very grateful to the skill and judgement of Aileen Donnelly S.C, and Conor Hanly of NUI Galway who reviewed and constructively commented on a draft. The views, however, contained within this document solely represent those of the RCNI.

We believe in ending sexual violence and ending injustice when it occurs. The RCNI believe this paper is a tool towards transforming our society so that justice is available to all victims.

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November 2005.

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'The Rape Crisis Network Ireland vision is a society where rape and all other forms of sexual violence no longer exist.'

Sexual Violence & Injustice in Ireland

This report and Rape Crisis Network Ireland (RCNI) recommendations are based on what is known about sexual violence in Ireland. RCNI expertise derives from 25 years of campaigning, the work of 16 centres across Ireland and countless survivors of sexual violence who have sought our support and advocacy and shared their experiences with us.

Currently in Ireland the problem includes:

Underreporting: Currently fewer than 1 in 10 complainants in cases concerning sexual violence engage with the criminal justice process at all. The SAVI¹ report demonstrates the extent of sexual violation in our communities and the level of non-disclosure². This research confirms Rape Crisis Centres' evidence that the criminal justice system only "deals" with the minority of cases. This phenomenon of under-reporting cuts across many jurisdictions. Additionally, of those who do report their experiences, Ireland, compared to 20 other European countries, experiences the highest number of cases "falling out of the system" before adjudication by the courts³.

Dissatisfaction with Garda attitude and follow up: Complainants have expressed profound dissatisfaction with the Gardaí Síochána not keeping them informed about the progress of "their" case, or worse still greeting their allegations with scepticism or disbelief⁴.

There has been a “striking... decline in the proportion of sex crimes reported resulting in proceedings being taken”

Secrecy of DPP’s decision: On the matter of whether proceedings will be commenced the process is even less amenable to inspection than the investigative procedure. The DPP continues with the legacy of his predecessor in a “no reasons for decisions” policy. The lack of a mechanism allowing for an acceptable degree of accountability has been publicly stated as a cause for concern by the current Director⁵. This systemic lack of public transparency fails both the individual complainant and society as a whole on whose behalf the Office of the DPP operates.

Declining rate of cases proceedings: There has been a “striking .. decline in the proportion of sex crimes reported resulting in proceedings being taken”⁶ from a high of approximately two thirds of all files submitted in the 1970’s resulting in proceedings being commenced to the current situation whereby approximately only one third do so.

The impact on the complainant that “their” case is not being proceeded with must be viewed by reference to crimes of sexual violence, which are by their very nature, crimes of the most profound abuse of power. That the complainant experiences a further sense of powerlessness through the judicial system is well documented⁷.

Traumatic experience of survivor at trial:

At the trial the complainant experiences:

A lack of preparation for the trial process and proceedings.

Profound frustration at the length of time it currently takes for a rape trial to be heard.

Lack of co-ordinated supports throughout the process.

All these factors contribute to Ireland leading the Attrition league table⁸ across Europe.

Agenda for justice

19 points of change

The Rape Crisis Network Ireland has committed to “influence legal policy within the national arena including lobbying for legislative reform with a view to maximising the complainants experience of the judicial process, from reporting onwards.” In developing the following policy positions from practice the RCNI draws on the expertise of staff, volunteers and indeed the survivors themselves working together on these issues for the past 25 years. Rape Crisis Network Ireland has identified 19 areas of change within legislation, practice and policy which, with the will and commitment of all involved parties, can be achieved.

The Criminal Justice Process involves the participation and co-operation of a number of professions/bodies. The RCNI reform agenda speaks to the need for reform within each one of these interdependent agencies including: an Garda Síochána, the Director of Public Prosecutions, the legal profession, the Judiciary, the Prison Service, Probation and welfare and the Legislature.

Legislative Reform

1. A statutory definition of what is meant by “consent” in the context of sexual contact.
2. The replacement of the current subjective analysis of recklessness as to consent in section 1 of the Criminal Law (Rape) Act 1981 with an objectively reasonable test.
3. The entitlement to free full separate legal advice, assistance and representation to complainants in cases of sexual violence.
4. A removal of the requirement for the DPP to “consent” to the prosecution of a marital rape.
5. A removal of the time limitation (12months) in which a prosecution for unlawful carnal knowledge under the Criminal Law Amendment Act 1935 must commence and an extension of the protections afforded under this Act to apply without reference to gender or sexual orientation.
6. A complete review of the Punishment of Incest Act 1908, as amended, to reflect the changing nature of “families” e.g. Categories of prohibited persons covered by this legislation ought to be enlarged to protect persons within a wider definition of “family” for example: step parents.
7. Reform of complainant/defendant anonymity provisions.
8. The removal of the “right” of a defendant to represent themselves in person in cases of sexual violence (thereby prohibiting the opportunity of direct cross-examination of the complainant).
9. A strengthening of the consequences of non-compliance under the Sex Offenders Act 2001 by increasing the current penalties to 5 years thereby rendering non-compliance an “arrestable offence”.

Practice Reform

10. A nationally funded accompaniment service (to Garda stations, sexual assault treatment centres, court etc.) for complainants in cases of sexual violence.

11. Specialist investigative Gardaí permanently stationed in each policing district throughout the country specifically trained in the investigation of sexual violence.

12. Specialist Prosecutors to be appointed to the conduct of cases of sexual violence who have undertaken appropriate levels of specialist training.

13. Judicial education on sexual violence to be a compulsory pre-requisite to hearing cases of sexual violence¹⁰.

14. The adequate provision of services in court facilities to complainants in cases of sexual violence including separate waiting areas, restroom facilities etc., video link facilities, screening of witness box etc.

15. Adequate provision of a sufficient number of suitably qualified Judges to expedite cases before the courts.

16. Appropriately resourced pre-release risk assessment of sex offenders serving custodial sentences to facilitate suitable post release supervision.

17. National notification procedures to ensure that victims are advised in advance of the release from custody (either on bail or following completion of a custodial sentence) and appraised of any conditions attached to such release

Policy Reform

18. An ending of the DPP's current "no reasons for decisions" policy and the replacement of same with a mechanism that is both accountable and seen to be accountable¹¹.

19. Recognition of the need to underpin "Victim Charter Rights" with an effective legislative framework that provides both enforcement and redress provisions.

Research Recommendations

While these 19 reforms will constitute significant steps towards prevention and justice there is much we still do not know. The RCNI has identified nine areas in need of research if further necessary progress is to be made.

The RCNI Recommend Research into:

1. Cases of sexual violence currently heard in the Circuit and District Courts (to replicate the current study being undertaken by NUI Galway into cases of sexual violence under the jurisdiction of the Central Criminal Court).
2. The reasons behind the declining proportion of prosecutions in crimes of sexual violence.
3. Rates of recidivism by sex offenders.
4. The particular challenges faced by persons with learning disabilities and other “vulnerable” complainants in cases of sexual violence¹².
5. The appropriateness of guideline sentencing in cases of sexual violence.
6. The monitoring of the frequency of leave granted to allow cross examination of a complainants previous sexual history under section 3 of the 1981 Act, as amended by the 1990 Act. and the appropriateness and frequency of the “discretionary” corroboration warning given under s 7 of the Criminal Law (Rape) (Amendment) Act 1990.
7. The circumstances in which it may be appropriate to allow reference to the relevant previous convictions of a defendant in the context of a trial for similarly sexual violent offences.
8. The need to implement legislation to penalise abuse by professionals such as in the context of sexual relations with persons in their care or under their ministry.
9. The SAVI research to be re-visited every five years to provide ongoing base-line prevalence rates.

“...the present system lacks balance.”

The Irish State and Justice

The Department of Justice Equality and Law Reform has enunciated as a key objective:

“The need for balance and proportionality...to find the right balance between the competing rights of the accused, the prosecutor, the victims of crime and society generally¹³”

Sexual violence represents in our communities the most prolific¹⁴, yet under-reported¹⁵ violations of a person’s bodily and sexual autonomy.

Given the current “weighting of the scales” the RCNI are of the view that the present system lacks balance. We are calling for these measures to address or effect a “recalibration of the scales of justice”¹⁶ to re-align the status of the complainant in the Criminal Justice Process as a matter of urgency.

The Courts Service:

“The institutions of State can no longer perceive themselves as being exempt from public scrutiny....public bodies need to show themselves to be open and transparent in their dealings with the public”¹⁷

Fiona Neary, RCNI Executive Director said, “the RCNI welcome this statement and presents this document as a tool to support interagency work towards such openness and transparency.”¹⁸

Defendants v Complainants

Of the tiny proportion of cases that reach the trial stage the complainant faces a balance of power weighted entirely in favour of the accused.

The Defendant benefits from:

1. Entitlement to Free Legal Aid.
2. The presumption in favour of Bail (notwithstanding the tightening up of the bail regime by The Bail Act 1997).
3. The right to seek disclosure of highly sensitive material - medical records and counselling notes being but a few examples.
4. The burden of proof resting on the prosecution (there are of course a few notable exceptions e.g. insanity).
5. The standard of proof (beyond reasonable doubt).
6. The “excludable nature” of many items of highly probative evidence.
7. The right to silence with no adverse inference drawn from same (when questioned by the Gardaí or at trial)-regarded by many as “a misguided concession to the guilty”.¹⁹
8. The right to represent oneself in person- therefore the right to cross examine in complainant as happened in DPP v Mariusz and Pawel Ludecke in the Central Criminal Court before Mr Justice Abbott in July 2005, in a 31 day trial. When a similar tactic was adopted by Milton Brown in an English case, such was the level of outrage that the defendant was able to sack his legal team and conduct his defence in person, cross examining his victim for days (he was eventually convicted), that the law was subsequently changed following a successful campaign by Baroness Helena Kennedy QC- withdrawing the right to self representation to Defendants in Rape trials. Ireland has no such restriction in our jurisdiction and further we had no such sense of outrage when the “Polish case” was given extensive press coverage.²⁰
9. The right to seek leave to cross examine on a Rape Complainant’s previous sexual history. Here again the impact of a subjective analysis of recklessness as to consent is evident: a defendant asserting a “honest but mistaken belief in consent” is more likely to be successful in getting leave to adduce evidence of a complainant’s previous sexual history (to show the basis of that “honest belief” for example by reference to the complainant’s “known” propensity towards sexual promiscuity) than a defendant who is required to proceed in an “objectively reasonable” manner in relation to consent (there is anecdotal evidence from England and Wales that following the 2003 Act there has been a substantial decline in successful applications of leave to adduce evidence of a complainant’s previous sexual history²¹).
10. The benefit of having the jury warned about convicting on uncorroborated evidence (although this warning is now discretionary rather than mandatory as yet anecdotal evidence suggests that it is given as a matter of course in most cases).
11. The right to manipulate to maximum advantage structures practices designed to ensure a fair trial.

Additionally as an unexpected “bonus” the defendant frequently also benefits from:

12. An over-clogged court system resulting in the Central Criminal Court “discount”²², and an overcrowded prison system leading to early and temporary release.
13. The benefit of complainant anonymity. Criminal Law (Rape) Act 1981 (as amended) and the Incest Proceedings Act 1995 leads to the “protection” of the identity of the perpetrator. Under the provisions of the Incest Proceedings Act 1995 the anonymity of both the complainant and the accused is protected and guaranteed even following conviction of the accused. Under the 1981 Act the anonymity of the accused is removed on conviction of a rape offence.

The anonymity of the complainant is not removed. The 1981 provisions relating to the anonymity of complainants were extended to all sexual assault offences, defined in the 1990 (Rape) (Amendment) Act, as rape offences, aggravated sexual assault and sexual assault offences. Similarly, there is no provision for the complainant to waive anonymity in such cases. The effect of all of this is that the Law or the Judge (who can give leave to over-ride anonymity in all cases except Incest) decides whether anonymity may be waived not the complainant. We are calling for an amendment along the lines of the UK provisions contained within the Sexual Offences (Amendments) Acts of 1976 & 1992 whereby anonymity may be lifted with the complainant's written consent.

14. Societal suspicion as to the trustworthiness of particular types of victims (children, women, the disabled, minorities etc.).

15. A non codified criminal legislative system that has shown slow legislative reform. By way of example the Punishment of Incest Act dates back to 1908. Because of the changing nature of our society and indeed of the "family unit" in the last century the legislation fails to afford sufficient protection to children in that it does not apply to "stepfathers" nor to adopted or indeed fostered children. Similarly it relates only to penile penetration of the natural child's vagina and not to a whole range of other sexual violations including anal rape, sexual assault etc. Further the underlying premise of this antiquated legislation is the protection and purity of our bloodlines rather than seeking the highest level of protection from sexual exploitation within the "family".

16. We still have no statutory definition of consent- other jurisdictions (see reform adopted in the UK (2003 act) where consent is now defined as an agreement by choice by a person with capacity and freedom to make the choice, further reforms within the same Act require an objective assessment of "reasonableness" in the context of mistaken but honest belief in consent) have adopted statutory definitions of consent that inherently protect and uphold the sexual autonomy of the individual, we should follow suit. The additional and unexpected benefit of such reforms has been the reductions in applications seeking leave to adduce aspects of the complainant's previous sexual (in an attempt to bolster support for the defendant's claim of "mistaken but honest belief" in consent) as such beliefs must now be found to have been objectively reasonable.

17. Constructions of liability that require evidence of a subjective appreciation or "advertent" fault, thus leaving an honest but mistaken (even wildly mistaken) belief in consent, that would not be shared by any reasonable person as full vindication. The effect of this view of "through the eyes of the defendant" is that provided that a jury are satisfied that a defendant believed he/she had consent (n.b. remember the defendant does not need to establish this in a positive sense but rather the prosecution must show beyond a reasonable doubt that the defendant knew that the complainant was not consenting or was (subjectively) reckless as to consent) then they must acquit. New Zealand, Canada and most recently England and Wales have moved away from retention of a subjective test noting that²³:

"The fact that an unreasonable belief can exonerate by implication authorises the assumption of consent, regardless of the views of the victim or whatever they say or do. Women who do not consent to intercourse should not have to see the assailants go free because of their unreasonable beliefs or attitudes about women. A subjective test encourages adherence to the outdated myth that women enjoy being overborne by a dominant male and that "no" really means "yes. Placing an onus on a person to ensure that their partner is consenting, with the risk of facing prosecution if they do not so ensure, is not disproportionate given the harm to the other person that results from non-consensual sex.²⁴

Defendants v Complainants

The complainants' status:

By contrast the complainant is a mere witness for the State to the harm visited on them. This dubious locus standi in proceedings results in "rights" largely lacking by legislative authority.

The complainant does have a number of statutory entitlements:

1. The Sex Offenders Act 2001 gives free Legal Aid to cover representation by counsel where leave is sought to adduce in evidence the complainant's previous sexual history in cases of Rape and Aggravated Sexual Assault (n.b. Not in cases of Sexual Assault).
2. Legal Advice is available to a complainant in a prosecution for the offence of: Rape, Aggravated Sexual Assault, Unlawful Carnal Knowledge and Incest under the Civil Legal Aid provisions of the 1995 Act.
3. The complainant has a right to be "heard" as to the impact the offence(s) have had (The Criminal Justice Act 1993) and the sentencing Judge is required to "have regard" to same in passing the sentence.
4. The hearing of sexually violent cases are conducted "otherwise than in public" (n.b. Note the discretionary nature of this provision, thereby giving the trial judge exceptional latitude in this regard).

And important non-statutory entitlements:

The complainant is the intended beneficiary of the "Charter for the Victims of Crime". This sets out the levels and standards of treatment that a victim can reasonably expect from the various agencies within the Criminal Justice Process (from the Gardaí through the Chief State's Solicitors Office, the Office of the DPP, The Courts, The Prison Service, Probation and Welfare). Details of how to "complain" if the undertakings of these agencies are not adhered to are contained within the charter. The difficulty with these provisions lies in the fact that they are not currently underpinned by legislation and thus remain aspirational.

The RCNI believe the cumulative effect is a balance of justice weighted entirely in favour of the accused which is urgently in need of realignment.

Rape Crisis actions towards justice

The RCNI has a legal coordinator post which occupies a unique position in Irish society positioned as it is to analyse the institutions of the Criminal Justice Process from an independent perspective whilst bringing to the sector, and therefore to public discourse and policy formation, the experience of survivors of sexual violation and frontline RCC staff.

Attrition research:

Through this post the RCNI have commissioned NUI Galway to undertake the first statistically significant research programme on attrition in rape cases in Ireland. At the heart of this proposal is the desire to quantify and explain attrition by which we mean that of crimes committed, a smaller proportion are reported; of those reported, a smaller proportion are prosecuted; of those prosecuted a smaller proportion end in conviction. Ireland leads the attrition league table across Europe²⁵. We anticipate that this research will significantly increase our understanding of the causes of attrition. This understanding will act as another platform from which the RCNI will be able to advocate changes which lead to the development of a more supportive process.

Court Accompaniment:

In the summer of 2005 the RCNI was successful in its application to the Commission for the Support of Victims of Crime in the allocation of the largest single grant made by the Commission in its first year. This grant represents a landmark for Rape Crisis Centres as it is recognition for the first time of the incredibly valuable work undertaken across the country in all strata of the courts (District, Circuit and Central Criminal) by way of court accompaniment and support. The RCNI was able to offer specialised training to RCC staff and volunteers undertaking this work thus ensuring the necessary standard of service delivery to clients and allaying any fear that such support interferes negatively with the Criminal Justice process. Indeed we know from our twenty five years of offering such services, that the provision of support through the judicial process impacts positively, not simply on the willingness of a complainant to engage with and stay with the process, but also by significantly enhancing a complainant's performance as a witness for the State.

In pursuance of these objectives in relation to the criminal justice system the RCNI has made submissions to:

The Corporate Plan of the Legal Aid Board.
The Working Group on the Jurisdiction of the Courts.
The Garda Síochána Policing Plan 2004.
The Garda Síochána Bill 2004.
The Department of Justice, Equality and Law Reform.
The Law Reform Commission.
The Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights.
The "User panel" of the proposed new Criminal Courts Complex.
The Commission for support of Victims of Crime.

Additionally:

The RCNI has chaired the legal subcommittee of the National Steering Committee on Violence Against women since 2002.

Arising from the submission to the Garda Síochána Bill the RCNI initiated and continues to be committed to a joint programme of work with the Garda Síochána.

Endnotes

¹Sexual Abuse and Violence in Ireland: A National Study of Irish Experiences, Beliefs and Attitudes Concerning Sexual Violence. Hannah McGee et al. 2002

²47% of participants who had experienced sexual violence had not told anyone prior to their interview with the researchers (SAVI).

³Rape Still a Forgotten Issue, Prof. Liz Kelly & Linda Reagan, 2003.

⁴See the as yet unpublished research into 'Garda Attitudes', Dr. Stephanie O'Keefe.

⁵Primetime, 2004.

⁶Dr. Ian O'Donnell, Deputy Director, Institute of Criminology, faculty of Law, UCG

⁷See generally Alder, Rape on Trial.

⁸Rape: Still a forgotten issue, Linda Regan & Liz Kelly 2003.

⁹RCNI Strategic Plan, 2003 - 2007

¹⁰As is the case in England and Wales as per The Right Hon. Lord Justice Auld addressing the Working Group on the Jurisdiction of the Courts, Dublin, November 2002: "It is now a condition of authorization that every Judge to try rape and serious sexual offences that he or she has received specific training from the Judicial Studies Board in such work".

¹¹See *R v DPP ex Parte Manning & Melbourne* [2000] 3 W.L.R 436 at 478: on the matter of "vindicating prosecutorial decisions" by showing that solid ground exist for what might otherwise appear to be a surprising or even inexplicable decision, and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given" Lord Bingham C.J.

¹²Whilst we lack specific Irish data on this issue we have international research which tells us that: "people with cognitive impairment experience sexual assault at significantly higher rates than other members of the community" both as children (39-68% of girls with intellectual disabilities are victims of sexual assault before their 18th Birthdays-Boyle et al 1988) and as adults. In the USA the Seattle Rape Relief service in a six year study found that clients with such disabilities had four times the national rate of prevalence of sexual abuse. (Ryerson, E. Report to the Sexuality Information Council of the United States, Washington DC 12 (1) pp 6-7. While in Australia, women with an intellectual disability living in an institutional setting were found to be 10 times more likely to be victims of sexual assault (Chenoweth, L. *Invisible Acts, Violence Against Women with Disabilities*, Australian Disability Review 2 (93), pp22-28).

The Dutch Penal code Art.243, Connecticut Crim. Statute 6,53a-71, Minnesota Crim. Statute MN609.344.

¹³Dept. of Justice, Equality & Law Reform, Strategy Statement 2001-2004, Objective 4.30.

¹⁴42% of women will experience some form of sexual violence in their lifetime (SAVI).

¹⁵7.8% of women and 1% of men report their experiences of sexual violation to the Gardai (SAVI).

¹⁶Caroline Fennell, *The Law of Evidence in Ireland* (2nd Edition)

¹⁷Courts Service, Annual Report 2001, p.21.

¹⁸Fiona Neary, RCNI Executive Director

¹⁹Jeremy Bentham.

²⁰See *The Irish Times* of 6th July 2005.

²¹Vera Bead Q.C. M.P speaking at the Rape Crisis Network Scotland Seminar, August 2004.

²²A special reduction in sentence of 25% granted to defendants who never occupied a trial date (over and above their ordinary guilty-plea discount) in the C.C.C during particular periods of unacceptable back-log.

²³During the Second Reading of the then Sexual Offences Bill (House of Lords February 2003)

²⁴See Andrew Ashworth, "Principles of Criminal Law" 1999 pp.354-355.

²⁵Rape: Still a forgotten issue. Linda Regan & Liz Kelly 2003.

The Rape Crisis Network Ireland (RCNI):

The RCNI is the national umbrella organisation for 16 Rape Crisis Centres'; we have been in existence since 1985. As the national forum of Rape Crisis Centres we provide a strong voice for survivors and seek to act as a catalyst for social change to end rape and all other forms of sexual violence.

The Rape Crisis Network Ireland's position paper has been informed by the tens of thousands of survivors of sexual violence who have contacted a Rape Crisis Centre and taken the first, and arguably the most difficult step, towards healing.

Amongst the RCNI's key objectives are:

To undertake research and promote awareness as to the causes, nature and extent of sexual violence.

To raise public awareness about the realities of sexual violence and the needs of survivors of sexual violence.

To campaign for the societal and legislative changes that will work towards the elimination of sexual violence and sexual abuse.

To ensure the highest standards of support and counselling for survivors of sexual violence.

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