

August 2020

# Submission to the Department of Justice on the Criminal Justice Sectoral Strategy

## Introduction

Established in 1973, the National Women's Council (NWC) is the leading national women's membership organisation in Ireland. NWC seeks full equality between men and women and we draw our mandate from a membership of over 180 groups and organisations across a diversity of backgrounds, sectors and locations. We also have a growing, committed individual membership. The Irish Observatory on Violence Against Women is chaired by NWC<sup>1</sup>

NWC actively support and work with government to implement the aims of the National Strategy for Women and Girls and to develop an integrated and focused programme of gender aware and gender proofed investment. It is important this vision is also aligned to UN Sustainable Development Goals and the UN Convention for the Elimination of Discrimination against Women recommendations to Ireland, as well as other UN convention recommendations.

The Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (the Istanbul Convention) which was recently ratified, is a significant, international legal instrument in combatting domestic and sexual violence. Its purpose is to protect women from all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence. The Second National Strategy on Domestic, Sexual and Gender Based Violence<sup>2</sup> works to ensure its implementation.

The COVID-19 pandemic has exacerbated and compounded all forms of violence against women<sup>3</sup> (VAW) this, in turn, will have a long-lasting impact on society as a whole and will challenge the criminal justice system like never before. Thus, the impact from the pandemic should be considered fully in any forthcoming criminal justice sectoral strategy.

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<sup>1</sup> The organisations in the Observatory are Women's Aid, Akidwa, Cork Sexual Violence Centre, Dublin Rape Crisis Centre, Galway Rape Crisis Centre, Immigrant Council of Ireland, National Women's Council of Ireland, Pavee Point Travellers Centre, Ruhama, Sonas, Haven Horizons, Longford Women's link, Aoibhneas, National Collective of Community-based Women's Networks, Consortium of Gender Based Violence Ireland, Ascend Domestic Abuse Service, Cairde, Action Aid, YWCA, European Women's Lobby through NWC Representative

<sup>2</sup> Department of Justice (2016) Second National Strategy on Domestic, Sexual and Gender Based Violence. <http://www.cosc.ie/en/COSC/Pages/WP08000096>

<sup>3</sup> In Ireland, leading organisations working on domestic violence such as Women's Aid report an increase in the number of calls to their helplines and the Gardaí reported a 25% increase in domestic violence calls in April/May 2020 compared to April/May 2019. See Oireachtas Library and Research Service (2020) 'Domestic Violence and Covid-19 in Ireland', available at <  
[https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2020/2020-06-09\\_lrs-note-domestic-violence-and-covid-19-in-ireland\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2020/2020-06-09_lrs-note-domestic-violence-and-covid-19-in-ireland_en.pdf)>

## Background

Gender equality is the foundation for the formation of economic structures, laws, and social and political systems that both prohibit gender-based violence and provide effective avenues for redress when such violence occurs. As such, the criminal justice system is an essential mechanism of the State that can advance gender equality through holding perpetrators of gender-based violence to account, protecting victims and in ultimately ending such violence. Given this tremendous responsibility it is essential that the makeup of those working within all areas of the justice system must model and reflect gender equality. Gender equality in all its dimensions is central to the department's equality and human rights mandates<sup>4</sup>.

NWC is acutely aware that the arc of the criminal justice system begins long before individuals enter the system and its effects reach well beyond the point where individuals formally exit. Accordingly, NWC is committed to the prevention of all gender-based violent crimes and oppressions and works continuously towards that end<sup>5</sup>. However, NWC is firm in the belief that the criminal justice system has, for too long, neglected to adopt a gendered approach to criminal justice which has failed women as both victims and perpetrators of the criminal law. Of course, a long-term Criminal Justice Sectoral Strategy should include prevention, but the immediate and primary concern should focus on holding perpetrators of gender-based violent crimes to account.

The criminal justice system does not exist free of context, existing gendered stereotypes are still a pervasive force across all areas of the criminal justice system whether that be in the prevention, in investigation and arrest, the decision to prosecute, during bail hearings, at trial, during sentencing or post sentence of a crime. This submission makes recommendations on the integral role a gendered analysis should play in the Criminal Justice Sectoral Strategy.

The ability to access remedies from the criminal justice system is a privilege not afforded equally, with women, non-Irish nationals, ethnic minorities such as Traveller and Roma women and disabled women expressing lower levels of satisfaction with the criminal justice system<sup>6</sup>. A lack of understanding of the intersectional issues that affect women in their interactions with the criminal justice system is as a result of historical and systemic neglect in understanding the nature and affect the criminal justice system has on women, both as victims and perpetrators of the criminal law. Research also shows that satisfaction with the criminal justice system tend to diminish the deeper victims progress into the system as

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<sup>4</sup> Despite significant strides being made by women solicitors and barristers there still remains a considerable gender imbalance in senior positions within the legal professions and within the public service more generally. See IHREC (2020), 'Submission to the Citizens' Assembly on Gender Equality', available at <[https://www.ihrec.ie/app/uploads/2020/03/IHREC-Submission-to-the-Citizens-Assembly-on-Gender-Equality-March-2020\\_fin.pdf](https://www.ihrec.ie/app/uploads/2020/03/IHREC-Submission-to-the-Citizens-Assembly-on-Gender-Equality-March-2020_fin.pdf)>

<sup>5</sup> NWC is Chair of the National Observatory on Violence Against Women and is Chair of the National Advisory Committee on ending sexual harassment and violence in third-level education.

<sup>6</sup> Women's Aid, (2019), 'Unheard and Uncounted: Women, Domestic Abuse and the Irish Criminal Justice System', available at <[https://www.womensaid.ie/assets/files/pdf/unheard\\_and\\_uncounted\\_-\\_women\\_domestic\\_abuse\\_and\\_the\\_irish\\_criminal\\_justice\\_system\\_full\\_report.pdf](https://www.womensaid.ie/assets/files/pdf/unheard_and_uncounted_-_women_domestic_abuse_and_the_irish_criminal_justice_system_full_report.pdf)>

victims' needs increasingly come into conflict with organisational imperatives<sup>7</sup>. Evidently, it is essential that the organisational imperatives of the department of justice include and prioritise gender equality and responsiveness as a foundational principle in order to increase victims' confidence and satisfaction with the criminal justice system.

Legislative changes such as the Criminal Justice (Victims of Crime) Act 2017 and the Criminal Law (Domestic Violence) Act 2018 has resulted in greater recognition of victims' rights and, for the first time, victims of crime have become an 'important stakeholder' in the criminal justice system. Although regrettably, the delivery of effective supports has been hampered by a lack of resources, an absence of political will, limited understanding of victims' needs and poor information provision<sup>8</sup>.

In spite of there being no agreed definition of what constitutes a 'vulnerable witness' in criminal proceedings it has often been interpreted as applying to those persons who are vulnerable by virtue of some personal characteristic such as youth or mental or physical disability. While stopping short of recommending an expanded definition of what constitutes a vulnerable witness the O'Malley report does offer and adopt an expanded understanding of a 'vulnerable witness'. Recognising that a person may be vulnerable by virtue of the circumstances in which they find themselves, even if they are not inherently vulnerable by virtue of age or disability.<sup>9</sup> Acquiring the recognised legal status of 'vulnerable' necessarily leads to increased legal and procedural protections for victims of gender-based violent crimes. This expanded understanding of what constitutes vulnerability needs to be fully integrated and applied to all law and policy that deals with all victims of gender-based violent crime across and within the entire justice system<sup>10</sup>.

This submission first addresses the unacceptable reality that women and girls constitute the majority of the victims for certain types of crimes, particularly when men are the primary offender. These gendered experiences of victimisation appear in crimes such as rape, sexual assault, intimate partner abuse<sup>11</sup>, coercive control, online digital abuse, sexual harassment, stalking, prostitution, pimping and trafficking, to name but a few. Despite this it is only in the last few years that the gendered experiences of women within the criminal justice system has begun to be recognised in any meaningful way. The submission then moves to consider the

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<sup>7</sup> Dr. Deirdre Healy (2029), 'Exploring Victims' Interactions with the Criminal Justice System: A Literature Review' University College Dublin, at 23

<sup>8</sup> Kilcommins, S., Leahy, S., Walsh, K & Spain (2018), 'The Victim in the Irish Criminal Process', Manchester, Manchester University Press.

<sup>9</sup> The terms of reference of the report did not cover 'vulnerable complainants' but was instead confined to a review of protections for vulnerable witnesses in investigation and prosecution of sexual offences. O'Malley T (2020) Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences, Page 13

<sup>10</sup> Under the Criminal Justice (Victims of Crime) Act 2017, s. 15(2)(f), while 'regard must be had' to the particular vulnerability of victims of 'terrorism, organised crime, human trafficking, gender-based violence and violence in a close relationship', this does not guarantee that victims of gender-based violent crimes are automatically afforded the status and protections of being a 'vulnerable person'.

<sup>11</sup> Irish law does not recognise a specific crime of domestic or intimate partner abuse but instead recognises the relationship proximity between the perpetrator and the victim as an aggravating factor to consider at sentence it is extremely difficult to assess which cases are domestic and intimate partner abuse as distinct from other offences. This omission in the law is but one example of the gendered nature of the law as domestic and intimate partner abuse is not recognised as a distinct crime.

role of women as perpetrators of crime and how the criminal justice system has failed to respond to their specific situation and vulnerabilities leading to a significant increase in the number of women being sent to prison.<sup>12</sup> In particular, NWC draws attention to the devastating and disproportionate impact that this has had on Traveller women. In effect, the justice system has continued the institutionalisation and criminalisation of poverty and inequality disproportionately experienced by women. The submission concludes by offering some suggested reforms in other areas of the justice system that will, it is believed, greatly improve the overall workings of the Criminal Justice System.

This submission sets out recommendations relating to issues that should be addressed in any Criminal Justice Sectoral Strategy. These recommendations, if adopted, will, it is hoped, lead to increased effectiveness of the system; more efficient use of resources across the sector; increased use of evidence-based data to drive reform, and; increase confidence in the criminal justice system.

## Key Recommendations

- Undertake a comprehensive, systemic review of domestic and intimate partner abuse within the criminal justice system (investigation, prosecution and probation of all offences that relate to domestic and intimate partner abuse – including, and not limited to, breaches of Protection, Safety and Barring orders). This examination should include exploring the provision of: specialised domestic, sexual and gender based violence court systems; fast-tracking of gender-based violent crimes; the effect on victims of the in camera rule in family law proceedings; the disconnect between the criminal, family and civil law; the use of witness statements; improving the attendance of witnesses.
- The Criminal Justice Sectoral Strategy should adopt ‘Access to Justice’ as a key strategic priority, of which the particular complexities of women’s access must be specifically named.
- End the requirement for victims of domestic violence to make financial contributions for civil legal aid services where safety, protection or barring orders are being sought.
- Implement the recommendations of the O’Malley report in full. Furthermore, extend the provision to all victims of gender-based violent crimes: provision of free legal advice; introduction of pre-trial hearings; improve case management; training for judiciary and the legal profession; anonymity provisions.
- Improve data collection. Develop a common identifier system for VAW crimes for use by An Garda Síochána, Director of Public Prosecutions and the Courts Service that can feed into statistics gathered by the CSO. This identifier system should be capable of

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<sup>12</sup> See Irish penal Reform Trust submission in advance of the examination of Ireland’s combined sixth and seventh periodic reports under the UN CEDAW

distinguishing all possible assault, harassment, false imprisonment, sexual violence, coercion and other offences.

- Implement gender-specific non-custodial options for women, as an alternative to custodial sentences, which take into account the complexity of female offenders' needs, including those of Traveller women.
- Increase post-release supports including an open prison and supported step-down residential facilities, which should be geographically spread.
- The strategy should consider the various ways that the criminal justice system can be improved by reforms in other areas of law beyond the criminal law. Including, but not limited to, supporting the establishment of Domestic Homicide Reviews; A Statutory Maintenance Agency, and; A Court Welfare System.

## Increased Effectiveness of the Criminal Justice System

Improving the experience of victims of crime in the criminal justice process should be a continuing priority. Victims and survivors are not a homogenous group but instead each have unique needs characterised by their victimisation, their gender, their relationship with the offender and with their community, and their own personal characteristics. As such, a range of approaches and flexibility in justice system responses is required; but all must be grounded in dignity, respect and human rights.

If the experience of victims in the criminal justice process is to be improved, there must be better understanding of the impact of victimisation and of the need to treat victims of crime with compassion, dignity, and sensitivity.

Attitudes about victims' needs are changing among An Garda Síochána, the legal profession and other system officials. Victims' attitudes are changing also as they will no longer accept being excluded from key decisions and kept uninformed, they seek more accountability from, and more participation in, the criminal justice system. Thus, a key feature of an effective criminal justice system is one wherein the victim is recognised as an essential independent stakeholder.

### Access to Justice

Unhindered access to justice for women is a critical pathway for the achievement of gender equality. Effective access to justice is an indispensable right enshrined in numerous instruments within the universal human rights protection system to which Ireland holds membership. The obligation not to discriminate against women and to achieve substantive equality between women and men is an essential part of these rights. The UN Committee on the Elimination of Discrimination against Women has recognised six connected key fundamentals necessary for a justice system to be responsive to gender. These are: justiciability; availability; accessibility; good quality; accountability and the provision of



remedies for victims.<sup>14</sup> While acknowledging that accessing justice may be difficult for many people, NWC considers that it is especially so for women, due to gender inequality in society and in the justice system.

According to the Council of Europe's Guaranteeing Equal Access of Women to Justice 'most cases of sex-based discrimination in which the European Court of Human Rights (ECtHR) has found a violation of Article 14 of the European Convention on Human Rights (prohibition of discrimination) have been brought by men, even though gender discrimination disproportionately affects women. Furthermore, a review of ECtHR case law reveals that the cases in which there has been a finding of discrimination on the ground of sex are by and large those in which differential treatment is explicit (e.g. labour contracts stipulating an earlier retirement age for women; parental leave not available for men). The limited jurisprudence on indirect sex-based discrimination presents a significant challenge for women's access to justice'.<sup>15</sup>

The increasing difficulty in gaining access to our justice system serves to undermine our justice system. In recognition of this, the Irish Human Rights and Equality Commission's Strategy Statement 2019 – 2021 has named as one of its four strategic areas 'Protect the rights of individual persons who face the greatest barriers to justice'.

We believe that effective access to justice must be at the forefront of our legal system<sup>16</sup>. Excellent laws without an effective ability to invoke them are rendered meaningless. In that respect NWC recommends that the new Criminal Justice Sectoral Strategy should adopt 'Access to Justice' as a key strategic priority, of which women's access must be specifically named. This would assist in recognising the specific barriers that women face when attempting to access the justice system. Through being aware of how gender creates different roles for women and men, and by taking account of unequal power relations between women and men, the department of justice will be better able to address different vulnerabilities experienced by different groups of women. While this section deals specifically with access to justice issues in relation to the financial and other barriers to accessing justice the following section makes recommendations on specific aspects of specific crimes. The departments aim to increase confidence in the criminal justice system must be seen through the experiences of victims. Failure to adopt this view will inevitably lead to decreased confidence in the system as victims' needs will continue to be neglected.

### Access to Legal Aid

While legal aid is technically available to victims of domestic violence, the requirement to pay financial contributions hampers the accessibility of justice. In 2013, the situation was exacerbated as the minimum contribution for legal aid services provided by the Legal Aid

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<sup>14</sup> See CEDAW General Recommendation on Women's Access to Justice at [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf)

<sup>15</sup> This information was directly provided by the Council of Europe's Guaranteeing Equal Access of Women to Justice (2016) page 2.

<sup>16</sup> IHREC Strategy Statement 2019 – 2021; <https://www.ihrec.ie/documents/strategy-statement-2019-2021/> (last accessed 13 February 2019).

Board increased from €50 to €130<sup>17</sup> a rise of 160%<sup>18</sup>. This is not a once off payment as victims of domestic violence may need to make recurring applications for legal aid and a financial contribution is required for each<sup>19</sup>. Moreover, some women are not eligible for legal aid because of assets held in joint names over which they have no control. High demand for services has led to long waiting lists and waiting times, with some women waiting months for a solicitor.

In a somewhat separate, yet related issue, in recognition of the importance of access to legal advice for victims of sexual crimes the O'Malley report recommends amending the current law to include the provision of free legal advice to victims of all sexual offences that is not contingent on there being a prosecution.<sup>20</sup> NWC concurs with the O'Malley report on the need for individual information and advice that is 'tailored to the circumstances of their particular case'<sup>21</sup>. The importance of free legal advice for victims of sex crimes should be extended to include all forms of violence against women as defined by the Istanbul Convention, including intimate partner abuse, sexual harassment, stalking, online digital abuse, FGM and forced marriage. Although not specifically referenced in the Istanbul Convention, NWC would also recommend that victims of trafficking, prostitution and pimping also be provided with the same access to free legal advice in line with all victims of gender-based violence. The provision of free legal advice acknowledges the gendered nature and gendered constraints that are experienced by victims of all gender-based violent crimes in accessing legal advice. We understand from our members and from individual communications with NWC that many victims do not have access to such advice, it is thus essential that the justice system can be accessed fairly by all victims.

## Recommendations

- The Criminal Justice Sectoral Strategy should adopt 'Access to Justice' as a key strategic priority, of which the particular complexities of women's access must be specifically named.
- End the requirement for victims of domestic violence to make financial contributions for civil legal aid services where safety, protection or barring orders are being sought.
- Implement the recommendations of the O'Malley report in full and extend the provision of free legal advice to include all victims of gender-based violent crimes.

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<sup>17</sup> Civil Legal Aid Regulations 2013 (SI No. 346/2013).

<sup>18</sup> While a system of waiver does exist, which permits the Legal Aid Board to waive an applicant's legal fees where failure to do so would cause "undue hardship", and such waivers have been applied to cases involving victims of domestic violence, difficulties exist as to the operation of the waiver system. Some of the difficulties include a lack of public awareness, waiting times, no automatic entitlement.

<sup>19</sup> SAFE Ireland (2014) Safety in a Time of Crisis: Priorities for Protecting Women and Children impacted by Domestic Violence, Athlone: SAFE Ireland, p.13.

<sup>20</sup> O'Malley T (2020) Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences, Page 90

<sup>21</sup> Ibid.



## Effective Investigation and Prosecution of Gender-Based Violent Crimes

Considerable reforms have been undertaken to improve the quality of investigation of certain gender-based violent crimes, particularly sexual crimes and intimate partner abuse. Expert and specialist trained Gardai within the Divisional Protective Services Units have greatly improved the experience of victims of these crimes<sup>22</sup>. Despite these welcome reforms there are still many gender-based violent crimes that are not properly understood or investigated fully examples of which include, trafficking in persons, sexual exploitation of women through prostitution<sup>23</sup>.

Notwithstanding these obvious shortcomings, the research continuously demonstrates unreasonably high attrition rates and decreased satisfaction of victims as they progress further through the criminal justice process. For that reason, attention now turns to prosecution phase of the criminal justice process as it relates to gender-based violent crimes.

Article 49 of the Istanbul Convention obligates States to ensure that judicial proceedings in relation to gender based and domestic violence are carried ‘without undue delay’, and that prosecutions are ‘effective’.<sup>24</sup> It can be argued that Irish law, at present, makes limited provision to ensure such outcomes<sup>25</sup>.

### Fast tracking gender-based violent offences

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<sup>22</sup> Recent reports of the Central Statistics Office show an increased level of reporting of sexual offences to the Gardaí – from 1,415 in 2006 to 2,549 in 2016 see CSO - Crime - Recorded Crime Offences Recorded Crime Offences (Number) by Type of Offence and Year – Sexual Offences.

<http://www.cso.ie/multiquicktables/quickTables.aspx?id=cja01> . NWC is encouraged by the rollout of nationwide DPSU and the recognition of the need for specialist investigations of gender-based violent crimes by An Garda Síochána. The prompt response by An Garda Síochána to the surge in domestic abuse during the Covid-19 lockdown and the Commissioner’s continued emphasis on domestic abuse is an example of the paradigmatic shift that has occurred within An Garda Síochána in relation to intimate partner abuse.

<sup>23</sup>According to the 20219TIPS report Ireland has been downgraded to Tier II watchlist on their failure to adequately identify victims of human trafficking. Available at <<https://www.state.gov/reports/2019-trafficking-in-persons-report-2/ireland/>>

<sup>24</sup> Article 49 – “General obligations 1 Parties shall take the necessary legislative or other measures to ensure that investigations and judicial proceedings in relation to all forms of violence covered by the scope of this Convention are carried out without undue delay while taking into consideration the rights of the victim during all stages of the criminal proceedings. 2. Parties shall take the necessary legislative or other measures, in conformity with the fundamental principles of human rights and having regard to the gendered understanding of violence, to ensure the effective investigation and prosecution of offences established in accordance with this Convention”.

<sup>25</sup> However, the law does provide certain general accommodations which might impact on the effective prosecutions for such offences. These include the general discretion of a court to allow video link evidence where the offence is a “sexual offence” or involved “violence or the threat of violence” (see s. 12, Criminal Evidence Act 1992); the ability of the prosecution to tender evidence in the form of a witness statement in a trial by indictment where the witness refuses to give evidence (see s. 16, Criminal Justice Act 2006); and the ability of the court to sit in camera when dealing with sexual offences.

There is no fast-tracking procedure in place within the Irish criminal justice system to ensure that gender-based violent crimes are dealt with in an expedient or prioritised fashion. For the most part, such offences are dealt with much like any other offence that comes before the criminal courts in terms of the typical length for proceedings, the public nature of the hearing, and the manner in which those proceedings are ultimately determined. The development of a fast-tracking procedure within the Irish courts would ensure that such matters are dealt with in an expedient or prioritised fashion. It is also noteworthy that the National Action Plan of the Strategy 2016-2021, contains no proposals for speeding up or prioritising prosecution of gender-based or domestic violence offences.

The O'Malley report recommends the introduction of pre-trial hearings in rape and sexual assault trials as a means of, *inter alia*, reducing the unreasonable delays in such trials<sup>26</sup>. Effective case management and pre-trial hearings should also be a key consideration in the review of domestic and intimate partner abuse crimes within the criminal justice system.

Fast-tracking, better case management and pre-trial hearings of domestic and intimate partner abuse cases are of particular importance where family law matters are also running concurrently. Unfortunately, evidence suggests that criminal convictions for breaches of violence orders (the only recognised domestic violent offences in statute) or other criminal acts against women are often ignored in the family court when dealing with issues such as access and custody or visitation with children<sup>27</sup>. The failure to take into account previous histories of domestic abuse and criminal convictions in family law fails to meet the requirements of the Istanbul Convention and the constitutional rights of women and children to live free from violence. In spite of this error in application of the law - which needs to be corrected immediately –the importance of fast-tracking domestic and intimate partner abuse cases so that family law cases can make informed decisions as to the safety and appropriateness of contact/access arrangements between a domestically abusive parent and their children.

### Securing the attendance of the victim

Recognising the specific vulnerabilities of victims who have experienced all forms of gender-based violent crimes within the criminal justice system is an essential component of reducing attrition rates and reducing the re-traumatisation of victims of such crimes on their journey through the criminal justice process. The value in the use of advocates, intermediaries and specialist support services has long been recognised in reducing the traumatic effects on victims within the criminal justice process. Crucially the role of advocates and specialist support services also provide much needed information to victims, the provision of which is

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<sup>26</sup> O'Malley T (2020) Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences, Page 56

<sup>27</sup> The disconnect between the criminal and family law systems is dangerous. When determining access and custody, criminal behaviour is not taken into account by the Family Law Court, even when there is a conviction and a sentence. Orders under the Domestic Violence Act are also not taken into account. Domestic violence is considered a "separate issue" with the result that access is granted in cases where it puts the children and the mother at risk and exposes them to further abuse. See Women's Aid, (2019), 'Unheard and Uncounted: Women, Domestic Abuse and the Irish Criminal Justice System', available at [https://www.womensaid.ie/assets/files/pdf/unheard\\_and\\_uncounted\\_-\\_women\\_domestic\\_abuse\\_and\\_the\\_irish\\_criminal\\_justice\\_system\\_full\\_report.pdf](https://www.womensaid.ie/assets/files/pdf/unheard_and_uncounted_-_women_domestic_abuse_and_the_irish_criminal_justice_system_full_report.pdf)

the most important precursor of satisfaction of the criminal justice process among victims of sexual violence.<sup>28</sup> Similarly, in regard to domestic and intimate partner abuse, coordinated community responses are considered by many to be the ‘gold standard’ in the field of intimate partner violence due to a strong evidence base.<sup>29</sup> These include, but are not limited to, specialist police and prosecution units, victim advocates, and a separate Domestic Violence Docket systems at court.

The biggest practical impediments to the successful prosecution of such offences is securing the attendance of the victim in court to give evidence, due to factors such as fear, intimidation or a wish to avoid publicity. Although this issue could in part be dealt with – and a greater number of successful prosecutions brought about – by expanding some of the provisions referred to in footnote [25] and by increased focus on specialisation at all stages of the criminal justice process.

### Hearing cases *in camera*

The courts can at present only sit *in camera* in limited circumstances, such as where a sexual offence is at issue. A general discretion for a court to sit *in camera* when dealing with the prosecution of all domestic or gender-based violence could result in higher witness attendance rates. Similarly, the ability to use video link evidence is currently confined to sexual offences and offences involving violence<sup>30</sup>. Arguably this does not cover the full ambit of violence dealt with by the Istanbul Convention, and an expansion of the video link provisions could result in greater witness attendance and more effective prosecutions in relation to all matters covered by the Istanbul Convention.

The disconnect between criminal and family law in addressing issues of domestic and intimate partner abuse is the single biggest concern raised by members and individuals who contact NWC. In particular, the *in camera* rule, confidentiality and non-disclosure clauses imposed on parties in the family courts, in essence, preclude any person involved in *in camera* proceedings in the field of child protection, private family law or elsewhere risks being held in contempt of court every time he or she discusses the proceedings with anyone other than his or her legal representative or the other parties to the proceedings.<sup>31</sup>

### Witness statements

The ability of the prosecution to rely on a witness statement as evidence, rather than needing to call a witness, is only applicable in proceedings on indictment, i.e. in the Circuit Court or higher. However, many incidents of domestic abuse are tried in the District Court – indeed,

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<sup>28</sup> Dr. Deirdre Healy (2029), ‘Exploring Victims’ Interactions with the Criminal Justice System: A Literature Review’ University College Dublin, at 69

<sup>29</sup> Dr. Deirdre Healy (2029), ‘Exploring Victims’ Interactions with the Criminal Justice System: A Literature Review’ University College Dublin, at 61

<sup>30</sup> Although the availability of this special measure is limited at best for victims of sexual violence

<sup>31</sup> Houses of the Oireachtas (2019), ‘Joint Committee on Justice and Equality Report on Reform of the Family Law System’ available at <

[https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint\\_committee\\_on\\_justice\\_and\\_equality/report\\_s/2019/2019-10-24\\_report-on-reform-of-the-family-law-system\\_en.pdf](https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_justice_and_equality/report_s/2019/2019-10-24_report-on-reform-of-the-family-law-system_en.pdf)>

the offence of breaching a safety, protection or barring order is a summary-only offence. Expanding the circumstances in which the prosecution can rely on a witness statement instead of directly calling a witness to give evidence would likely result in a greater number of successful prosecutions for gender based and domestic violence offences, as it would allow the prosecution to proceed even where a witness faces fear or intimidation to the level that he or she refuses to give evidence.

### Recommendations

- Investigate the most appropriate specialized domestic, sexual and gender-based violence court systems; Moving towards a modern model.
- Examine options for an integrated court system<sup>32</sup>
- Commission an independent review into how victims of domestic and interpersonal abuse are treated within the criminal justice system.

## Women as Perpetrators of Crime within the Criminal Justice System

Over recent years, there has been a significant increase in the number of women being sent to prison<sup>33</sup>. In 2015, there were 3,411 female committals 32 compared to 155 female committals in 1999<sup>34</sup>. Although Travellers account for 0.6% of the overall population in Ireland, they account for 22% of the female prison population<sup>35</sup>. The majority of women serve short sentences and commit non-violent offences<sup>36</sup>. In 2015, 80% (2,667) of female committals were for failure to pay court-ordered fines<sup>37</sup>. Despite the commencement of the Fines (Payment and Recovery) Act 2014, the highest percentage of female committals continues to be for fines default<sup>38</sup>. The lower risk presented by women has resulted in

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<sup>32</sup> While there are many examples of good practice of integrated court systems we would like to draw particular attention to the recently published report in the UK which recommends that ‘the family courts should pilot and deliver a reformed Child Arrangements Programme in private law children’s cases. The reformed programme would implement the design principles of being safety-focused and trauma-aware; taking an investigative, problem-solving approach based on open enquiry; having sufficient resources and using them efficiently; and coordinating with connected systems, procedures and services.’ See Ministry of Justice, (2020), ‘Assessing Risk of Harm to Children and Parents in Private Law Children Cases Final Report’ available at <<https://www.gov.uk/government/consultations/assessing-risk-of-harm-to-children-and-parents-in-private-law-children-cases>>

<sup>33</sup> See Irish penal Reform Trust submission in advance of the examination of Ireland’s combined sixth and seventh periodic reports under the UN CEDAW

<sup>34</sup> Inspector of Prisons (2013) Interim Report on Dóchas Centre, p.9

<sup>35</sup> Irish Prison Service cited in Travellers in Prison Initiative, [http://ssgt.ie/travellers\\_in\\_prison.html](http://ssgt.ie/travellers_in_prison.html).

<sup>36</sup> Irish Prison Service, Snapshot Offence Profile 2007-2014

<sup>37</sup> Irish Prison Service (2016) Irish Prison Service Annual Report 2015, p. 31

<sup>38</sup> Irish Examiner, Jailing for Fines down by 1000, 3 December 2016

provision of “generic offender based services to women offenders, designed for men in the first instance.”<sup>39</sup>

The provision of gender-specific non-custodial alternatives on a national basis is particularly important for women, who often have primary caregiving responsibilities and may be at risk of losing their home if imprisoned. Despite the introduction of the Criminal Justice (Community Service) Amendment Act 2011, the number of Community Service Orders for women decreased every year between 2012 and 2015<sup>40</sup>.

The two women’s prisons are consistently the most overcrowded in the State<sup>41</sup>, with higher rates of female remand committals (18.9%) than males (14%)<sup>42</sup>. Currently, 30% of women in the Dóchas Centre are in shared cells<sup>43</sup> using the toilet in the presence of others. Overcrowding and staffing issues are having a detrimental impact on regimes, including access to education<sup>44</sup>. 85% of women in the Dóchas Centre have addiction issues, with limited interventions for women on remand<sup>45</sup>. The prison currently has no onsite psychologist, and a waiting list for addiction services<sup>46</sup>.

There are no open prison facilities for women in Ireland. The particular vulnerability of women on release from prison has been highlighted by the Inspector of Prisons and others, stating that no woman should leave prison homeless, and calling for provision of supported accommodation<sup>47</sup>. Female offenders in Ireland are 4.6 times more likely than males to experience difficulties with accommodation<sup>48</sup>. There is particular need for tailored post release supports for Traveller women who are over-represented in the prison population.

## Recommendations

- Implement gender-specific non-custodial options for women, as an alternative to custodial sentences, which take into account the complexity of female offenders’ needs, including those of Traveller women
- Increase post-release supports including an open prison and supported step-down residential facilities, which should be geographically spread.

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<sup>39</sup> The Probation Service & Irish Prison Service Joint Strategy 2014-2016: An Effective Response to Women who Offend, p.7

<sup>40</sup> Probation Service Annual Report, 2014 and Probation Service Annual Report, 2015

<sup>41</sup> Inspector of Prisons (2013 ) Interim Report on the Dóchas Centre, p.14 and Dóchas Visiting Committee Report 2015, p. 7

<sup>42</sup> Strategic Review on Penal Policy, p.65

<sup>43</sup> Irish Prison Service (2016) Census of Cell Occupancy

<sup>44</sup> Dóchas Centre Visiting Committee Report 2015.

<sup>45</sup> The Probation Service & Irish Prison Service (2016) Review of Drug and Alcohol Treatment Services for Adult Offenders in Prison and in the Community, pp.69-70, 74

<sup>46</sup> Ibid.

<sup>47</sup> Inspector of Prisons (2013) Interim Report on the Dóchas Centre, p.10 and Dóchas Visiting Committee Annual Report, (2015), p.7

<sup>48</sup> Kelly, J. & J. Brogue (2014) Gender Differences in Criminogenic Needs among Irish Offenders, Irish Probation Journal, p.97

## The use of evidences-based data to drive reform

Significant change on violence against women cannot be achieved without a sustained commitment to data collection and analysis by all agencies working in the area of domestic and sexual violence. After 17 years the Government committed to undertaking the second national strategy on sexual violence which is expected to be complete by 2022<sup>49</sup>. This is but one step in what is needed as there is still, as yet, no commitment to undertake a similar nationwide study on the prevalence of other forms of gender-based violence such as domestic or intimate partner abuse. This is so despite the Government's commitment, in principle, to establishing a bottom line 'gold standard' of data collection and analysis with plans to include the disaggregation of data by ethnicity, sex, age, disability and relationship between the victim and perpetrator.

While the nationwide survey on sexual violence is a welcome and necessary step, it is imperative that the development, implementation and monitoring of a 'gold standard' is undertaken in consultation with civil society organisations; is in line with human rights principles and standards; and is allocated sufficient resources.

Data from An Garda Síochána has proven to be unreliable, with the Garda Inspectorate Report revealing that domestic violence incidents were often not classified correctly<sup>50</sup>. Improvements have been made since 2015, as all incidences recorded on PULSE must now be flagged if they are domestic violence related. However, there continues to be a significant concern with the PULSE system as it was established as a data recording system and does not easily facilitate data analysis on the full spectrum of violence against women. The data produced by the Courts Services are also unreliable as they are still largely a paper-based system and individual to each court geographical area, so there is no agreed national system for recording data from the district and circuit courts.

### Recommendations

- Implement the data recommendations of the Second National Strategy on Domestic, Sexual and Gender-Based Violence 2016-2021 to establish the 'gold standard' of data collection as outlined in the Istanbul Convention.
- Harmonise and share information among relevant stakeholders (the justice system, police, social services, health services) by contributing to the development of a system of multiagency (An Garda Síochána, TUSLA, Courts Service)
- Develop a common identifier system for VAW crimes for use by An Garda Síochána, Director of Public Prosecutions and the Courts Service that can feed into statistics gathered by the CSO. This identifier system should be capable of distinguishing all possible assault, harassment, false imprisonment, sexual violence, coercion and other offences.

<sup>49</sup> the last comprehensive study on the level of sexual violence in Ireland dates from 2002 was The SAVI Report Sexual Abuse and Violence in Ireland Hannah McGee, Rebecca Garavan, Mairéad de Barra, Joanne Byrne and Ronán Conroy Royal College of Surgeons in Ireland. Commissioned by Dublin Rape Crisis Centre: <http://www.drcc.ie/about/savi.pdf> Accessed 5/9/2016

<sup>50</sup> Garda Inspectorate, 2014, Crime Investigation Report



- Enable a qualitative analysis of case law to identify negative gender stereotypes and ways to overcome them.

## The Justice System Beyond the Criminal Law

As has been stated above, the criminal justice system does not operate in a vacuum but is instead one element of the justice system as a whole. The following recommendations relate specifically to areas that arguably fall beyond the criminal law but that are inextricably related to the proper function of the criminal justice system and, as such, should be borne in mind in the new Criminal Law Sectoral Strategy.

### Domestic Homicide Reviews

The UN's Global Study on Homicide 2019 found Ireland had a homicide rate of 0.9 per 100,000 people. Males were far more likely than females to be both the victims and perpetrators of homicides. However, women formed the vast majority of victims in family and intimate partner homicides.<sup>51</sup> Over half of women were murdered by their current or former boyfriend, partner or husband (resolved cases) and 61% of women were killed in their own homes. Since records began in 1996, 225 women have died violently, with 16 children being killed alongside their mothers<sup>52</sup>. We must recognise the strong connection between the killing of women and domestic violence. We must also ensure that women are placed at the centre of any reform recommendations, and in that respect, we question the decision to exclude the word femicide from the terms of reference of this study. While familicide covers all the victims in these types of crimes, women form the vast majority of victims in family and intimate partner homicides, and therefore this term is of explicit relevance to this study. In order to affect change the first step is to correctly name what we are trying to change. We recommend amending the terms of reference and the scope of the study to include the word 'femicide'.

Investigation and review processes should be carried out in a way that minimises the trauma impact on victims. Training should be provided to ensure the process is sensitive to their needs. Specialised support services offering trauma informed care should be sufficiently funded to ensure independent support for victims in the immediate, medium and long-term. This approach should be cognisant of victims' safety, their ability to make empowered choices, to be engaged and collaborated with in a transparent system and for services to have an understanding of the intersectional issues in relation to trauma such as gender, disability, ethnic minority status etc.

### Recommendation

- Support the establishment of a multi-agency domestic homicide reviews on a statutory basis to protect women and children and save lives.

<sup>51</sup> <https://reliefweb.int/sites/reliefweb.int/files/resources/Booklet1.pdf>

<sup>52</sup> Women's Aid Femicide Watch 2018.

## Statutory Maintenance Agency

In Ireland, a comparatively low level of maintenance is paid to lone parents by their former partners; currently only 35% are in receipt of child maintenance payments. If expected maintenance payments are not paid, are not paid on time or if a second parent is unwilling to submit to an agreed maintenance payment regime, then parents are forced to seek payments through an adversarial and costly court system. In other jurisdictions, for example, this would take the form of an administrative process. The guaranteed payment of maintenance is becoming increasingly important with the growing number of divorces and the increased prevalence of lone-parent families across Ireland. It is questionable whether such an issue should be dealt with by our already strained court system<sup>53</sup>

A number of marriages and partnerships break down as a result of domestic violence. Forcing parents back into an adversarial context to ensure maintenance is inappropriate. Furthermore, this provides additional scope for further abuse where the abuser can use the court process as a way to delay maintenance payments and utilise processing time to liquidate assets to cause financial hardship. In a martial breakdown a spouse can make an application to the court to prevent the liquidation of assets, but you cannot do so if you were never married.

The introduction of a Statutory Maintenance Agency would reduce conflict and abuse between parents and between spouses and ex-spouses about future continuing financial obligations while also encouraging shared parental financial responsibility. Additionally, this would ensure the recovery process for maintenance is not overly burdensome, time-consuming, costly and traumatising to the party who has already obtained a final maintenance order from the courts. This is especially relevant to victims of domestic and intimate partner abuse.

## Recommendations

- Support the establishment of a Statutory Maintenance Authority

## Court Welfare System

For decades a myriad of reforms of the family law structure in Ireland have been proposed by experts and advocates alike. Failings in the law leaves all victims of domestic and intimate partner abuse to the perils of an outdated, underfunded, and inadequate justice system, that adds to the harm already experienced. There are a number of crucial reforms that must be prioritised chief amongst these is the establishment of a Court Welfare Service. This includes

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<sup>53</sup> Single Parents Acting for the Rights of Kids (SPARK), CHILD MAINTENANCE - A KEY TO REDUCING POVERTY AMONG LONE PARENT FAMILIES?, Social Policy in Recession and Recovery` 1st July 2016. See [http://www.ispa.ie/images/seminars/conference\\_2016/conf2016\\_slides/Louise\\_Bayliss.pdf](http://www.ispa.ie/images/seminars/conference_2016/conf2016_slides/Louise_Bayliss.pdf) See also <http://www.thejournal.ie/readme/maintenance-defaulters-we-have-no-legal-remedies-for-parents-who-refuse-to-pay-3479857-Jul2017/>

specialist supports to victims of domestic and intimate partner abuse in all private family law matters. These are necessary to support positive court outcomes and to minimise adversarial cases. A high-quality Court Welfare Service should comprise a system for the statutory assessment and management of child maintenance payments; the management and resourcing of necessary court assessments in relation to children and parents; a range of ancillary support services including counselling, mediation, mentoring and Child Contact Centres; and expert training for all relevant staff and stakeholders.

## Recommendations

- Support the establishment of a Court Welfare System

## Conclusion

Ireland's consistently low prosecution rates, low conviction rates, as well as the high attrition rates<sup>54</sup>, concerning domestic, sexual and gender-based crimes, exemplify why our traditional criminal justice system is ineffective in dealing with these types of crimes. It is imperative that this is addressed, otherwise the recognition of new gender based offences, such as coercive control, the commission of FGM on a girl or woman in Ireland and the removal of a girl or woman to a place outside the State for the purpose of FGM, sexual activity with a trafficked person, and the criminalisation of the purchase of sex, will undoubtedly be subjected to similar treatment, thereby guaranteeing similar poor outcomes.

It should also be recalled that the justice system is a critical component of a comprehensive response to this type of violence. There is no offender accountability without it and, for many victims, it is an important element of their healing process. When the justice system is ineffective or unresponsive, it not only fails to support victims and keep communities' safe, but it also has the power to undermine prevention, advocacy, and other critical efforts.

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<sup>54</sup> "Attrition, in cases of domestic and sexual violence, relates to the lack of progress on to completion of criminal cases, and more specifically, to the stages at which cases drop out from the criminal justice system, that is, from the initial report stage to the final stage of court proceedings." National Strategy on Domestic, Sexual and Gender-based Violence 2010-2014 included a commitment to minimise attrition in domestic and sexual violence cases, where appropriate.