



THE BAR
OF IRELAND

The Law Library

Submission by the Council of The
Bar of Ireland to the Department of
Justice & Equality on the
implementation of the
recommendations of the O'Malley
Report on the Review of Protections
for Vulnerable Witnesses in the
Investigation and Prosecution of
Sexual Offences

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Introduction

The Council of The Bar of Ireland (**“the Council”**) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,170 practising barristers. The Bar of Ireland is long established, and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

Scope of Submission

Following publication of the Report on the Review of Protections for Vulnerable Witnesses in the Investigations and Prosecution of Sexual Offences (**“the Report”**), which was prepared at the request of Government by a working group chaired by Tom O’Malley, an implementation group has been established by the Minister for Justice and Equality, to consider the recommendations contained therein and the necessary steps required to effectuate their implementation.

As a key stakeholder in the administration of criminal justice, the Department of Justice & Equality (**“the Department”**) has invited the Council to submit its views on the implementation of the recommendations, with particular emphasis on the implementation of the recommendations relating to the legal profession.

The Council would like to state at the outset that it welcomes the publication of this report. Along with its recommendations, it is a vital and important analysis of the current criminal justice system’s approach to sexual offences and vulnerable witnesses, and it will be foundational in ensuring that the justice system’s approach to such cases is effective, humane and respects the fundamental tenets of fairness before the law.

While the Council broadly welcomes the recommendations set out in the Report, the Council would also caution that the provision of adequate resources and funding for the recommendations will be critical to the successful reform of the current system.

Consideration of Recommendations

The Department has requested that the following key factors be taken into consideration in addressing the recommendations:

1. **Measures** to be taken to implement recommendation.
2. Where there are **obstacles** to implementation of the recommendations please provide reasons and alternative proposals or adjustments necessary for implementation.
3. Additional **resources** required for implementation? If so please provide details including justification and cost.
4. **Timescale** for completion.

In doing so, the Council has limited itself to those recommendations which concern the legal profession and those with which its members have experience, knowledge and expertise.

Preliminary trial hearings

The Council welcomes the recommendation for the use of pre-trial hearings to deal with legal issues such as cross-examination on previous sexual history, disclosure and the admissibility of evidence.

Such hearings before the jury has been empanelled to hear the case should be able to deal with certain legal issues so that trials are not subject to unnecessary *voir dices* (trial within a trial on legal issues) during the course of the trial. In this regard, the Council notes the proposed obligation on both prosecution and defence to notify the judge conducting the preliminary trial hearing of any outstanding matters relating, for example, to disclosure, that may prevent the trial from commencing on the scheduled date and welcomes same. Although the Council notes in passing that in very many cases this is already done by the parties having the matter listed for a disclosure application before the relevant Court.

The Council would note at this juncture that the 5th edition of the Director of Public Prosecution's (DPP) Guidelines for Prosecutors is likely to need further revision in response to the various recommendations contained within the report, and the Council is willing and available to contribute to this process should it be of assistance to the DPP.

Pre-trial hearings will promote efficiency and will reduce the length of the trial itself and the impact this can have on complainants. It will have the benefit of making more efficient use of the time of jurors, witnesses and Gardaí and will reduce the burden on a victim during the trial of waiting to give evidence. Such a measure will assist in all criminal prosecutions including those in relation to sexual offences.

The General Scheme of a Criminal Procedure Bill drawn up by the Department in 2015 makes provision for preliminary hearings and the Council would support its enactment as a matter of priority.¹ On review of the General Scheme, the Council notes however that it does not include a provision that the same judge should preside over both the preliminary hearing and the trial itself. It is the view of the Council that it should contain such a provision in order to avoid duplication of judicial resources and to ensure continuity throughout the trial. Without such provision it carries the significant risk of lengthening the trial through the repetition of evidence. A trial is a unitary process and while this procedure will breach that by allowing certain issues to be dealt with in advance, the trial process will be better protected where the one judge presides over all aspects of the trial.

Concurrent with any proposal to introduce pre-trial hearings is furthermore the need to ensure that greater judicial resources are provided for the hearing of criminal cases in general. While the preliminary hearing will assist in shortening the length of the actual trial, it is unlikely to reduce the number of days that a case will take in Court. If the *voir dire* (trial within a trial on legal issues) to challenge certain evidence would have taken a full day during the trial, it will most certainly take a full day during the preliminary hearing, and where a judge presides over a preliminary hearing for that day, that is a day on which that judge is not hearing another trial. Contrary to what the report suggests, without the assignment of additional judges to criminal matters (which will most likely require the

¹ [General Scheme of a Criminal Procedure Bill](#)

appointment of additional judges to the relevant courts), it is the view of the Council that preliminary hearings will not in and of itself ease delays in the criminal courts.

An increase in the workload of barristers is anticipated with the introduction of preliminary hearings and the Council welcomes acknowledgment by the Report that the barristers and solicitors in private practice representing either the prosecution or the defence should be duly remunerated for their work in preparing for and attending same. The Council notes that Head 2, subsection (3) of the Revised General Scheme sets out that a preliminary trial hearing shall be part of the trial and the accused shall be arraigned at the start of the preliminary trial hearing unless he or she has already been arraigned. Accordingly, it would seem appropriate that an arraignment fee should apply at the preliminary trial stage and that thereafter any subsequent day of the preliminary trial hearing and/or the trial would receive a payment commensurate with a trial day payment.

Criminal proceedings are becoming increasingly complex due to a multiplicity of factors and the Council is available to provide input, as appropriate, to assist the DPP, the Department and the Legal Aid Board, in determining a suitable fee structure for preliminary trial work that will reflect the work undertaken in preparing for it and the work carried out during the hearing.

Specialist training

The Bar of Ireland is committed to ensuring our members, across all areas of law have the requisite skill and competence to safeguard the integrity of all parties. The Bar of Ireland's existing Continuous Professional Development (CPD) programme is robust and equipped to incorporate relevant multi-disciplinary training, as envisaged by the Report. It is important to note that the Council's CPD programme already incorporates training for barristers dealing with vulnerable witnesses with several seminars and workshops having taken place in recent years and months.

The Bar of Ireland's existing CPD framework encompasses a range of online/remote options which can deliver training to members in an expedient manner through, for example, live and on-demand webcasts and interactive self-assessment tools. While training can be readily conducted online and equip members with a foundational knowledge, we envisage that training of certain specialist skills and competencies would only be effective on an in-person basis as this allows practitioners to practice and obtain feedback related to their performance of the targeted skills and behaviours.

The Council has previously recommended in a submission in relation to vulnerable defendants that more specialised training should be available for lawyers dealing with vulnerable defendants. The recommendations in the O'Malley report are the corollary of that submission. The Council will develop a course of continuing professional development suitable for barristers in line with the recommendations of the O'Malley report. The seminars and lectures constituting this course will be delivered by persons possessing relevant expertise, several of which will require expertise in specific non-legal fields. The Council notes that, in addition to this foundational course, the Report recommends that a certain number of CPD points be obtained biennially and on an on-going basis.

While it is envisaged that many of these seminars and lectures could be delivered online, the Council has a concern at this initial stage that some aspects of the foundational course would be of greater benefit if delivered in person. The feasibility of any in-person training will likely depend on what is

permitted at any given time by COVID regulations and guidelines. The Council intends to develop a course that can be delivered within the timeframe suggested in the Report. However, given that the course has yet to be developed, the Council cautions that it may not be possible to complete the course in that timeframe either optimally or fully. Nonetheless, the Council will use its best endeavours to do so.

The capacity to train large cohorts (if not all) of our membership is also contingent on funding. Like many other organisations, The Bar of Ireland is encountering periods of significant financial challenge as a result of COVID-19 and has had to streamline many of its member service offerings on a much reduced budget. Our experience of developing specialist training programmes is that they are a resource intensive undertaking and in order to expand this standard of training to more members adequate funding will be required. The Council would welcome the Department's views in relation to the availability of State funds to assist the profession in fulfilling its obligations as prescribed by the State.

The Council notes the recommendation to establish a planning and implementation committee and indicates its willingness to participate in such a committee. Consultation with suitably qualified experts will also assist the Department in identifying the cost implications in the delivery of specialist training and whether such training necessitates financial assistance from the State. As mentioned earlier in this submission, the provision of adequate resources and funding for the recommendations will be critical to the successful reform of the current system.

The report recommends that members should be required to earn a certain number of CPD points in relation to the prescribed training on a regular basis. The Council is committed to assuming responsibility for the roll-out of mandatory training for members. It is noted that the Report recommends that the DPP and the Department (in respect of legal aid) receive, upon request, a list of barristers who have satisfactorily completed the prescribed training and the Council sees no difficulty with this.

[Intermediaries](#)

The recommendation that a panel of intermediaries be established in this jurisdiction is welcomed. The systems operating in Northern Ireland and in England and Wales appear to be well-developed and numerous qualified intermediaries are available for trial purposes. Despite the provision of enabling legislation in 1992, there are no intermediaries in this jurisdiction, insofar as the Council is aware, and there are no rules of court providing for the use of an intermediary. The Council is aware of several instances where intermediaries from outside this jurisdiction have been successfully used. The Council is of the view that the availability of intermediaries ought to be expanded and enhanced in this jurisdiction and would welcome the opportunity to provide input into the development of a code of conduct for intermediaries. Training for intermediaries will need to incorporate understanding of the rules of evidence, for example, and ultimately to ensure that witnesses are supported in giving their best evidence.

[Anonymity, Public Attendance and Media Reporting of Sexual Offence Trials](#)

The Council supports the extension of existing anonymity provisions for victims and defendants to all sexual offences and the extension of hearings otherwise than in public to all sexual offences.

Questioning of Victims/Legal Representation for Victims

Currently victims' entitlement to separate legal representation during applications to cross-examine in relation to previous sexual history is confined to rape offences. The extension of this representation to victims in respect of all sexual offences is welcome and appropriate. The Council notes the proposed provision that a barrister, who is briefed to represent the victim when an application is being made to engage in such questioning, be allowed to continue to represent the victim while the questioning, if permitted by the trial judge, is taking place.

Where there is an intention by the defence to question a victim about other sexual experience under the terms of s. 3 of the Criminal Law (Rape) Act 1981, the Council agrees that the defence should be required, unless the interests of justice otherwise require, to give notice to the prosecution in advance of a preliminary hearing. Where such notification is given, the Council agrees with the recommendation that speedy access to comparably qualified counsel is provided by the Legal Aid Board and to facilitate prompt access, the Council suggests that the Board establish a panel from which the Board can call on suitably qualified barristers. This facility would be particularly useful especially where the interests of justice require that such an application be permitted mid-trial thereby attaching greater urgency to the need to find suitable representation at short notice.

Disclosure

The Council makes the following observations in relation to disclosure:

- Bringing disclosure of medical records into line with the disclosure of counselling records would achieve greater consistency, however the Council is of the view that this should not apply to evidential medical records, such as SATU records.
- An obligation on outside bodies to expeditiously furnish counselling notes to the DPP would reduce one of the significant impacts on the delay of trials. The Council understands that this is often less problematic in cases where the third party, in possession of any relevant records, operates under a memorandum of understanding with the DPP.
- The Council agrees that victims should be made aware of their right to object to the disclosure of counselling records, and ought to be advised of their entitlements in relation to same. Such recommendations underline the benefit of making legal advice available to a victim much earlier in the process, as recommended in the report.
- A code of practice in relation to the collection of digital material would be helpful.

Promoting Public Awareness of Victims' Rights Legislation

The Council welcomes the roll out of campaigns bringing awareness of victims' rights to public attention and the profession is more than willing to play its part, as appropriate. The Council regularly undertakes public-facing campaigns, community-based projects and public events which present ample opportunity to draw attention to matters of justice and the public interest. For example, The Bar of Ireland participated in its inaugural 'Justice Week' in February of this year - a joint awareness campaign of the legal professions across the four jurisdictions of Ireland, Northern Ireland, Scotland and England & Wales which aims to boost the profile of justice and the rule of law. The focus of this year's campaign was to engage with young people through a series of events and social media to inform, educate and improve their understanding of the importance of the justice system, and to

demonstrate the possibilities that the law can provide in protecting their fundamental rights and freedoms. It is intended that 'Justice Week' form part of the legal and justice sector's annual calendar of events, and as such presents a valuable platform on which to promote and communicate the rights and protections afforded to victims of crime.

Inter-Agency Awareness and Co-Operation

The Council welcomes enhanced interagency collaboration to ensure that all state agencies, voluntary organisations and non-governmental organisations dealing with vulnerable victims are fully aware of the services provided by others. The proposed development of a dedicated website accessible to all the relevant agencies that would outline the services provided by each agency and provide updates on any new developments or initiatives being undertaken would be very useful, and the Council would welcome the opportunity to input to this facility, as appropriate.

Consistency in Service Delivery

The Council agrees that there is a need to ensure consistent facilities and accommodation for victims, vulnerable witnesses, and persons providing victim support across all court venues. It will also be important to ensure that sufficient sexual assault treatment units and Garda special interview suites, for example, be provided throughout the country.

Witness familiarisation

The Council notes that victims are regularly assisted in familiarising themselves with courtrooms in advance of trials by prosecution solicitors (in the Central Criminal Court and Circuit Court) and prosecuting Gardaí (in the District Court). The Council's view is that this is an important and helpful facility and we agree with the recommendations of the Report in this regard.

Conclusion

The Council would like to reiterate its broad support of the recommendations and looks forward to ongoing engagement with the Department to ensure that the recommendations are speedily and effectively brought to fruition. We are committed to working with all stakeholders to ensure that this area of law is reformed appropriately in line with the Report's recommendations, ensuring that the rule of law is upheld and justice served, from both a defence and prosecution perspective.



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