



THE BAR  
OF IRELAND

*The Law Library*

Submission on behalf of the Council  
of The Bar of Ireland to the Review  
Group on the Protection of  
Vulnerable Witnesses in the  
Investigation and Prosecution of  
Sexual Offences

July 2019

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## INTRODUCTION

The Council of The Bar of Ireland is the accredited representative body of the independent referral Bar in Ireland. The *independent referral bar* are members of the Law Library and has a current membership of just under 2,200 practising barristers.

It has a strong interest in all areas of the justice system and is pleased to contribute to the consideration of these issues by the Working Group under the chairmanship of Professor Tom O'Malley BL. The Council will be happy to contribute to any further debate and further submissions, either written or oral, on the topics covered herein in due course if so requested by the Working Group.

The submission below follows the format of the issues raised at a consultation held with legal professionals in the Criminal Courts of Justice in November 2018.

## SUBMISSIONS ON THE INDIVIDUAL ISSUES RAISED

### Anonymity

#### **Is there any aspect of the current law governing the anonymity granted to defendants and complainants in criminal proceedings for sexual offences that ought to be amended?**

In the view of the Council there is little to suggest that there is dis-satisfaction with the current operation of the system of anonymity for complainants and defendants in trials concerning specific sexual offences in this jurisdiction. The granting of such anonymity does not appear to the Council to be the foremost issue of concern to practitioners, complainants, accused persons and other participants in the system.

Indeed, the Council considers that the present procedure operates well in practice and strikes an appropriate balance between the constitutionally mandated protection of the right to one's good name and the right to privacy of a complainant while also preserving the integrity of the trial process where offences of this nature involve allegations involving intimate issues for all concerned.

The Council notes that the law as it stands does provide for the publication of the name of an accused person if he/she is convicted of the sexual offence concerned (where anonymity arises by operation of law) save in circumstances that are required to protect the anonymity of the complainant concerned.

Importantly, members of the media can report on such trials, as is right, in order to ensure that there is fair and accurate reportage of criminal proceedings. That is vital in an open society but the Council does not believe that reporting the name of an accused person during the course of the proceedings enhances public understanding of the issues involved in sexual offences cases whilst to do so may be damaging to that accused even if they are ultimately acquitted of the offences charged against them.

The Council notes that in April 2018 the Criminal Justice Board in Northern Ireland commissioned an independent review of the arrangements to deliver justice in serious sexual offence cases. The review was commissioned following the controversy in the wake of the acquittal of two rugby players after a nine-week rape trial in Belfast in March 2018.

A former Lord Justice of Appeal, the Right Honourable Sir John Gillen, led the review supported by an Advisory Panel. The preliminary report into the law and procedure in serious

sexual offences in Northern Ireland ('the Gillen Review') was published for consultation on the 20<sup>th</sup> November 2018.<sup>1</sup> The final report was published in May 2019.<sup>2</sup>

As part of the Review, Gillen looked at the law in relation to anonymity in a number of common law jurisdictions, including our own.

Lord Gillen recommended that the present system in Northern Ireland remain in place, namely that defendants are named "post-charge" on the basis that there was no good argument for a distinction between an accused in such cases compared to those charged with other serious offences.

Notwithstanding that recommendation by Lord Gillen for Northern Ireland, the Council believes that the present system in this jurisdiction contains an appropriate balance in that accused persons may be named if they are convicted, albeit subject to statutory restrictions to protect the complainant's privacy.

The Council does not believe that naming accused persons pre-trial would increase reporting of sexual offences. Other steps need to be taken in that arena to support complainants to report assaults on them and also to increase the supports available to them when they do report such crimes. These issues are addressed further below, and the Council believes that steps in that area are far more important than the idea of naming an accused person during the course of criminal proceedings in which he/she may not ultimately be convicted of such offences.

In short, the Council does not endorse the views of Lord Gillen on this matter as the present state of Irish law provides appropriate protections for the various public interests which are involved.

If the law on anonymity is to be preserved, the Council recommends that the Review Group consider the list of offences to which such anonymity relates.

For instance, the offence of sexual assault is not included in the list of offences to which anonymity for a defendant and a complainant is conferred by virtue of the *Criminal Law Rape Act, 1981* (as amended).

In some cases, this anomaly has been addressed by making an application under s.20(3) of the *Criminal Justice Act, 1951* if the proceedings are of an indecent or obscene nature.

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<sup>1</sup> Gillen, J. (2018). *Preliminary Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland*

<sup>2</sup> Gillen, J. (2019). *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland Part 1*. Available at: <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>

However, this is unsatisfactory, and it would be preferable if the anonymity provisions for all sexual offences were housed under one statute and that the list was comprehensive to cover all sexual offences.

The Review Group should also examine whether other offences, apart from sexual assault set out above, should be added to the list as it might be debated whether some child pornography offences and other related offences should be included in the list. The Council does not present a conclusive view at this stage on the list, if any, of other offences which might be added to the list, save that the matter should be examined.

Accordingly, the Council considers that there is merit in a proposal that a defendant and complainant in a sexual assault case and, possibly, those charged with some other offences should also be able to avail of anonymity, at least until the proceedings are finalised.

This should be explored further, and a comprehensive list of such offences should be set out in statutory form.

**Is there any aspect of the current law restricting public attendance at, or media reporting of, trials of sexual offences that ought to be amended?**

Notwithstanding the collapse of some recent cases in the Central Criminal Court, this does not appear to the Council to be a significant issue in most sexual assault cases. The Council recognises that an open, democratic society requires accurate and fair reporting of court proceedings and same is protected by Article 34.1 of the Constitution.

The general experience of the Council is that the court reporters, who are often working in a freelance capacity in an increasingly difficult economic time for the news media, are conscientious and diligent in ensuring that accurate reporting of court proceedings takes place. This must be supported in a democratic society so that the public are aware of the details of criminal trials to inform public debate on these issues where the public themselves, for good reason, are not allowed to attend such trials.

Nevertheless, such reportage must not undermine the administration of justice and the added advent of social media reporting and forums presents challenges to the integrity of criminal proceedings. There have been regrettable lapses in court reporting on some occasions in recent times and in “colour” pieces in particular, which endanger the sanctity of a criminal trial and which cannot be tolerated in a proper justice system.

Meanwhile, much of the commentary on social media can be loose and inaccurate and sometimes harmful to the administration of justice. Some social media commentary appears contemptuous of the requirements of a fair trial, sometimes fuels false narratives about the evidence of such trials and can do untold damage to the aim of all right thinking people in society who want victims of sexual crimes to report such crimes, receive appropriate supports and bring the perpetrators to justice.

The Council considers that the recent practice direction on the use of cameras and electronic devices in court<sup>3</sup> may assist in that regard and it is also noted that the Law Reform Commission is considering the topic of contempt of court. It may be that any new restrictions in this regard may require, from a *vires* point of view, legislative underpinning.

Ultimately, the integrity of the court process must be preserved so that juries considering these cases are not subject to influence or pressure that is untoward while cases are being heard.

A comprehensive and integrated approach to such issues across the criminal justice system, including new primary legislation to deal with contempt of court and the use of social media for court reporting, may be required.

Any such legislation should not undermine or unduly trammel the right of the media to report on criminal trials, including those of sexual offences.

However, all persons involved in the criminal justice system, including the media, have a role to play in ensuring that the criminal justice system provides a fair trial for complainants, accused persons and witnesses. The Council believes that this must be addressed in an urgent fashion by comprehensive legislation and hopes that the work of the Law Reform Commission, aided by consideration of the Practice Direction on the use of cameras and electronic equipment in court, can provide a clear framework for such issues in early course.

## Pre-trial hearings

**Are there any measures or practices that might be adopted that would lessen delay in sexual offence trials? Is there, in your view, greater scope for the use of pre-trial hearings at which certain legal questions relating, for example, to the admissibility of evidence, including sexual history evidence, might be addressed before the trial proper begins?**

The Council repeats submissions previously made to the Government in a number of contexts about the judicial system as follows:

- i. Pre-trial hearings have been recommended in a number of reviews carried out by Government appointed committees and working groups over the last 20 years.

The Council supports the concept of pre-trial hearings to deal with certain applications before the trial before the jury begins. Such pre-trial hearings should be able to deal with certain legal issues so that trials are not subject to unnecessary *voir dire*s (trial within a trial on legal issues) during the course of the trial before the jury empanelled to hear the case.

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<sup>3</sup> SC 18 Use of cameras and electronic devices in court, dated the 19<sup>th</sup> November 2018

However, the workings of such pre-trial applications need to ensure that there is an avoidance of duplication of judicial resources. These are practical matters about the modalities and structure of such pre-trial hearings that need to be resolved.

- ii. Concurrent with any proposal to introduce pre-trial hearings is the pressing need to ensure that greater judicial resources are provided for the hearing of criminal cases in general and, in particular sexual assault cases.

A reduction in the time period between charge and trial, so often criticised by complainants and accused persons with good reason, will only come about with the appointment of additional judges to the trial courts (Circuit Court and High Court (Central Criminal Court)) so that the reasonable objective of holding such trials no more than 12-14 months at the latest from the time of charge can be met.

Such a time-period is ambitious, but it is vital that the Government, in conjunction with the relevant parties, seeks to achieve a reduction in delay in trial dates for such cases across the State.

Furthermore, pre-trial hearings, in whatever guise they are implemented, simply will not work to alleviate delays unless there are an increased number of judges to hear such applications and, thereafter, to conduct the criminal trials themselves.

Moreover, the reality is that criminal proceedings are becoming increasingly complex due to a multiplicity of factors, including the need for legal practitioners and the judges to implement measures to assist vulnerable witnesses or where there are particular evidential issues which take up greater time (video-recorded evidence being played to a jury), than might have been the case in “traditional” trials.

Without greater judicial resources such trials cannot be conducted in an expeditious fashion consistent with the rights of complainants and accused persons.

While individual judges in the Circuit Court areas and the Central Criminal Court are taking practical measures to ensure that sexual offences trials are held within a reasonable time, the reality is that some such trials may only be heard some three years after a person is charged depending on the area of the country involved and the length of court lists. This is unacceptable.



Again, this is repeating a submission made in a number of contexts to the Government by the Council where it has been pointed out that the number of judges per person in the State is amongst the lowest in OECD countries.<sup>4</sup>

Regrettably, these submissions in the past have not been heeded by Government but it is now time to act positively to provide the necessary judicial resources to drive the implementation of any changes that are brought about on foot of this report.

In short, the key matter to ensure that delays in criminal trials are avoided is to increase the number of judges who are available to conduct such trials.

- iii. The disclosure process, which is discussed in detail below, must also be overhauled and provided with additional financial resources.

For the pre-trial hearing process to have any chance of being useful it must be ensured that such pre-trial hearings do not add another layer of complexity and result in further delay and obstruction of trials. To work, they must be used to litigate legal issues so that the net factual issues are then ready to be litigated at the trial itself before the Jury.

That would mean that the disclosure process needs to be completed prior to the pre-trial hearings so that the parties can address the legal issues concerned. The Council is sceptical as to whether this is achievable in the present context where much disclosure is made on the eve of the trial and where the financial resources to ensure it is dealt with at an earlier stage simply do not appear to be available.

The Council is concerned that the disclosure process, with the complexities inherent in that process, is now causing difficulty for such trials due to a lack of financial resources, personnel and expertise in how to handle such issues when they arise. Unless this is addressed, the addition of pre-trial hearings will not assist the system in any meaningful manner.

- iv. One factor that leads to delays in some rape trials at present relates to cross-examination as to previous sexual history. Such issues often only crystallise at the beginning of the trial itself, which then necessitates contacting the Legal Aid Board to obtain legal assistance for the complainant where such complainants are entitled to legal assistance under s.4A of the *Criminal Law (Rape) Act, 1981*.

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<sup>4</sup> European Commission (2019). *The 2019 EU Justice Scoreboard*. Available at: [https://ec.europa.eu/info/sites/info/files/justice\\_scoreboard\\_2019\\_en.pdf](https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf)

This can result in trials being delayed for periods over a number of days while such legal representation is organised and the relevant lawyer(s) have a chance to consult with the complainant on the issues raised in the application to cross-examine on previous sexual history.

The Council recommends that a person who wishes to cross-examine on previous sexual history should have to lodge a notice at an appropriate juncture before the trial date or by the pre-trial hearing (if that is introduced in legislation).

This would involve an amendment to s.3(2)(a) of the *Criminal Law Rape Act 1981* to require such notice to be given at an appropriate juncture in advance of the trial so that such representation for a complainant, provided for under s.4A of the 1981 Act, can be obtained and can consult with the complainant in an appropriate fashion **before** the trial begins.

There are already provisions for notice to be given of the adducing of expert evidence under s.34 of the *Criminal Procedure Act 2010* and where an accused person intends to raise mental health issues at trial under s.19 of the *Criminal Law Insanity Act, 2006*.

The Council believes that the introduction of an appropriate notice requirement in this area is warranted for similar reasons. It would ensure that such issues are known to the parties, including the complainant, before the trial begins so that he/she can obtain appropriate legal advices on the relevant issues before the trial begins and the application in question can then be heard at the appropriate juncture by the relevant judge without involving a delay in the trial itself.

## Disclosure

### **Are there any aspects of the law relating to disclosure that need to be reviewed?**

The issue of disclosure is particularly important in trials of sexual offences. It has already been referred to in this submission in the preceding section. As a matter of everyday practice, it is the most difficult issue for members of the Bar in such cases, both prosecuting and defending, to deal with arising from the volume of such materials, the difficulty in navigating the (newly) enacted provisions in this area and the overriding consideration to ensure that a fair trial is achieved regardless of which side an individual barrister is representing.

It is also recognised that disclosure is a contentious and difficult issue because there is often little in the way of external objective evidence against which the credibility of the complainant can be tested in a trial for sexual offences. Thus, the limits of the materials that can or cannot

be used to test such credibility in the context of a criminal trial may be contentious from case to case and may also be dependent on the particular factual circumstances of that case.

An added issue in recent times is the proliferation of the use of social media by all members of society, which has also added to the complexity of this area, both with regards to the volume of material available in a given case, the technical expertise required in order to conduct investigations appropriately and the overriding requirement to ensure that only material relevant to the charge and the possible guilt or innocence of an accused is disclosed.

The privacy concerns of complainants and the issue of relevance of such materials is also contentious and requires due consideration.

Given the issues involved, the Council sets out below a number of considerations in relation to the disclosure issue which may assist the Working Group. It notes that the Law Reform Commission examined this issue in detail in recent years and its report on the matter is comprehensive on the general issues that were examined. Even so, some comment on the issues in the trials of sexual offences is relevant.

*i. Need for reform identified on numerous occasions*

The Council notes that in a recent Bar Review article,<sup>5</sup> Mary Rose Gearty SC and Dr Miriam Delahunt BL described the lead up to a number of collapsed trials in the UK as “*the disclosure bomb*” and drew parallels between the two jurisdictions.

Those English cases included one in which a 22-year-old student’s trial for rape at Croydon Crown Court was halted on the 14<sup>th</sup> December 2017 due to disclosure at the opening of the trial of text messages between the complainant and her friends, which suggested that there had been consent to the sexual intercourse in question that was the subject matter of the charge against the defendant. The phone records in question should already have been disclosed to the defence.

In a separate case in Snaresbrook Crown Court in January 2018 a rape trial collapsed when it emerged that images from the defendant’s phone of him and the alleged victim, apparently cuddling in bed, had not been found or disclosed. The defendant had been under investigation for 18 months and his defence team had recovered the images themselves from his phone after it had been returned to him by the police investigating the allegation.

These cases should serve to underline, if any requirement was needed, the necessity to have a functioning and fair disclosure system that ensures that material which relates to the guilt or the innocence of a defendant or which could provide a reasonable lead in relation to either of those two issues is provided to a defendant’s legal team at an appropriate juncture in advance of the trial.

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<sup>5</sup> Mary Rose Gearty SC and Dr Miriam Delahunt BL (2018), ‘Delay and disclosure: disaster?’, *The Bar Review*, 23(3), 83-86.

Sadly, the reality is that disclosure in this jurisdiction is often made on the eve of the trial itself. While improvements have been made, the Council is concerned that the entire issue is not being approached in a principled, thematic and organised fashion and the risks of a miscarriage of justice are increased in such circumstances.

In their article, Gearty and Delahunt noted that “*an exponential increase in the volume of disclosure available in any given case; and insufficient resources in the existing system to properly evaluate this information*” could lead to similar problems in this jurisdiction.

The authors offered a number of suggestions to avert a similar disclosure disaster from occurring here, including payment of appropriate fees to barristers for increased review of disclosed materials, increased resources, improved record keeping across all criminal justice stakeholders, increased transparency, addressing delays in the disclosure system, pre-trial hearings and the publication of records detailing reasons for adjournments.

The Supreme Court highlighted the importance of legislative intervention in this area as far back as 2009.<sup>6</sup>

However, only recently has any legislation been commenced which attempts to address deficiencies in the area. A brief critique of this new legislation is set out below as the Council considers that issues arise about the present legislation.

ii. *Section 39 of the Criminal Law (Sexual Offences) Act 2017*

Section 39 of the *Criminal Law (Sexual Offences) Act 2017* was commenced on the 30<sup>th</sup> May 2018. It inserted a new section 19A into the *Criminal Evidence Act, 1992*. The section aims to set out a framework for the disclosure of counselling records in the hands of non-parties in prosecutions for sexual offences.<sup>7</sup>

Section 19A(8) provides a mechanism for applications to the court for disclosure hearings.

Section 19A(10) sets out the following factors that the court shall take into account when considering whether the record should be made available to the defendant:

*(a) the extent to which the record is necessary for the accused to defend the charges against him;*

*(b) the probative value of the record;*

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<sup>6</sup> *HSE v White* [2009] IEHC 242.

<sup>7</sup> See *Releasing my counselling records*, Office of the Director of Public Prosecutions, May 2018.

Available at:

[https://www.dppireland.ie/app/uploads/2019/03/Releasing\\_my\\_counselling\\_records\\_ENG\\_revised\\_Feb\\_2019.pdf](https://www.dppireland.ie/app/uploads/2019/03/Releasing_my_counselling_records_ENG_revised_Feb_2019.pdf)

- (c) the reasonable expectation of privacy with respect to the record;*
- (d) the potential prejudice to the right to privacy of any person to whom the record relates;*
- (e) the public interest in encouraging the reporting of sexual offences;*
- (f) the public interest in encouraging complainants of sexual offences to seek counselling;*
- (g) the effect of the determination on the integrity of the trial process;*
- (h) the likelihood that disclosing, or requiring the disclosure of, the record will cause harm to the complainant including the nature and extent of that harm.*

The Council notes that the section has been described *“as a missed opportunity to address the very real difficulties that arise in balancing the rights of an accused to a fair trial with the privacy rights of a complainant.”*<sup>8</sup>

While the section gives a broad definition of the term ‘counselling’ it only allows for records created by a narrowly defined ‘*competent person*’ to fall within the section.

The legislation also fails to provide for a disclosure mechanism in summary proceedings for a sexual offence before the District Court or the Special Criminal Court.<sup>9</sup> While proceedings for such offences in the Special Criminal Court are rare, the offence of sexual assault can be prosecuted in the District Court and the failure to include those other courts within the provisions is anomalous.

Furthermore, as has been pointed out, the above factors which the court must take into account in a disclosure hearing, as set out in s.19A(10), imply that an accused person has an input into such a hearing.

However, there is no provision for the defendant’s lawyers to have sight of the records in advance of the hearing. Alternatively, there is no provision for a schedule to be provided in advance so that the defence can engage in a meaningful manner at disclosure hearings concerning the record(s) in question.

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<sup>8</sup> James Dwyer SC (2017). ‘A New Protocol for disclosure of counselling records in sex offence cases’, *The Bar Review*, 22(3), 73-76.

<sup>9</sup> See sections 19A(1) and 19A(2). This anomalous situation is described by Dwyer (note 8 above) at p.75.

Accordingly, Dwyer noted that, *“it seems therefore that the function of defence counsel is limited to making submissions that a record should be disclosed, without knowing what it contains.”*<sup>10</sup>

The Council is concerned that the question arises as to how the defence can make submissions that the record is necessary for the accused to defend the charges against him if he/she does not know what the records contain?

This potential problem may undermine the (presumed intended) efficiency of such hearings. It could result in situations where the defence feels compelled (by their duty to act in their client’s best interests) to apply for the disclosure of records which would not assist them at all, just in case the record turns out to be necessary.

This could have the overall effect of unnecessarily elongating the proceedings, causing further stress to both complainants and defendants.

As is also pointed out in the same article, s.19A(17) introduces unhelpful and confusing phrasing into the legislation. It provides that *“this section does not apply where a complainant or witness has expressly waived his or her right to non-disclosure of a counselling record without leave of the court.”*

Mr. Dwyer notes that this is presumably intended to refer to a complainant’s right to object to a disclosure order being made by the court.

However, he comments that *“there is no provision for the court inquiring into the capacity of a complainant to exercise such a waiver having regard to his or her age, mental capacity or vulnerability.”*<sup>11</sup>

Furthermore, the reference to a “witness” having a right to non-disclosure is entirely unclear as s.19A(1) states that it is only the counselling records of complainants to which the section relates.

In overall terms, the Council considers that the provisions in s.19A of the *Criminal Evidence Act, 1992*, as inserted, are replete with difficulty and that a new provision needs to be enacted to deal with the issue.

To that end the Council has obtained the views of practitioners in the area and sets out some of their observations on the implementation of the section in question below.

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<sup>10</sup> *Ibid* at p 75.

<sup>11</sup> *Ibid* at 76.

iii. How are disclosure hearings working in practice?

Anecdotal evidence from the limited number of disclosure hearings that have run to date seems to suggest that many of the above problems are now becoming apparent in the hearings themselves.

Such is the level of concern about some of the provisions (examples are set out below) that, in practice, many cases proceed by avoiding the relevant provisions where it is possible to do so.

This does not derive from a willingness to ignore the law; rather the practitioners in question consider that the provisions are not aiding the administration of justice and are concerned that the requirement in Article 38.1 of the Constitution to ensure that a fair trial takes place means that recourse to general principles, rather than the framework of the Act, is preferable.

In most cases both the prosecution and the defence want a case to proceed as it is not in anybody's interests to adjourn without a good reason to do so.

This means that in cases involving significant amounts of disclosure, the experience of our members in the Law Library is that prosecution counsel often takes on the task of reading and assessing the contents of such material. Following that, prosecution counsel will agree with defence counsel how much is relevant and must be shared by way of disclosure.

If this is done by agreement, the complainant having given prior consent to the prosecution for the disclosure of all relevant records (not just counselling records), there is no need for an application.

Accordingly, in reality the problems in this area are being overcome by prosecution counsel considering voluminous amounts of documentation and agreeing to disclose materials to the defence after consulting with the defence counsel in the case. This ad hoc process is carried out in many cases.

Even so, practitioners who have engaged with this area have expressed concerns about the potential volume of disclosure upon which they (or, in the event of a contested application that requires a determination, a single judge) must decide, depending of course on the case in question and the issues that arise in it.

Sexual assault cases, particularly historic cases, may have a large number of counselling records from a number of different counsellors over very many years. Such disclosure is often handwritten, difficult to read and will be onerous to review. The defendant does not have to set out in advance what his/her defence to the charge is during any such disclosure application.

There is a lack of clarity with regards to when the time limits in section 19A(4)-(6) begin to run. There is a rule of court which requires an application by the accused within 21 days of his arraignment. This is wholly unrealistic in terms of what may be required by way of disclosure. To cite the most obvious problem with it, such a deadline does not capture ongoing counselling, which may be highly relevant. In practice, barristers are relying on the right of the accused set out in the Act and this rule of court has not been used to prevent an application, as far as we are aware. Particular concern has also been expressed over the lack of any appeal procedure. The legislation offers no practical guidance on the redaction or restricted/limited viewing of the document as set out in s.19A(12) of the 1992 Act (as inserted).

Practitioners noted that difficulties have indeed arisen with the requirement on the accused seeking disclosure in s.19A(3)(b) to ***“state the reasons grounding the application, including grounds relied on to establish that the record is likely to be relevant to an issue at trial.”*** This has created a difficulty in that the accused is expected to state the reasons without knowing what the records contain.

Practitioners were unclear about whether counsellors should be legally represented/aided (as complainants are). It appears to be contemplated by the Act. This could create practical difficulties and lengthy delays as a complainant may have engaged with a multiplicity of counsellors over their years of therapy, particularly in historic cases.

Similar concerns were expressed over the requirement for an accused in s.19A(4) *“to notify ... any other person to whom the accused believes the counselling record relates of his or her intention to make the application.”*

This requirement is unworkable and cannot be met until the accused has had sight of the disclosure. It is also a potentially onerous provision which could involve the notification of a large number of people.

The Council considers that the legislative provisions for disclosure need to be re-addressed and set out in a comprehensive fashion that goes beyond the provision of just counselling notes and remedies the current defects. As stated above, the present section is lacking in clarity and is not aiding the administration of justice.

The primary obligation to seek out and preserve evidence that may assist the prosecution of the case and the defence of the charges rests with An Garda Síochána and it is also vital that this is re-enforced in Garda training and is applied in practice in investigations concerning sexual offences.

The recent disclosure difficulties in the United Kingdom, referred to below, occurred in part due to problems in the manner in which investigations were conducted where material that



could assist the accused person was either ignored or not sought by investigating police officers. Simply put, An Garda Síochána must ensure that investigations into all offences, including sexual offences, involve the gathering of all material evidence, both probative to guilt and capable of exonerating an accused of the crime in question.

In 2014 the Law Reform Commission Report on Disclosure and Discovery in Criminal Cases conducted a thorough review of legislative reform in this area and suggested a draft Criminal Procedure (Disclosure) Bill.<sup>12</sup>

Regrettably, this Bill appears to have been ignored in recent legislative changes. The Council believes that this Bill should be re-assessed and progressed as it provided a framework for disclosure in criminal proceedings in a thematic manner that may avoid some of the difficulties being encountered in this area.

iv. Situation in England and Wales and Northern Ireland

In late 2017 and early 2018 there were a number of widely reported failures in the disclosure process leading to the collapse of a number of criminal trials in the UK.<sup>13</sup> The collapses led to a series of inquiries, reports and reviews which aimed to uncover the reason for such failures.

Indeed, Sir John Gillen noted in his preliminary review that —

*[t]here has been no shortage of reviews on the topic of dealing with disclosure. It has generated more official reviews than virtually any other issue in the law of criminal process.*<sup>14</sup>

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<sup>12</sup> LRC 112-2014, *Disclosure and Discovery in Criminal Cases*, December 2014.

<sup>13</sup> See for example, Grierson J. (2017). 'Scotland Yard carrying out 'urgent review' after rape trial collapses', *The Guardian*. Available from: <https://www.theguardian.com/uk-news/2017/dec/15/scotland-yard-carrying-out-urgent-assessment-after-trial-collapses>;

Bowcott O. (2018). 'Solicitor for student in rape case criticises police and CPS', *The Guardian*. Available from:

<https://www.theguardian.com/uk-news/2018/jan/30/met-police-and-cps-apologise-to-man-after-collapse-of-case>;

Greenfield P. (2018). 'Judge: collapse of sex crime trials could lead to rapists going free'. *The Guardian*. Available from:

<https://www.theguardian.com/law/2018/jan/20/judge-collapse-of-sex-trials-could-lead-to-rapists-going-free>; Weaver M. and Grierson J (2018). 'Police chief admits 'cultural problem' with evidence disclosure', *The Guardian*. Available from:

<https://www.theguardian.com/law/2018/jan/24/more-than-900-criminal-cases-collapse-undisclosed-evidence-cps-police>;

Bowcott O. (2018). 'Urgent review of all rape cases as digital evidence is withheld', *The Guardian*. Available from: <https://www.theguardian.com/society/2018/jan/26/urgent-review-of-all-cases-as-digital-evidence-is-withheld>.

<sup>14</sup> Gillen, J. (2018). *Preliminary Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* at [10.8].

A brief overview of the recent reviews is set out below.

### The National Disclosure Improvement Plan

In January 2018, the Crown Prosecution Service (CPS), the National Police Chiefs' Council (NPCC) and the College of Policing came together to publish the joint National Disclosure Improvement Plan (NDIP).<sup>15</sup> This was a package of measures to improve how the criminal justice system deals with disclosure. The NDIP set out what had already been done to improve the disclosure process and the further steps that would be taken under five themes: capacity, capability, leadership, governance and partnership. The key priorities of the plan can be summarised as follows:

- to strengthen the capacity of investigators and prosecutors in dealing with disclosure, with an emphasis on pursuing reasonable lines of enquiry, particularly in the context of significant volumes of communications and other digital material;
- to improve capabilities by providing training that equips investigators to identify, review and record relevant material so that the prosecutor is able to make an informed disclosure decision;
- to reinforce the messages on the “thinking approach” to disclosure by effective leadership both at the top of the organisations and by appointing disclosure champions to drive cultural change;
- to ensure focused and continuous oversight and governance of the actions set out in NDIP to ensure progress and significant improvement.

### The House of Commons Justice Select Committee Inquiry into disclosure of evidence in criminal cases

Following reports in the press of cases which had collapsed, or guilty verdicts which had been overturned on appeal, due to errors in the disclosure process, The House of Commons Justice Select Committee launched an Inquiry into disclosure of evidence in criminal cases.<sup>16</sup> This report, published in July 2018, noted that the Inquiry coincided with the Attorney General's review of disclosure, and followed the publication of the NDIP. As such, the report focussed on some of the long-standing and systemic issues that have undermined the process of disclosure.

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<sup>15</sup> CPS, NPCC and College of Policing (2018), *National Disclosure Improvement Plan*. Available at: <https://www.npcc.police.uk/documents/criminaljustice/2018/NDIP.pdf>

<sup>16</sup> House of Commons Justice Committee, *'Disclosure of evidence in criminal cases'*, HC 859, 20<sup>th</sup> July 2018. Available at: <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/859.pdf>

The Select Committee concluded that there needs to be:

- 1) A shift in culture towards viewing disclosure as a core justice duty, and not an administrative add on;
- 2) The right skills and technology to review large volumes of material that are now routinely collected by the police; and
- 3) Clear guidelines on handling sensitive material.

UK Attorney General's Review of the efficiency and effectiveness of disclosure in the criminal justice system<sup>17</sup>

On the 11th December 2017 it was announced that the UK Attorney General would lead a review of disclosure procedures. The terms of reference were to review the efficiency and effectiveness of disclosure in the criminal justice system, including specifically how processes and policies are implemented by prosecution and defence practitioners, police officers and investigators.

A summary of the Attorney General's findings and recommendations is set out below:

- 1) Primary legislation continues to provide an appropriate disclosure regime, but in practice the system is not working as effectively or efficiently as it should.
- 2) Practical reinforcement of the duty to make reasonable lines of inquiry and apply the disclosure test correctly.
- 3) Pursuing a fair investigation and considering disclosure obligations from the outset, rather than as an afterthought.
  - There is wide support for the proposition that a fair investigation requires consideration to be given to disclosure from the outset. There is an ingrained cultural problem that sees disclosure as an administrative or bureaucratic issue that only arises at the mid-point of litigation. Working practices should be adjusted to drive the cultural change that is required. In particular, transparent emphasis on an auditable record of what the investigator and prosecutor have actually done to discharge their disclosure obligations (or the reasons why they did not do something) can be more useful to each participant in the process than simply a list of items of unused material.

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<sup>17</sup> Attorney General's Office (2018) *Review of the efficiency and effectiveness of disclosure in the criminal justice system*. Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/756436/Attorney\\_General\\_s\\_Disclosure\\_Review.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756436/Attorney_General_s_Disclosure_Review.pdf)

- 4) Proportionate frontloading of disclosure preparation by the prosecution.
  - Too many disclosure issues and tasks are left until too late a stage in litigation. Bringing disclosure performance forward in some cases would reap significant benefits and electronic working makes this achievable. Certain processes can be streamlined to remove work that is unnecessary or duplication.
- 5) Early and meaningful engagement between prosecution and defence.
- 6) Harnessing technology.
  - In meeting the complications caused by technology in the digital age, it is right that technological solutions are adopted, including Artificial Intelligence where appropriate, while recognising that there is no technological “silver bullet”. It is equally important to respect and protect complainant, witness and third-party privacy rights.
- 7) Data and management information.
  - The collection of data and management information to inform performance on the impact of disclosure on cases is not fit for purpose.
- 8) Sustained oversight and improvement.
  - In order to deliver the necessary change in culture there needs to be sustained oversight by senior operational leaders and ministers.

#### Northern Ireland, Gillen Review

The Gillen Review also made some key recommendations in relation to disclosure. These recommendations are set out below:

- Challenges should be made to the PSNI culture, which too often fails to see disclosure of third-party material/schedules of unused material as at the very core of the investigative process and the imperative of timely decision-making;
- Disclosure is currently seen merely as an add-on at the end of investigations, which then adds enormous delay to the whole matter; that has to change;
- There is a need for specially trained designated police Disclosure Officers, working with PPS guidance, in all serious sexual offence cases where disclosure is an obvious issue;

- Early positive and enthusiastic meetings between, and the engagement of, the defence and the Public Prosecution Service to exchange disclosure schedules is another vital ingredient;
- Firm judicial case management, with judges setting time limits for disclosure schedules to shape expectations and allow for measurement and evaluation of progress, is also pivotal; and
- Resources have to be invested in training skilled disclosure operators and technological advances to hasten the process.<sup>18</sup>

v. Issues arising from the Reviews carried out in the neighbouring jurisdictions

a) Lack of primary legislation a key weakness in the Irish system:

This jurisdiction has much to learn from the many recurring issues identified in the above reports from England and Wales and Northern Ireland. They could be said to mirror many of the difficulties which regularly occur in the disclosure system in this jurisdiction.

All of the above reviews and reports appear to be generally happy with the UK legislative framework of the *Criminal Procedure and Investigations Act 1996*. They conclude that the problems have, for the most part, stemmed from the practical application of this legislation rather than the legislation itself. Although all of the practical difficulties highlighted in the UK reports could be said to be equally relevant to this jurisdiction, a strong legislative basis underpinning the system would provide a solid basis upon which practical, cultural and institutional change could occur.

Accordingly, the Council considers that the overarching difference in this jurisdiction is that we are lacking a strong legislative framework which goes beyond the disclosure of “counselling notes” in sex cases.

b) Constructive and meaningful engagement between prosecution and defence

The Council notes that point 5 of the UK Attorney General’s Review on disclosure recommended that *“Early and meaningful engagement between prosecution and defence”* was important in ensuring that the disclosure process was successful and achieved a fair trial.

This point raises a real and substantial issue which is addressed, in part, in s.19A(3)(b) of the 1992 Act whereby a defendant seeking counselling records must ***“state the reasons grounding the application, including grounds relied on to establish that the record is likely to be relevant to an issue at trial.”*** However, in the context of counselling records this has created a difficulty in that the accused is expected to state the reasons without knowing what

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<sup>18</sup> Gillen, J. (2019) *Gillen Review: Report into the law and procedures in serious sexual offences in Northern Ireland Part 1*, Chapter 10. Available at: <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/gillen-report-may-2019.pdf>

the records contain and where there is no schedule provided. The Council has already pointed out the frailties with this provision above and does not repeat that submission here, save to emphasise that such difficulties need to be remedied rather than repeated if we are to achieve the proper administration of justice in this area.

The same difficulty arises in relation to other types of material where it may be difficult for a defendant to assess whether they wish to seek particular types of records when they do not know what the Garda investigation has accumulated in terms of material.

On the other hand, given the volume of material accumulated in some investigations it may be difficult for the Prosecution to make a comprehensive assessment as to what is relevant for the purposes of disclosure. Particular issues might arise about personal data on electronic devices where material about a complainant's personal life is contained and where such data might have nothing to do or might not appear to have anything to do with the events of the alleged sexual assault in question.

The Council believes that this issue requires deep consideration as the balance must be maintained between the prosecution and the defence and must always favour a fair trial.

Allied to this, the general principle to the effect that material which could damage the prosecution case, aid the defence to the charge, or give reasonable leads to either of those two objectives, must be upheld and applied by the Garda investigation team and by the Prosecution.

Thereafter, it is submitted that where issues arise about the volume of material held by the prosecution (i.e. on electronic devices) and/or where issues about the personal privacy of a complainant arise and where the parameters of disclosure need to be resolved between the parties then there should be a procedure, if necessary set out in statute, for the Prosecution and the Defence to engage in a meaningful and constructive manner on such issues.

One potential solution to the issue is to ensure that the engagement is subject to judicial supervision in the event of a dispute between the parties allowing a pre-trial hearing to ventilate disclosure issues in an appropriate and timely manner so that the smooth running of the trial is ensured. Such a procedure has already been used in a small number of trials.

Such a procedure need not be complex as it could provide that in instances where the Prosecution is having difficulty in assessing the relevance of particular material in the context of the case itself, or where the material is voluminous, or where there are particular concerns in terms of respecting the personal privacy of the complainant or some other person who may be affected by the disclosure, then the Prosecution could serve a notice on the defence informing it of such a difficulty and outlining the reasons for concern.

If appropriate, a schedule should be prepared by the Prosecution so that the Defence is made aware of the nature and volume of material involved so that instructions can be taken as to whether to seek disclosure of same.

Thereafter, the Defence may have to outline reasons to the Prosecution why such material should be disclosed if the Prosecution are unwilling to provide such disclosure.

In most cases, the interview with the accused provides this information. Hence, the Council does not believe that such a requirement would be as onerous on the defence as might first appear. It is also provided for in s.19A(3)(b) of the 2017 Act, albeit in a flawed manner as outlined above.

In those cases, without such an indication, an obligation to disclose reasons why certain material is sought may be the only way to ensure that the disclosure process is focused on the live and relevant issues at trial, rather than becoming a battleground in itself that is divorced from the evidence to be given by witnesses. In the event of a dispute on the matter, the judge dealing with the pre-trial hearing can assess whether the reasons outlined by the defence are sufficient to warrant disclosure of the material concerned, or indeed can assess the material and rule on its potential relevance and hence whether or not it should be disclosed.

In the event of a dispute on the matter, it should be resolved by the judge at the pre-trial hearing.

It is important that disclosure requests do not become oppressive or obstruct the running of a fair and expeditious trial. Where such clarity is provided, the relevance of the materials sought can be assessed by reference to the facts of the case.

In short, the Council is submitting that an active engagement between the Prosecution and the Defence is required in the context of the quantity of disclosure material now potentially available, and worldwide developments in this area. However, we recognise that this is a complex issue that requires detailed consideration and the input of experienced practitioners if it is to be effective and fair.

The specific timing as to when the Prosecution provides a schedule of material not disclosed and when the Defence might apply for disclosure of same must also be considered carefully. However, it is vital that it is accomplished in the pre-trial stage, which would then assist the prosecution, the defence and the judge dealing with any pre-trial matters, including disclosure. It should also assist the fair and expeditious running of the trial itself.

The Council recognises that the suggestion of such a change in criminal procedure for sexual offences could impose an obligation on a defendant to set out the relevance of materials which are sought in particular contexts and subject to judicial supervision at the pre-trial hearing stage. However, it does so on the basis that criminal procedure must attune itself to the requirements of a fair trial at all times. The requirement on the Prosecution to provide

disclosure under the general principles is not altered in this recommendation. Rather, the Council envisages that in cases with particular difficulties there is a mechanism to resolve such difficulties, either by way of correspondence between the parties or by judicial intervention if that is required.

Moreover, the Council makes this recommendation alongside its other recommendations in this area, namely that the disclosure process is properly funded, including the critical funding of barristers to review disclosure. This also includes an express request that remuneration is provided for disclosure hearings, which can be particularly complex in some cases. In that regard, the Council notes with considerable dissatisfaction that no steps have been taken to remunerate counsel for the extensive work done in this area despite repeated submissions on the area.

c) Social media information/materials – particular considerations:

The Council notes, as part of its response on the disclosure issue, that there is no legislative framework providing for the disclosure of relevant contents of a complainant's phone and social media in sexual assault cases.

There are particular privacy and policy issues that arise about any requirement for complainants to hand over their phones for technical analysis after an allegation of sexual assault is made by them. Some of these are set out in detail, albeit in a different context, in the Supreme Court decision in **CRH v. Competition Authority** [2018] 1 I.R. 521.

The days when phones contained only a list of contacts and identified only who had been contacted are long gone. Phones now typically contain an enormous amount of information, most of it wholly irrelevant to the crime being investigated and much of it very personal.

It is instructive that, anecdotally, colleagues at the Bar who deal with allegations involving teenaged complainants and accused have reported that in the course of the investigation none of the young people interviewed (complainant, witnesses or accused) was willing to hand over their phone for forensic analysis by AGS or, in some cases, knowing that they were to be interviewed, phones had been wiped clean before the witness attended for interview.

On the other hand, as outlined above in the section from England and Wales, disclosure of social media communications between a complainant and the accused may, in some instances, be relevant and important to the issues to be determined at trial. In some such instances in the UK, there was a failure to gather and obtain such materials by the prosecution and a failure to assess the relevance of same for disclosure purposes for trials.

Thus, this is a difficult arena in which the importance of disclosure in a criminal trial must not be forgotten but also where rights to privacy and the obligation to ensure that disclosure does not lead to a trawl through irrelevant and deeply personal affairs of complainants and accused persons must also be protected.



If meaningful disclosure provisions are to be implemented, the Council believes that the Prosecution and the Defence must be enjoined to engage with each other in a constructive manner at an early stage of the proceedings and that difficulties with any issues about disclosure are litigated at an early stage.

For instance, if the defence claims prior contact on social media which suggested a belief in consent, such a case should be outlined as the justification for the examination of a complainant's phone or access to relevant social media accounts.

## Pre-recorded Evidence and Cross-examination

**What is your view on the adequacy of existing measures and systems for facilitating witnesses, and vulnerable witnesses, in particular to give pre-recorded evidence already evidenced by video link? The group has been asked to deal with the protection of “vulnerable witnesses”. Which categories of person, in your opinion, should come within the meaning of this term?**

In March 2018 the Rape Crisis Network Ireland (RCNI) released its report *‘Hearing Every Voice -Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings’*.<sup>19</sup> The Council took an active part in the compilation of the report.

The report notes that vulnerable witnesses are not defined in statute in Ireland. The RCNI offers a wide definition (for the purposes of their report) of the term “vulnerable witness” which is worth setting out in full:

*“We use the term to refer to all witnesses whose capacity to take part fully in criminal proceedings is reduced for some reason or reasons connected with personal characteristics, such as youth (meaning, under 18 years of age), or a physical or intellectual disability, or with the nature of the offence (sexual and/or violent crimes, for instance). Our definition includes all those who are victims of a “relevant offence” as defined in Section 30 of the Criminal Justice (Victims of Crime) Act 2017 (CJVoCA 2017), as well as those who are under 18 years of age, and those who have a “mental disorder” again as defined by Section 19 of the CJVoCA 2017. As far as physical disability is concerned, we regard witnesses of any age as vulnerable if they have any disability which impairs significantly their ability to participate in criminal justice proceedings as a witness, such as communication difficulties. We also consider that the definition should encompass any accused person who is vulnerable in any one of these ways.”<sup>20</sup>*

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<sup>19</sup> Rape Crisis Network Ireland. (2018). *Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings*. Dublin: Rape Crisis Network Ireland. Available at: <https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf>

<sup>20</sup> *Ibid* at pgs.7-8.

The Council considers that there is merit to this approach although some matters may need to be further elucidated in relation to the definition. Such a definition encompasses recognition of those with autism spectrum disorder and other communication difficulties.

The RCNI have recommended as follows:

*“Certain special measures, such as the use of intermediaries, should be extended to victims who are not under age and do not have a mental disorder as defined by CJVoCA 2017. These include people who suffer from conditions such as autism, which do not come under the definition of “mental disorder” but nevertheless have a serious impact on their ability to participate fully in criminal justice proceedings.”<sup>21</sup>*

The Council considers that there is some merit in the view that the definition of vulnerable witness should be a broad one which is underpinned by the principle of allowing the witness to give their best evidence whilst all the time protecting the fair trial rights of the accused.

The Council agrees that the definition should also encompass any accused person who is vulnerable in one of these ways.<sup>22</sup> However, there may be some complexities in how to address a vulnerable accused person which would merit further thought and consideration, with the benefit of expert evidence and a further report.

An understanding of the concept of the vulnerable witness has developed and was dictated by legislation providing for special measures for certain persons.<sup>23</sup> This has led to a narrow, legislation-led view of the vulnerable witness. It has also meant that the provisions relating to vulnerable witnesses are disjointed and would benefit from consolidation and clarity.

#### **Pre-Recorded Evidence by Video-Link**

- **Pre-recording evidence and pre-recording cross-examination and the legal issues that arise in respect of same.**
- **A short synopsis on giving evidence by video-link and the circumstances in which that is appropriate.**

##### **(i) Existing Special Measures**

The Council recognises the importance of giving vulnerable witnesses the benefit of appropriate special measures and notes that much has been done in this jurisdiction in recent years to improve the number and range of special measures available to vulnerable witnesses during court proceedings.

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<sup>21</sup> *Ibid* at p.43.

<sup>22</sup> See discussion at p. 8 of the above Report.

<sup>23</sup> See generally O'Malley. (2013). Chapter 17, Section 8 – ‘Special Arrangements for Vulnerable Witnesses’. In: *Sexual Offences*, 2nd ed.; and Ward J. (2017). ‘Criminal Law (Sexual Offences) Act 2017 and Vulnerable Witnesses’. *Irish Criminal Law Journal*, 27(3), 90-99.

A comprehensive review of all special measures available to vulnerable witnesses in this jurisdiction is contained within the *Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings* report, published in March 2018 by the Rape Crisis Network Ireland, to which the Council contributed (the “*Hearing Every Voice Report*”).<sup>24</sup>

The main provisions are contained within Part III of the *Criminal Evidence Act 1992* and apply to “relevant offences”.<sup>25</sup> The special measures include as follows:

- All child complainants under 18 years of age are entitled to have their evidence-in-chief testimony pre-recorded as their direct evidence. This is permitted as long as the complainant is available at trial for cross-examination, and a video recording can be excluded if the court finds that it is not in the interests of justice for it to be admitted.<sup>26</sup> Once child complainants are over 18, they may not have their evidence-in-chief pre-recorded as their direct evidence, unless they have a “mental disorder” as specified by the *Criminal Evidence Act 1992*.<sup>27</sup>
- Under the age of 18, complainants can give evidence by video-link i.e. from a special room in the court building but outside the courtroom itself.
- Where the witness under 18 is giving evidence other than through a live television link, the court may direct that the evidence be given “from behind a screen or other similar device so as to prevent the witness from seeing the accused”.<sup>28</sup> The witness must be capable of being seen and heard by the judge and/or jury, the relevant legal representatives acting in the proceedings, any interpreter or intermediary and the accused.
- Complainants are entitled to court accompaniment by a support worker or other appropriate person.<sup>29</sup>

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<sup>24</sup> Rape Crisis Network Ireland. (2018)

<sup>25</sup> S. 12 of the *Criminal Evidence Act 1992*, as substituted by s. 30(a) of the *Criminal Justice (Victims of Crime) Act 2017*, provides that a “relevant offence” means (a) a sexual offence; (b) an offence involving violence or the threat of violence to a person; (c) an offence under section 3, 4, 5 or 6 of the *Child Trafficking and Pornography Act 1998*; (d) an offence under section 2, 4 or 7 of the *Criminal Law (Human Trafficking) Act 2008*; (e) an offence consisting of attempting or conspiring to commit, or of aiding or abetting, counselling, procuring or inciting the commission of, an offence mentioned in paragraph (a), (b), (c) or (d).

<sup>26</sup> S. 16 of the *Criminal Evidence Act 1992*, as amended by s. 37 of the *Criminal Justice (Sexual Offences) Act 2017*.

<sup>27</sup> S. 19 of the *Criminal Evidence Act 1992*, as amended by s. 30 of the *Criminal Justice (Sexual Offences) Act 2017*.

<sup>28</sup> S. 14A of the *Criminal Evidence Act 1992*, as inserted by s. 30(d) of the *Criminal Justice (Victims of Crime) Act 2017*.

<sup>29</sup> S. 20 of the *Criminal Justice (Victims of Crime) Act 2017*.

- For most trials of sexual offences, the hearing is *in camera*, and in all such cases the person making the complaint is entitled to his or her anonymity. Further, s. 252 of the *Children Act 2001* provides that no identifying information or image of any child witness may be published or broadcast.
- The wearing of a wig and gown by the judge and the barrister or solicitor questioning a child witness is prohibited “in respect of a relevant offence” and in respect of any other offence of which the child is a victim.<sup>30</sup>
- An accused person is prohibited from personally cross-examining child witnesses in all criminal proceedings listed in s. 12 of the *Criminal Evidence Act 1992* and adult complainants where the accused is charged with “a sexual offence”, as defined in s. 2(1), unless the court is of the view that “*the interests of justice require the accused to conduct the cross-examination personally*”.

(ii) Pre-Recording Cross-Examination:

There is currently no provision for cross-examination to be pre-recorded in this jurisdiction. Testimony in cross-examination must be offered at the trial, whatever the age, health and/or mental capacity of the victim or other witness. Our criminal justice system is based on the premise that oral evidence at trial is the best evidence which can be obtained.

At present, there is no way in which pre-recorded cross-examination may be introduced as evidence in court. Further, there are no special rules governing cross-examination of victims in sexual offence cases with the exception of the rule limiting cross-examination in relation to the sexual history of a complainant in a rape case.

In England and Wales, the pre-recording of cross-examination of witnesses deemed “eligible for assistance” has been the subject of a pilot programme in three designated Crown Courts.

The goals of the programme were to provide cross-examinations significantly earlier in order to aid recall and to improve the quality of the evidence provided by the victims and other witnesses, and secondly, to reduce stress and the risk of re-traumatisation for victims and other witnesses. The programme required defence lawyers to submit any questions they considered important to the judge at a Ground Rules Hearing (GRH) for his/her approval.

The Gillen Report notes that many practitioners involved in the pilot recognised the importance of the GRH in its success because questions asked were more relevant and focused as a result of the additional scrutiny. Further advantages to pre-recorded cross-examination included:

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<sup>30</sup> S. 14B of the Criminal Evidence Act 1992, as inserted by s. 30(f) of the Criminal Justice (Victims of Crime) Act 2017.

- Less delays between incidents occurring and witnesses giving evidence (though it wasn't clear if witness recall was improved);
- Shorter and more focused cross-examination;
- Reduced trauma from cross-examination;
- Less waiting time in court;
- Slightly shorter trial durations.

However, practitioners also reported a number of issues of concern. These included:

- Issues with technology including sound quality and screen space;
- The ability to effectively question the vulnerable witness;
- Whether it is fair to afford this opportunity to a complainant but not a defendant;
- A potential reduction in jurors' ability to read a complainant's body language;
- Whether video testimony lacks the immediacy and persuasiveness of live testimony and whether it creates emotional distance between the complainant and jury;
- Concerns relating to the feasibility of pre-recording cross-examination at an early stage when disclosure has not been complied with;
- The potential to have to recall a witness if new information emerges after the recording.

Of note, there was little difference in rates of conviction between cases involving cross-examination in person and pre-recorded cross-examination.

The report on the pilot programme on pre-recorded cross-examination in England and Wales concluded that sufficient resources must be in place to ensure that the sound and picture quality of the recording is of a high standard prior to a national roll-out of the programme. It further noted that the defence must be given enough notice and disclosure to ensure that an informed and effective cross-examination can take place.

In Northern Ireland, a similar pilot programme remains on hold since February 2017. The Gillen Report notes that a major issue is that timely disclosure is not being achieved, with material often being delivered up to the last minute, or indeed, even during the trial, thus affecting the viability of the proposal of pre-trial cross-examination. Further, concerns were also raised about the concept of questions being agreed in advance and how it could impact on the introduction and success of the pilot.

Both the Gillen Report and the *Hearing Every Voice Report* contain a detailed analysis of the cited advantages and disadvantages of pre-recorded cross-examination for vulnerable witnesses.

The issue is a difficult one and the points of concern, noted above, mean that it should not be assumed that the use of technology will necessarily improve the trial process. The concept of a unitary trial has traditionally been regarded as the appropriate trial model. The relative advantages and disadvantages of proceeding with pre-recorded cross examination will need

to be carefully considered, and only then in the context where the pre-trial disclosure process has been properly overhauled and resourced. In particular, the Council is concerned about the possible risk that a complainant is cross-examined in a video-recorded format and then has to be re-called at the trial itself due to disclosure being made between the time of the video-recording and the trial date. This might only worsen the situation for such a complainant rather than assist the trial process.

The Council is of the view that any proposal to pilot pre-recorded cross-examination in this jurisdiction should be preceded by a thorough consideration of the issues arising from the United Kingdom experience.

The Council considers that, where disclosure permits it, pre-recorded testimony in chief and cross-examination may in principle be permissible, however a thorough examination of the UK experience should be carried out before a pilot programme would be commended.

Accordingly, it is vital that any consideration of introducing pre-recorded testimony should be preceded by a detailed review of the pilot project underway in England and Wales. To replicate such a “pilot project” here would itself require legislation and a review period so that the relevant interested parties could consider the issues that arise.

It appears to the Council that there are genuine concerns that pre-recorded testimony may not work in this jurisdiction, certainly at least until we have increased judicial resources, solved the problem of late disclosure, and have ensured that technology is of the required standard to carry out such examination in chief or cross-examination.

These matters are of substantial importance because the introduction of pre-recorded testimony, whether of examination in chief or cross-examination, which is mis-handled has the capacity to irretrievably damage the criminal trial process in a particular case or in general.

More generally, the Council endorses the view that information must be presented simply and unambiguously for child witnesses, whose understanding and range of expressions may be limited.

The Council considers and recommends that the use of intermediaries be enhanced and expanded.

The system in operation in England and Wales is well developed and numerous qualified intermediaries are available for trial purposes. Despite the provision of enabling legislation in 1992, there are very few intermediaries working in Ireland, insofar as the Council is aware. There are no rules of court providing for the use of an intermediary. On rare occasions, family members or other persons known to a witness, have been permitted to act as intermediaries. This is the main practical difficulty in implementing the provision generally.

The obvious limitation with the provision itself is that it appears to provide only for a limited involvement by the intermediary, namely, assistance with questions being put to the witness, but not with the answers the witness gives. For a vulnerable witness with communication

difficulties, this service may be worthless if his response cannot be conveyed reliably to the court.

As noted in the *Hearing Every Voice Report*, eliciting best evidence from vulnerable witnesses means avoiding jargon, technical, academic or simply “adult only” language, complex questions with more than one part, questions with tags, double negatives, and so on.<sup>31</sup>

It is important to note that the Council’s Continuing Professional Development (CPD) programme already incorporates training for barristers dealing with vulnerable witnesses. Specific seminars / workshops were held in 2016, 2017, in June and October of 2018 and most recently in April of 2019. Further seminars are planned to continue this work.

Moreover, consideration of appropriate language in witness handling forms part of the Council’s regular Advanced Advocacy Training Courses, which are conducted over a 2 to 3-day period, and which take place twice annually. In these courses, trained senior barristers work in small teams with their colleagues, each taking turns acting as barrister and then as witness, and work through a hypothetical case, exploring different ways of adducing and testing the evidence.

In December of 2018, the Chair of the Council’s Advanced Advocacy Committee addressed the judges of the District Court on the topic of Vulnerable Witnesses and the Victims Directive. The Advocacy Committee has taken the lead in promoting the adaptation of adversarial skills and judicial practice to achieve best evidence from children and other vulnerable witnesses. In each of the dedicated seminars in 2016 and 2017, a superior court judge was invited to chair the event and the events were attended by large numbers of barristers practising in the field of sexual offence work and by members of the judiciary.

Learning outcomes in these specific CPD seminars and workshops include how to identify potentially vulnerable witnesses, how to tailor consultations to achieve the best outcome for client and court, implementing the Victims Directive to ensure maximum protection for the witness and his or her full, informed participation, how to tailor direct or cross-examination to achieve the best evidence from the witness and how to minimise or, if possible, eliminate the trauma suffered by a witness giving evidence in a criminal trial.

Lastly, the Council endorses the recommendation of the *Hearing Every Voice Report* that such special measures as are afforded to vulnerable witnesses, should also be extended to vulnerable accused persons. The Council agrees that this proposition is correct in principle, because vulnerability is not confined to prosecution witnesses. The Council notes that as numerous different considerations arise for accused persons, it is a topic that might best be separately considered and researched in terms of implementing the measures that are required for accused persons.

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<sup>31</sup> Rape Crisis Network Ireland. (2018) at p. 42

## Additional Legal Supports to Witnesses

### **Provision of additional legal supports to witnesses during the court processes**

The Council notes that an argument has been made that complainants should have legal representation throughout the trial process. The current position is that they have such representation for sexual history applications and in relation to the disclosure applications under the Criminal Law (Sexual Offences) Act 2017.

The Council is concerned that the addition of another legal team to the trial process is unlikely to improve the trial process and, instead, carries a real risk that it will cause confusion and damage the integrity of the trial process. The DPP, through her counsel, already has a role to ensure that a trial judge gives appropriate rulings and directions on any evidential and legal issues in a trial.

If implemented correctly, the Criminal Justice (Victims of Crime) Act 2017 will ensure that the witnesses going through the trial process are informed of their rights and advised correctly as to their role in the process.

The recent call for separate representation pre-supposes that this will not happen and that such witnesses need a separate team representing the witness and asserting his rights specifically to the Court. This is to fundamentally change the trial process as one between State, represented by the DPP in her role as the independent prosecution service, and the accused person.

If introduced in such cases, it is hard to resist the argument for its introduction in other criminal cases, particularly those in which credibility becomes an issue.

Stated in this way, the sweeping nature of the proposed change should be clear. It appears to the Council that the better course is to ensure full and meaningful implementation of the Victims Directive and the Criminal Justice (Victims of Crime) Act 2017 to ensure that appropriate information and assistance is given to victims at all stages of the criminal process. In this regard, the Council believes that the Oireachtas should ensure that legislation already enacted is enforced, implemented and resourced.

Furthermore, the Council considers that before more legislative changes are considered on this topic, the implementation of the *Criminal Justice (Victims of Crime) Act 2017* by the Gardaí and the DPP should be assessed.

If it is implemented in a regular and uniform manner, that will provide much practical assistance to complainants and vulnerable witnesses in general which will address the issues raised by other stakeholders about the trial process. The elimination of delays between the making of a complaint and trial would also assist enormously.



### **Access to specialist training for An Garda Síochána, members of the judiciary and legal professionals dealing with sexual offences:**

As already set out above, the Bar of Ireland already has in place extensive training for members to facilitate the achievement of best evidence in courts, with a particular emphasis on vulnerable witnesses and complainants in sexual offence cases.

The Council fully supports the provision of specialist training for all professionals in this very complicated and evolving area of practice, which encompasses constitutional fair trial rights, access to justice and human rights and the victims' legislation, implementing the Victims Directive in Ireland.

The practitioners involved in this area of law have long recognised the specialist skills involved and the Council has actively developed its advocacy programme keeping recent developments in EU law and practice in England and Wales, with its focus on improving the position of the vulnerable witness, to the fore.

Further, the Council endorses the recommendation in the *Hearing Every Voice Report*, that witnesses be facilitated in formally recording their feedback on the effectiveness of measures to assist them in giving evidence.

The continuing development of best practice in this area will not be possible without a detailed and sustained exchange involving all of those who have a role in the administration of justice. The Bar of Ireland will continue to play its part, both in offering specialist training and in offering its assistance in appropriate training programmes for other stakeholders.

Its Advocacy Trainers include several who have obtained international accreditation from the International Advocacy Training Council (IATC), many of whom have taught their Irish colleagues in the 6 years since the courses began here. It also includes a number of senior trainers who have trained barristers on week-long courses in England and Wales, Australia and Hong Kong and those who have travelled to Scotland and South Africa in June and July of 2019, at the invitation of their respective independent bars, to train our colleagues in those jurisdictions.

### **Other Issues**

#### **(i) Codifying Legislation in Sexual Offences Area**

The law on sexual offences needs to be consolidated into one or two Acts of the Oireachtas (one with the substantive offences and a second with the procedural rules which are unique to sexual assault cases).

The current state of the statute book of sexual offences is incomprehensible to the general public, difficult for Gardaí and other State agencies to navigate and, all in all, makes the trials

of such offences more difficult on a practical basis for practitioners and judges alike. This state of affairs is not conducive to the proper administration of justice.

The Council believes that such consolidating legislation should be a top priority for the Oireachtas in 2019 – 2020.

## **(ii) Myths surrounding Sexual Offences**

There is no empirical research in Ireland showing the prevalence and extent of rape myths and whether jurors or jury verdicts are or are not affected by them. However, the Council recognises that research from other jurisdictions indicates that rape myths do have an impact on jury verdicts.<sup>32</sup>

The topic of rape myths was the subject of in-depth analysis in the *Preliminary Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* by Sir John Gillen (“the Gillen Report”).<sup>33</sup> Ensuring that the balance is struck between jurors understanding rape myths, without encroaching on the rights to a fair trial of the defendant, is an important task.

Examples of rape myths include the idea that dressing in a so-called provocative fashion invites violence; or if a woman did not scream, fight or get injured, it was not rape; or if people have had sex with each other on a previous occasion, they have gone some considerable way to forfeiting the right of refusal. In England and Wales, the Crown Prosecution Service expressly recognises in its *Prosecution Guidance* that there may be myths and stereotypes around rape and provides a number of examples of such myths, including those as set out above.<sup>34</sup>

The Council is in favour of positive steps being taken to combat the presence of rape myths that may influence the judgment of juries. The Council is of the view that the two main approaches to addressing rape myths may be the use of judicial directions and the education of the public at large about rape myths and stereotypes.

### **Judicial Directions**

In Ireland, directions are at the judge’s discretion without any legislative compulsion. Judges have the discretion to address rape myths in their directions if they so wish. This is similar to the current position in Northern Ireland, England and Wales, and New Zealand.

While there is no research or empirical evidence in Ireland to suggest that the present system of judges’ directions is proving inadequate or, in particular, that juries are not being guided

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<sup>32</sup> Burrowes, N. (2013). *Responding to the challenge of rape myths in court. A guide for prosecutors.*

NB Research: London. [Online]. Available at: [http://nb-research.com/wp-content/uploads/2013/04/Responding-to-the-challenge-of-rape-myths-in-court\\_Nina-Burrowes.pdf](http://nb-research.com/wp-content/uploads/2013/04/Responding-to-the-challenge-of-rape-myths-in-court_Nina-Burrowes.pdf)

<sup>33</sup> Gillen, J. (2018) *Preliminary Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland*

<sup>34</sup> Available at <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-21-societal-myths>

by the directions given, the Council recognises that further steps may be taken to ensure that juries are presented with a balanced narrative that explains the facts of the case and a clear framework within which to consider the evidence. However, ensuring that the balance is struck between jurors understanding rape myths, without encroaching on the rights to a fair trial of the defendant, is not a straightforward task.

The Council considers that the forthcoming establishment of a Judicial Council in this jurisdiction will provide a forum for the judiciary within which they could assess the directions that are given to juries in Ireland to ensure that they are clear and not too complex; with appropriate focus on comprehensibility and the prevention of false assumptions. At all times, there is a need to ensure that directions to the jury are couched in simple terms without jargon or unnecessary legalese.

In 2010 the Judicial Studies Board in England and Wales published the *Crown Court Bench Book* setting out specimen directions for use by judges in the Crown Court. Judges point out to juries that experience shows that a number of myths are erroneously held and should be dispelled. It reads:

*“The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, expert in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgment but to approach the evidence without prejudice.”*

Further, *The Crown Court Compendium* (last updated in June 2018) highlights a “real danger” that juries will make and/or be invited by advocates to make unwarranted assumptions and emphasises the importance of a judge alerting the jury to guard against this.<sup>35</sup>

The Council considers that this guidance may well be of useful application in this jurisdiction also. Once established, the Judicial Council will have an opportunity to consider these matters and should be afforded the resources and assistance required to consider these issues, with the assistance of the accumulated research from other jurisdictions and the experience of the judiciary here in dealing with such trials. A prescriptive approach should be avoided at this

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<sup>35</sup> Available at <https://www.judiciary.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-june-2018a.pdf>

juncture and the observations made above are aimed at assisting the Judicial Council in considering these matters.

### Timing of Directions

In England and Wales, *The Crown Court Compendium* states that relevant directions may be given at the beginning of the case or as part of the charge to the jury and notes that it is advisable to discuss the proposed direction.

The Council considers that the opening speech of prosecution counsel should be recognised as a vital opportunity to set out the law clearly at the outset and endorses this general practice; a jury should not have to wait until the end of the trial to hear the guiding legal principles, when views may already have been formed.

There also may be a role for a judge to set out some general directions on consent at this early stage, depending on the facts of the case. In reality, the prosecution will be familiar with the facts and is in the better position to deal with any issues arising at the outset of the case.

The Council recognises that research shows that jurors formulate their narratives about cases early in proceedings and are likely to interpret all subsequent information in line with that narrative.<sup>36</sup> Thus, the opening speech from the prosecution and/or the opening remarks by the judge in relevant cases concentrate the minds of the jury in a clear way.

Directions from the judge could include providing jurors with the definition of consent in written form at the outset of relevant cases.<sup>37</sup> This would serve to remind the jury that evidence of the following, *inter alia*, does not amount to consent:

- the person did not protest or physically resist;
- the person was incapable of consenting because of intoxication;
- the person was asleep or unconscious.

It would also serve to remind the jury that consent may be withdrawn at any time before or during the act.

The Council recognises that the provision of directions at the commencement stages of a trial may not be appropriate in all cases and may be difficult in the absence of the evidence as it unfolds in the trial. Much depends on the length of the trial and its complexity. The Council is

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<sup>36</sup> Carlson, K.A., & Russo, J.E. (2001). Biased interpretation of evidence by mock jurors. *Journal of Experimental Psychology: Applied*, 7, 91-103.

Clifford, B. (2003) Methodology: Law's adopting and adapting to psychology's methods and findings. In: D. Carson & r. Bull (Eds.) *Handbook of psychology in legal contexts* (pp. 605-624). Chichester: Wiley.

<sup>37</sup> Contained in s. 9 of the Criminal Law (Rape) (Amendment) Act 1990, as substituted by s. 48 of the Criminal Law (Sexual Offences) Act 2017.

of the view that judicial flexibility is crucial on a case-by-case basis and that the judge should retain the discretion to decide when to give such directions.

The Council recognises that there may be potential challenges around how best to frame such information at the beginning of the trial to avoid reinforcing false information or causing jurors to become biased against the defendant.

Again, these matters should be considered by the Judicial Council in a principled and thematic fashion having regard to Irish law on the matter. The experience in other jurisdictions is relevant but appropriate directions, and the timing of same, should be tailored to meet the needs of our own criminal justice system under the Constitution.

### **The Question of Statutory Directions**

The Council is aware that, in other jurisdictions, including Scotland, New South Wales and Victoria, legislation requires judges to give specific directions in certain sexual offence proceedings where certain conditions apply. The concerns relating to the provision of statutory directions (as recognised in the Gillen Report) include the potential legislative intrusion into the independence of the judiciary and the setting of a precedent in terms of the legislature informing judges how to direct juries.

It is further noted that mandatory directions could produce a judicial straitjacket that may not fit the facts of the case at hand and may highlight factors that have no relevance to the case at hand. For these reasons, the Council is of the view that it would be undesirable to recommend introducing mandatory statutory provisions as to the content of judicial directions.

Just as specialist training has been recognised as a necessary component in the improvement of every aspect of the administration of justice, from first complaint to verdict, it may be that training and guidance for the judiciary in relation to these specific concerns would assist in ensuring judicial directions were appropriate and tailored to the requirements of each individual case.

As suggested above, the establishment of the Judicial Council is the obvious and most effective way to implement such a proposal. The Judiciary should be given the opportunity, through the Judicial Council, to consider these matters in a non-prescriptive manner where the wealth of experience and knowledge of the judges dealing with such cases is vital to any improvements that can be made.

### **The Question of Video Guidance in lieu of / in addition to Judicial Directions**

As part of a research project in England and Wales, Professor Cheryl Thomas, a leading academic expert on juries and jury research has led a project to create a film made with judges called *Avoiding Rape Myths and Stereotypes: A Guide for Jurors*. It is to be tested with real juries over the coming months. The Gillen Report recommends the introduction of a pre-trial video of the type being tested by Professor Thomas. It states that “a prescribed video film,

*similar or identical to that being produced in England if the research is favourable, from an authoritative source should be presented to the jury at the outset of the trial in all serious sexual offences”.*

Rather than providing such videos to juries before a trial begins, the Council sees the value and welcomes the provision of the results of authoritative, robust academic research, in whatever format it is available, to the Judiciary. Until there is a judicial council to offer formal training in this and other respects, the Council endorses the widespread dissemination of authoritative research in this area so that directions and indeed any statements by lawyers or judges are evidence-based rather than assertions that may perpetuate myths, which are ultimately damaging to the administration of justice.

Insofar as the Council is aware, there has been no widespread concern that judges are misdirecting juries in this regard, and these comments are made in that context. In general terms, the Council fully supports ongoing training for all professionals involved in the administration of justice to ensure that this remains the case. Again, this matter should be considered by the Judicial Council.

As a more general observation, it has been the experience of practitioners, and the Council believes, that juries can and should be trusted to render true verdicts according to the evidence in a case and the directions they are given.

If the judiciary has sufficient training in this regard, the Council does not consider that it should prove necessary to show the jury an instructional video on such issues in advance of the trial. The impact of such a video on a jury would be hard to assess in circumstances where they will hear all other information directly from witnesses and from the judge.

The awareness of juries about these issues should increase in the coming years as society in general becomes more aware of the danger of rape myths and stereotypes. Indeed, this effect has already been noted by practitioners in the area although we await statistical confirmation of the perception that there is less tolerance of an asserted defence of consent in the face of evidence of extreme intoxication, for instance. This societal awareness may be assisted by an educational programme in schools, as recommended in the Gillen Report.

### **Awareness Raising**

The Council recognises that public education is an essential tool in addressing rape myths and misconceptions. Within our schools, the Relationships and Sexual Education (RSE) programme provides an avenue for raising awareness. On 3 April 2018, the then Minister for Education and Skills, Richard Bruton, requested a review of the RSE curriculum by the National Council on Curriculum and Assessment (NCCA) and specifically asked that the review consider a

number of areas, including consent (what it means and its importance) and healthy, positive sexual expression and relationships.<sup>38</sup>

The review is ongoing and the NCCA are inviting submissions from interested parties.<sup>39</sup> In relation to third level colleges, it is noted that the Minister of State for Higher Education, Mary Mitchell O'Connor, has recently expressed her view that sexual consent classes for students should be embedded across all third level colleges.<sup>40</sup>

In terms of public awareness generally, the Council notes that in 2015, Ireland's National Office for the Prevention of Domestic, Sexual and Gender-based Violence (COSC) sponsored a three-week long campaign to raise awareness around sexual consent (the "#AskConsent" campaign). The work currently being undertaken by COSC is set out in its *Second National Strategy on Domestic, Sexual and Gender-based Violence 2016-2021* and includes a six-year public awareness campaign through television, radio, outdoor and internet advertising. The campaign aims to change societal behaviours and attitudes and "to activate bystanders with the aim of decreasing and preventing this violence".<sup>41</sup>

The Council is represented at the Cosc National Strategy meetings and actively contributed to its most recent report. In its submissions at the meetings, the focus of the Council was on the issues of consent and on highlighting the true nature of most sexual offending in that the vast majority of those sexually assaulted know their assailant and, in many cases, he is a partner, a friend or a family member. The public perception is that many such assaults are perpetrated by strangers. In point of fact, this is very, very rare, statistically speaking.

The Council recognises the importance of well-funded public, school and third-level campaigns to counteract sexist stereotypes and myths and to highlight the realities, and the consequences, of sexual offences.

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<sup>38</sup> Available at <https://www.education.ie/en/Press-Events/Press-Releases/2018-press-releases/PR2018-04-03.html>

<sup>39</sup> Available at <https://www.ncca.ie/en/updates-and-events/consultations/review-of-relationships-and-sexuality-education-rse>

<sup>40</sup> O'Brien, C. (2018) Sexual consent classes needed across all of third level, says Minister. *Irish Times*. Available at: <https://www.irishtimes.com/news/education/sexual-consent-classes-needed-across-all-of-third-level-says-minister-1.3652138>.

<sup>41</sup> Available at: <http://www.cosc.ie/en/COSC/Second%20National%20Strategy.pdf/Files/Second%20National%20Strategy.pdf>

## LIST OF RECOMMENDATIONS

1. The Council believes that the present system in this jurisdiction concerning the anonymity of accused persons during the criminal process contains an appropriate balance in that accused persons may be named if they are convicted, albeit subject to statutory restrictions to protect the complainant's privacy.
2. If the law on anonymity is to be preserved, the Council recommends that the Review Group considers the list of offences to which such anonymity relates. The Council considers that there is merit in a proposal that a defendant and complainant in a sexual assault case and, possibly, those charged with some other offences should also be able to avail of anonymity, at least until the proceedings are finalised.
3. It would be preferable if the anonymity provisions for all sexual offences were housed under one statute and that the list was comprehensive to cover all sexual offences. The Review Group should also examine whether other offences, apart from sexual assault set out above, should be added to the list.
4. In relation to media reporting of trials, a comprehensive and integrated approach to such issues across the criminal justice system, including new primary legislation to deal with contempt of court and the use of social media for court reporting, may be required.

Any such legislation should not undermine or trammel the right of the media to report on criminal trials, including those of sexual offences. The Council believes that this issue must be addressed in an urgent fashion by comprehensive legislation and hopes that the work of the Law Reform Commission, aided by consideration of the Practice Direction on the use of cameras and electronic equipment in court, can provide a clear framework for such issues in early course.

5. The Council supports the concept of pre-trial hearings to deal with certain applications before the trial before the jury begins. Such pre-trial hearings should be able to deal with a range of legal issues so that trials are not subject to unnecessary *voir dire*s (trial within a trial on legal issues) during the course of the trial itself. The downside of unnecessary *voir dire*s is that the trial is held up and delayed while legal argument takes place in the absence of the jury, who must remain outside court. However, there are practical matters about the modalities and structure of such pre-trial hearings that need to be resolved.
6. Concurrent with any proposal to introduce pre-trial hearings is the pressing need to ensure that greater judicial resources are provided for the hearing of criminal cases in general and, in particular sexual assault cases.



7. The Council recommends that a person who wishes to cross-examine on previous sexual history has to lodge a notice at an appropriate juncture before the trial date or by the pre-trial hearing (if that is introduced in legislation). This would involve an amendment to s.3(2)(a) of the *Criminal Law Rape Act 1981* to require such notice to be given at an appropriate juncture in advance of the trial so that such representation for a complainant, provided for under s.4A of the 1981 Act, can be obtained and can consult with the complainant in an appropriate fashion **before** the trial begins.
8. The disclosure process must be overhauled and provided with additional financial resources, both to An Garda Síochána and to legal practitioners who are assessing such materials.
9. The primary obligation to seek out and preserve evidence that may assist the prosecution of the case and the defence of the charges rests with An Garda Síochána. It is vital that this is re-enforced in Garda training and is applied in practice in investigations concerning sexual offences. Simply put, An Garda Síochána must ensure that investigations into all offences, including sexual offences, involve the gathering of all material evidence, both probative to guilt and capable of exonerating an accused of the crime in question. The recent controversies in the UK illustrate the difficulties in this area.
10. The Council considers that the legislative provisions for disclosure need to be re-addressed and set out in a comprehensive fashion that goes beyond the provision of just counselling notes. The Council considers that the overarching difference in this jurisdiction is that we lack a strong legislative framework which goes beyond the disclosure of “counselling notes” in sexual assault cases.
11. The Council considers that the provisions in s.19A of the *Criminal Evidence Act, 1992*, as inserted by s.39 of the *Criminal Law (Sexual Offences) Act 2017*, are replete with difficulty and that a new provision needs to be enacted to deal with the issue.
12. In 2014 the Law Reform Commission Report on Disclosure and Discovery in Criminal Cases conducted a thorough review of legislative reform in this area and suggested a draft Criminal Procedure (Disclosure) Bill.<sup>42</sup> The Council believes that this Bill should be re-assessed and progressed as it provides a useful framework for disclosure in criminal proceedings in a thematic manner that may avoid some of the difficulties being encountered in this area.
13. In relation to particular issues that arise concerning the volume or sensitivity of information gathered during the course of a Garda investigation, the Council considers

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<sup>42</sup> LRC 112-2014, *Disclosure and Discovery in Criminal Cases*, December 2014.

that constructive and meaningful engagement between the Prosecution and the Defence, which can be supervised by the Court if necessary, is vital to ensuring that the disclosure process aids, rather than obstructs, a fair trial.

- 14.** Thus, it is submitted that where issues arise about the volume of material held by the prosecution (i.e. on electronic devices) and/or where issues about the personal privacy of a complainant arise and where the parameters of disclosure need to be resolved between the parties, then there should be a procedure (if necessary set out in statute) for the Prosecution and the Defence to engage in a meaningful and constructive manner on such issues.
- 15.** Such engagement would be subject to judicial supervision so that in the event of a dispute between the parties, the pre-trial hearing could ventilate disclosure issues in an appropriate and timely manner. This will assist the smooth running of the criminal trial.
- 16.** In March 2018 the Rape Crisis Network Ireland (RCNI) released its report '*Hearing Every Voice - Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings*'.<sup>43</sup> The RCNI offers a wide definition (for the purposes of their report) of the term "vulnerable witness" and the Council agrees that the definition utilised is useful in this area, albeit some matters may need to be further elucidated in relation to the definition. Such a definition encompasses recognition of those with autism spectrum disorder and other communication difficulties.
- 17.** The Council agrees that the definition should also encompass any accused person who is vulnerable in one of these ways.<sup>44</sup> However, there may be some complexities as to how to address a vulnerable accused person which would merit further thought and consideration, with the benefit of expert evidence and a further report.
- 18.** The Council is of the view that any proposal to pilot pre-recorded cross-examination in this jurisdiction should be preceded by a thorough consideration of the issues arising from the United Kingdom experience. The relative advantages and disadvantages of proceeding with pre-recorded testimony will need to be carefully considered, and only then in the context where the pre-trial disclosure process has been properly reformed and resourced.
- 19.** More generally, the Council endorses the view that information must be presented simply and unambiguously for child witnesses, whose understanding and range of expressions may be limited.
- 20.** The Council considers and recommends that the use of intermediaries be enhanced and expanded. The system in operation in England and Wales is well developed and numerous

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<sup>43</sup> Rape Crisis Network Ireland (2018)

<sup>44</sup> See discussion at p. 8 of the above Report.

qualified intermediaries are available for trial purposes. Despite the provision of enabling legislation in 1992, there are very few intermediaries working in Ireland, insofar as the Council is aware. There are no rules of court providing for the use of an intermediary.

- 21.** The Council endorses the recommendation of the *Hearing Every Voice Report* that such special measures as are afforded to vulnerable witnesses, should also be extended to vulnerable accused persons. The Council agrees that this proposition is correct in principle, because vulnerability is not confined to prosecution witnesses. The Council notes that as numerous different considerations arise for accused persons, it is a topic that might best be separately considered and researched in terms of implementing the measures that are required for accused persons.
- 22.** In relation to the proposal that complainants should have legal representation throughout a trial, the Council is concerned that the addition of another legal team to the trial process is unlikely to improve the trial process and, instead, carries a real risk that it will cause confusion and damage the integrity of the trial process. The DPP, through her counsel, already has a role to ensure that a trial judge gives appropriate rulings and directions on any evidential and legal issues in a trial.
- 23.** Furthermore, the Council considers that before more legislative changes are considered on this topic, the implementation of the *Criminal Justice (Victims of Crime) Act 2017* by the Gardaí and the DPP should be assessed. If it is implemented in a regular and uniform manner, that will provide much practical assistance to complainants and vulnerable witnesses in general which will address the issues raised by other stakeholders about the trial process.
- 24.** The elimination of delays between the making of a complaint and trial would also assist enormously. Delays add to stress, impair human memories and are unfair on accused and complainants alike.
- 25.** The law on sexual offences needs to be consolidated into one or two Acts of the Oireachtas (one with the substantive offences and a second with the procedural rules which are unique to sexual assault cases). The current state of the statute book of sexual offences is incomprehensible to the general public, difficult for Gardaí and other State agencies to navigate and makes the trials of such offences more difficult on a practical level for practitioners and judges.
- 26.** The Council considers that the forthcoming establishment of a Judicial Council in this jurisdiction will provide a forum for the judiciary within which they could assess the directions that are given to juries in Ireland to ensure that they are clear and understandable and not undermined by false assumptions. At all times, there is a need to

ensure that directions to the jury are couched in simple terms without jargon or unnecessary legalese. The experience in other jurisdictions is relevant but appropriate directions, and the timing of same, should be tailored to meet the needs of our own criminal justice system under the Constitution.

- 27.** If the judiciary are provided with sufficient training and resources in this regard, the Council does not consider that it would assist to show the jury an instructional video on such issues in advance of the trial. The impact of such a video on a jury would be hard to assess in circumstances where they will hear all other information directly from witnesses and from the judge.
  
- 28.** The Council recognises that public education is an essential tool in addressing rape myths and misconceptions and supports an integrated approach to such matters by the Government and civic society. The Bar of Ireland will continue to play its part in a public information and education programme in this area.

## CONCLUSION

The Council welcomes this opportunity to review a very important area of law and, in particular, how that law affects the victims of sexual crimes. The Bar of Ireland will continue to play an important role in seeking to improve the position of those who give evidence in criminal trials, whilst at the same time not jeopardising the constitutional right to a fair trial of an accused person. Rather than viewing these objectives as being in conflict, the Council believes that our legal system and society generally must work to ensure that both objectives can be achieved by appropriate legislative means, and by the provision of the necessary financial and personal resources.

The Council urges that the issues of most concern – consolidation of legislation, resource problems, (including the number of judges), the provision of an effective and properly resourced disclosure regime and training for all stakeholders to assist the vulnerable in giving their best evidence – receive the most urgent attention of the Government.



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