

February 2021

Victim's Testimony in Cases of Rape and Sexual Assault



National Women's Council

Summary of Key Recommendations

- We recommend that a statutory definition - based on S.10 of the Victims and Witnesses of Crime (Scotland) Act - be inserted into the Criminal Law (Victims of Crime) Act 2017.
- The automatic rights afforded to children (presumption of protection needs) under the Criminal Law (Victims of Crime) Act 2017 should be extended to all victims of sexual offences. This would honour, in statute, the expanded understanding of what constitutes a 'vulnerable witness'. This would reflect both Status and Situational vulnerability.
- Frontline services should be resourced to both provide and engage the supports for victim-survivors. Increased and expedited multi-annual funding to frontline specialist support services to ensure they can offer victim-survivors support services.
- Ensure that victim-survivors of all sexual offences receive the same level and standard of support and accommodations irrespective of jurisdiction or the location of the court.
- Comprehensive, victim-led supports services that provide victim-survivors with the choice of a range of supports including, legal, psychological, financial and care. Including but not limited to court familiarisation and accompaniment services.
- Dedicated interview suites should be available for use for interviewing all victim-survivors of all sexual offences. Such suites should be located across the country and accessible to all.
- Legislation should be amended to provide for pre-recorded interviews to be considered as evidence-in-chief in all rape and sexual assault cases. An Garda Síochána should be resourced to ensure that they have the capacity to train sufficient numbers of Gardai to undertake such specialist interviews.
- Legislate and adequately resource provision for pre-recorded cross- and re-examination of victim-witnesses in all rape and sexual assault cases.
- Greater protections are needed to safeguard the privacy rights of victim-witnesses in rape and sexual assault trials especially in relation to counselling and medical records. A review of how S.16A is operating is urgently needed. Medical records should all be included in S.19A also so as to better protect the privacy rights of victim-witnesses.

1.1 Introduction

Established in 1973, the National Women’s Council of Ireland (NWCI) is the leading national women’s membership organisation in Ireland. NWCI 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.

We strive to show leadership in bringing women together to build a consensus on the kind of society we want to be a part of, and on the key values, that we believe, should be at the heart of that society. Our feminist values of equality, inclusion, respect for diversity, empowerment and meaningful participation by women in society, are shared by Irish trades union and civil rights movements.

Our Strategic Plan 2020-2024 ‘No Woman Left Behind’ aims to build on the progress that NWCI has helped to bring about for women in Ireland to date and sets out our vision for the future to progress key human rights and equality issues for women.

1.2 Submission Structure

NWC welcomes the opportunity to input into the Justice Committees consideration of a ‘victim’s testimony in cases of rape and sexual assault’. NWC’s comments reflect the lived experiences of the women that we have worked with and that have contacted us in huge numbers over many years.

Rape and sexual assaults are forms of gender-based violence¹. While women, men and children can be victims of rape and sexual assault, the perpetrators are predominantly men

¹ The Council of Europe Convention on Violence Against Women (Istanbul Convention⁴ 2011) emphasises the gender perspective on violence and states that violence against women cannot be addressed without looking at gender equality issues see Istanbul Convention [http://www.coe.int/t/dghl/standard setting/convention-violence/](http://www.coe.int/t/dghl/standard_setting/convention-violence/)

and women are disproportionately the victims². One in five women in Ireland have been raped in their lifetime, this compares with one in ten men³. Younger women are at an even greater risk of rape and sexual assault. The NUIG Sexual Experiences Survey (2020) found that nearly one in three female students had experienced rape while at college⁴. There are clear differences in female and male vulnerability to sexual violence. Where male vulnerability to sexual violence decreases as they age, female vulnerability does not decrease to the same extent.⁵ One in five women and one in ten men have experienced sexual assault in adulthood⁶.

In drafting this submission, we were cognisant of the significant reform that is currently underway in the form of the implementation of the O'Malley Review through the Department of Justice's strategy 'Supporting a Victim's Journey'. NWC and its members are engaging with and assisting the Department, to ensure these substantial reforms are driven from the perspective of the victims and survivors.

In accordance with the remit prescribed by the Justice Committee our submission focuses on two core areas: contextualising a victim's testimony and special measures to improve a victim's testimony. The submission concludes with a broader recommendation on the needed reforms of trial rules and processes that impact significantly on a victim-survivors experience of the trial process.

² The SAVI Report - Sexual Abuse and Violence in Ireland. A national study of Irish experiences, beliefs and attitudes concerning sexual violence. Dublin: Liffey Press, 2002. <http://www.drcc.ie/wp-content/uploads/2011/03/savi.pdf>

³ see <https://www.maynoothuniversity.ie/news-events/mu-and-trinity-study-finds-one-five-women-have-been-raped-their-lifetime>

⁴ See, <https://www.nuigalway.ie/media/smartconsent/Sexual-Experiences-Survey-2020.pdf>

⁵ Dublin Rape Crisis Centre and RCNI – National Rape Crisis Statistics 2011, p. 27. www.rcni.ie/wp-content/uploads/RCNIARNationalStatistics2011.pdf

⁶The SAVI Report –Sexual Abuse in Ireland, Executive Summary. E-publications at RCSI. <http://epubs.rcsi.ie/cgi/viewcontent.cgi?article=1014&context=psycholrep>

2.0 Contextualising a Victim's Testimony

It must never be forgotten that all sexual offences are grossly underreported. This trend sadly persists, with younger victims and older victims of domestic abuse being the least likely to report such crimes⁷. Compounding this reality is the fact that in 2008 only 8% of reports of rape resulted in conviction⁸, this has only marginally increased to 11% in 2018.⁹ The barriers to sexual offence reporting coupled with the high attrition rate is the backdrop to which all sexual offences need to be considered as there is no other category of crime that suffer the same perils as that of sexual offences.

The reasons for the exceedingly low reporting rates and unacceptably high attrition rates have been well documented and do not warrant repeating here in detail. That being said, the root causes of underreporting of sexually violent crime lies in the long history of oppression of women, their sexuality and their autonomy. The question is not whether, but instead, *how* do these oppressions continue to shape and influence the justice system generally, and how does this impact on a victim's testimony, specifically.

A victim's testimony is but one phase, albeit an incredibly important phase, of a victim's journey¹⁰. Events that precede, and indeed those that proceed it, will invariably impact upon this testimony. Whilst recognising this fact, for the purposes of this submission analysis will be confined to how a victim's testimony should be reformed so as to better protect the fundamental rights of victim/survivors of sexual offences which have for centuries now been

⁷ Rape Crisis Network Ireland, 2019 Statistics available at <<https://www.rcni.ie/wp-content/uploads/RCNI-Statistics-2019.pdf>>

⁸ Corr, M-L., O'Mahony, P., Lovett, J., & Kelly, L. (2009). Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries: Country Briefing: Ireland. <https://cwasu.org/wp-content/uploads/2016/07/Ireland.pdf>

⁹ CSO, Recorded Crime Detection 2018 available at <<https://www.cso.ie/en/releasesandpublications/ep/p-rcd/recordedcrimedetection2018/>>

¹⁰ The victim/survivor's journey includes , but is not limited to: the victim/survivors lived experience of the crime; the victim/survivor disclosing of the crime; the victim/survivor reporting the crime; when the crime is being investigated; when/if charges are brought; when/if preparing for a trial; when/if going through a trial; when/if the perpetrator is sentenced; when/if the perpetrator is released

denied, neglected, misunderstood, misinformed and damaging not only to victim/survivors but to society as a whole.

As noted above, there is significant reform afoot within both the Department of Justice and across the criminal justice system. It is perhaps the publication of the O'Malley Review that has been most significant in this regard. Using the O'Malley Review as a jumping off point, this submission will focus particularly on significant aspects of a trial that impact upon a victim's testimony in rape and sexual assault cases.

While much of this submission draws on the O'Malley Review it is important to note at this point that there are a number of shortcomings in that Review. Largely absent from the Review is the recognition that there are very different contexts for a victim-survivors and these different contexts can, and do, profoundly impact on victim-witnesses. Some may experience rape and sexual assault in the context of: domestic violence; in prostitution; in trafficking. Compounding this, victim-survivors may experience multiple layers of discrimination: as women; as disabled woman; as minority ethnic women; as Traveller woman. There is simply no one type of victim.

We welcome and recognise that the Department of Justice has taken a much broader approach in regard to the implementation of the Review and so we are recommending that the Committee take this broader and more inclusive approach when considering the victim's testimony in rape and sexual Assault cases.

2.1 Defining Vulnerability

The expanded understanding of what constitutes a 'vulnerable witness' is crucial in developing a truly trauma-informed and responsive criminal justice system. The shift away from recognising purely Status Vulnerability - based on the individual characteristics (whether that is age or capacity) - to Situational Vulnerability, which recognises the impact of the nature of the offence, goes beyond the mere provision of protections and special measures but,

instead, reflects a profound conceptual leap in understanding of the impact and seriousness of sexual offences¹¹.

The O'Malley Review makes clear in adopting a broad understanding of vulnerability that 'a person who has a well-founded fear or is likely to experience distress in connection with the giving of evidence' is to be considered a vulnerable witness and thus should be afforded all the requisite protections and special measures. The question is, to what degree is this understanding reflected in law and, most especially, in practice.

This reform is essential in truly recognising the gravity and impact of all sex-based crimes. In many respects, this recognition acts as a gateway to the array of protections and special measures that are so crucial in safeguarding witness' rights during their testimony.

Therefore, the incorporation of this important shift in understanding both, substantively (in statute and guidelines) and conceptually (through education, training and other measures), is fundamental and necessary to ensure that victims and vulnerable witnesses are afforded the protections they need to support them throughout the trial process, and, most especially during their testimony. This is necessary in order to ensure that victims and witnesses are facilitated to give their best evidence and to lessen, as far as is possible, the re-traumatisation of victims and witnesses through the criminal justice process.

Recommendation

- The automatic rights afforded to children (presumption of protection needs¹²) under the Criminal Law (Victims of Crime) Act 2017 should also be extended to all victims of sexual offences. This would honour, in statute, the expanded understanding of what constitutes a 'vulnerable witness'. This would reflect both Status and Situational vulnerability.

¹¹ It is noted that the Review Group cautions against equating a "vulnerable witness" with a "vulnerable complainant", but instead recognises that all witnesses may be "vulnerable" by virtue of their youth, disability or some other factor.

¹² Most especially, Criminal Law (Victims of Crime) Act 2017 "S. (7) For the purposes of an assessment, where a victim is a child—
(a) the child shall be presumed to have protection needs, and..."

- To fully meet this objective, we recommend that a statutory definition, based on S.10 of the Victims and Witnesses of Crime (Scotland) Act, be inserted into the Criminal Law (Victims of Crime) Act 2017

3.0 Supports for Victim-Survivors

It has long been recognised that Ireland lags significantly behind when it comes to protections and special measures for victims of crime. Especially so for victims of sex-based crimes. The prevailing negative view around such measures – that they amount to a disadvantage for the accused – must be challenged and reformed.

From consultation with member organisations of NWC, we know that in spite of legislative provisions providing for special measures (Victims of Crime Act 2017) they are still not commonplace within the Irish justice system. More serious than this – there is currently an *ad hoc* approach to the provision of supports which relies on volunteers and under resourced frontline services providing victim supports including court accompaniment, NWC is thus calling for a comprehensive, victim-led supports service that provides victims with the choice of a range of supports including, legal, psychological, financial and care.

Although there are notable amendments needed in legislation, it is perhaps more apt to conclude that the substantial reforms are needed in the application and implementation of such provisions, with the need to prioritise specialist training, infrastructure and technological advancements.

Whilst this submission is confined to considerations of the victim's testimony in rape and sexual assault cases the 'ingredients' that lead to that point must be considered. As such, this section will set out the key measures that must be taken to limit, as far as possible, re-victimisation of victim-witnesses and to support them to give their best possible evidence at trial.

Recommendation

- There needs to be comprehensive, victim-led supports services that provide victim-survivors with the choice of a range of supports including, legal, psychological, financial and care.

3.1 Pre-Trial and Trial Supports

The O'Malley Review and others have highlighted the importance of the provision of information, access to legal advice and specialist supports for victim-witnesses in preparing them for trial¹³. Indeed, the provision of such supports should be recognised as the fundamental rights of all victims of crime, which of course, includes that of rape and sexual offences. This is so, irrespective of whether or not: a victim-survivor formally reports the incident; the case is prosecuted; the case goes to trial, and/or; the accused pleads guilty.

We support the O'Malley Review's emphasis on the necessity for: the provision of information, access to legal advice, intermediaries, and psychological and other specialist support services. However, the question remains, who will deliver those supports to victims? And how will victim-survivors access legal advice and representation? The ideal situation is that supports are victim centred and accessible. Whilst the O'Malley Review sets out an array of services and supports needed for victim-survivors none of these avoid necessitating a victim go to range of services to seek supports. This diffused system of supports and services is not workable for victim-survivors. To access legal supports, they must go to one service, to access psychological supports they must go to another. We recommend that frontline services should be resourced to both provide and engage the supports for victims.

For present purposes we will focus on two particular services that impact directly and considerably on a victim's testimony. First, the familiarisation services offered by the DPP, in partnership with *An Garda Siochana* is particularly important for victim-witnesses in preparing them for the trial process and, in particular, for their testimony. This service offers an opportunity for victim-witnesses to familiarise themselves with the court and the trial

¹³ "The research found that specialist sexual violence services play particularly crucial roles through the use of approaches that can be characterised as flexible, enabling, holding and mending." See Marianne Hester, Sarah-Jane Lilley, More than support to court: Rape victims and specialist sexual violence services, *International Review of Victimology* (2018) 24(3), p. 313-328. doi:10.1177/0269758017742717; "Finding highlight the importance of advocacy that is independent of statutory and criminal justice agencies" see Oona Brooks, Michele Burman, Reporting rape: Victim perspectives on advocacy support in the criminal justice process, *Criminology & Criminal Justice* (2017) 17(2), p. 209-225.

process. This service has been described by the Rape Crisis Network Ireland as having “a profound effect on victims and has been very helpful in alleviating fear of unknown surroundings and procedures”¹⁴. Whilst this support appears to be extremely effective in Courts of Criminal Justice in Dublin, it has been noted that some inconsistencies in the quality of the meetings were reported in other parts of the country.¹⁵ As recommended in the O’Malley report:

it is vitally important that this service should be available to all victims of sexual crime in advance of trial, irrespective of the court or locality in which the trial is being held.¹⁶

The related, yet distinct service of court accompaniment is provided by a number of NGOs. However, in several court venues and throughout the country there is no such services available. The Victim Support at Court Service (V-SAC) is the only service whose sole function is to provide court accompaniment for all victims of crime, regardless of the type of crime. In addition to this, court accompaniment services are also provided by other NGOs as part of a suite of services they provide to victims of specific crimes. A large number of Rape Crisis Centres around the country provide court accompaniment services to victim-survivors of sexual offences. Although, as stated above this service is not available in every part of the country and is thus not available to every victim-witness who may need/want to avail of this support. The importance of the provision of this essential service for victim-survivors is recognised. Despite this, court accompaniment is still not adequately funded and, in large part, is only sustained by the extraordinary goodwill of volunteers, without whom the services would not exist.

¹⁴ Irish Council for Civil Liberties, *A Better Deal: The Human Rights of Victims in the Criminal Justice System* (Irish Council for Civil Liberties 2008) 18.

¹⁵ Romyana Grozdanova and Fiona de Londras, *Protecting Victims' Rights in the EU: The Theory and Practice of Diversity of Treatment During the Criminal Trial*, National Report: Ireland (Institute of Advanced Legal Studies 2

¹⁶ O’Malley Report (2020), P. 95

In line with the general understanding - as set out in the O'Malley Review - that all victim-survivors of all sexual offences need increased supports,¹⁷ we recommend that there is a commitment to ensuring the availability of these services to support all victim-survivors of all sexual offences.

Recommendation

- Increase and expedite multi-annual funding to frontline specialist support services to ensure that they can offer victim-survivors court accompaniment services.
- Frontline services should be resourced to both provide and engage the supports for victim-survivors.
- Ensure that victim-survivors of all sexual offences receive the same level and standard of support and accommodation irrespective of jurisdiction¹⁸ or the location of the court. Including but not limited to court familiarisation and accompaniment services.

3.2 Preliminary Trial Hearings

The O'Malley Review is expressly clear in need for preliminary trial hearings. This is not novel, but, instead, echoes earlier recommendations to introduce such.¹⁹ In fact, Ireland is an outlier in not having statutory provision for preliminary trial hearings and their introduction is long overdue.

¹⁷ "The right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experience) should be extended to include trials for sexual assault" at P. 84; "...the range and quality of support and services for victims should not depend on the court or locality in which a trial is held", at p. 32; "Some sexual offences are also dealt with in the District Court... When a sexual assault charge is contested in the District Court, the victim will be required to attend and give evidence as in a trial in one of the higher criminal courts. It is therefore essential that adequate support and accommodation should be available for victims in the District Court" at P. 32 O'Malley Report (2020),

¹⁸ This includes the District Court, Circuit Court and Central Criminal Court. The latter of these courts is recognised as having particularly good facilities and services to support victim-witnesses, but these are to be contrasted with the limited or lacking facilities and supports that are available in the District and, to a lesser degree, the Circuit Court.

¹⁹ Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* Pn 237 (Dublin: The Stationery Office, 2003), at 746 to 781; Expert Group on Article 13 of the European Convention on Human Rights.

There are of course a number of benefits to preliminary trial hearings. Chief amongst these from the perspective of victim-survivors of rape and sexual assault is the: potential for reduction in delays in the trial; reduced risk of unintended disclosures at the trial phase; the provision of special measures, and; decisions on the admissibility of evidence and disclosure.

4.0 Special Measures

The question of which victim-witnesses qualify for special measures is of course crucially important. Other considerations include who decides what special measures are available to vulnerable witnesses. And, importantly, whether there is capacity to provide for such measures.

At present those who come within the definition of vulnerable is limited in the Irish context. It is accepted that victim-witnesses who are young and/or have an intellectual disability are vulnerable and therefore have access to a number of special measures. As stated above, it is our view that such measures should be extended to include *all* victim-survivors of *all* sexual offences.

4.1 Interview Suites

Dedicated interview suites are primarily used to interview victims who are under 18, or those who have an intellectual disability. Additionally, there is nothing to preclude their use in interviewing other vulnerable witnesses. Each suit is equipped to record witness statements. The pre-recorded statements can then be admitted at trial²⁰. In relation to whether such evidence is considered to be evidence-in-chief the O'Malley Review finds that it is likely that in practice it is treated as such²¹. It is recognised that the use of pre-recorded statements may enhance the ability of witnesses to give their best evidence which 'is essential for the overall fairness of any eventual trial'.²² This recognition and understanding supports the above

²⁰ S.16 (as amended) Criminal Evidence Act 1992

²¹ O'Malley, p. 72

²² O'Malley, p. 38

assertion that such measures should be made available, as part of a suite of options available to all vulnerable witness – broadly defined so as to include victim-survivors of sexual offences.

Recommendation

- Dedicated interview suites should be available for use for interviewing all victim-survivors of all sexual offences.
- Legislation should be amended to provide for pre-recorded interviews to be considered as evidence-in-chief in all rape and sexual assault cases.
- An Garda Síochána should be resources to ensure that they have the capacity to train sufficient numbers of Gardai to undertake such interviews.
- Such suites should be located across the country and accessible to all.

4.2 Screens in Court

A court may issue a direction that a screen be positioned so as to prevent the witness from seeing the accused when a victim of any offence is giving evidence, even if the victim is 18 years or older, if satisfied that the interests of justice so require²³. Whilst these measures are available, they remain underused. There are considerable deficiencies in the infrastructure of and resourcing of such measure. Although some courts have extremely well-developed trauma-informed facilities, such as separate entrances and waiting areas, this is not the case in every court that hears sexual offence cases (most notably District Courts). Thus, in the absence of other trauma-informed facilities the use of screens in safeguarding the rights of victim-witnesses may be limited as best, and somewhat futile at worst.

²³ Criminal Evidence Act 1992, S. 14A

Recommendation

- Expand and resource provision for screens in court for all victim-witnesses in all sexual offence cases. Irrespective of location or jurisdiction of the court.
- Ensure that all court facilities are victim-witness centred and trauma-informed. This includes but is not limited to: separate entrances for victim-witnesses; separate waiting areas for victim-witnesses; quiet, private spaces for victim-witnesses; access to supports at courts. These should be provided throughout the country irrespective of location or jurisdiction of the court.

4.3 Video-linked Evidence

The Criminal Evidence Act 1992²⁴ provides that a video recording of any evidence in relation to a sexual offence (or certain other offences) through a live television link in proceedings under Part 1A of the Criminal Procedure Act 1967 shall be admissible at trial as evidence of any fact stated therein of which direct oral evidence would be admissible. However, for those over 18 years leave of the court must be granted for victim-witnesses to be able to give evidence via video link. In brief, it can be summarised that there are some special measures that *must* be provided to some victim-witnesses (those who are under 18 years and/or have an intellectual disability) and there are some special measures that *may* be provided to other victim-witnesses. In line with earlier reasoning, it is submitted that special measures must be provided to all victim-witnesses of sexual offences. We believe that this approach honours both the letter and the spirit of Criminal Law (Victims of Crime) Act 2017 S. 15.

²⁴ S.16

Recommendation

- Legislate for the expansion of provision for video-linked evidence for all victim-witnesses of all sexual offences. Irrespective of location or jurisdiction of the court.
- Ensure that such facilities are adequately funded and are of high quality. Pre-recorded Cross- and Re-Examination.

4.4 Pre-recorded Cross- and Re- Examination

Another example of a special measure that can greatly reduce the risk of re-victimisation of a victim-witness of a sexual offence is the use of pre-recorded cross-examination and re-examination. As with recorded evidence-in-chief and video-linked evidence detailed above, pre-recorded cross examination and re-examination have also been shown to be both possible and beneficial to victim-witnesses in giving them an opportunity to give their best evidence. The concerns around pre-recorded cross-examination (and re-examination) rest largely on issues of disclosure. While of course these are legitimate concerns, they are not, in fact, directed at the practice of pre-recorded cross and re-examination. But, are instead separate issues that require separate and distinct reform.

Evidence from pilot studies and from other jurisdictions where pre-recorded cross- and re-examinations operate has shown that much of the concerns raised around the introduction of such a measure are not in fact well founded²⁵.

²⁵ E. Davis and K. Hanna, 'Pre-Recording Testimony in New Zealand: Lawyer's and Victim Advisors' Experiences in Nine Cases' (2013) 46(2) *Australian and New Zealand Journal of Criminology* 294 and 297; Scottish Government, THE IMPACT OF THE USE OF PRE-RECORDED EVIDENCE ON JUROR DECISION-MAKING: An Evidence Review (2018) at <https://www.gov.scot/Resource/0053/00532556.pdf> last accessed 23 August 2018; Oslo Metropolitan University, Findings from the first evaluation of the Norwegian equivalent to childrens advocacy centers: Statens barnehus at https://www.hioa.no/eng/About-HiOA/Centre-for-Welfare-and-Labour-Research/NOV_A/Publikasjonar/Rapporter/2012/Findings-from-the-first-evaluation-of-the-Norwegian-equivalent-to-childrens-advocacy-centers-Statens-barnehus last accessed 23 August 2018; *R v Dinc (Zafer)* [2017] EWCA Crim 1026 (CA (Crim Div)); The most commonly cited concerns are: the rights of the accused; the possible issues with technology; a potential reduction in

From the available evidence it is clear that defendants can still have their right to a fair trial protected while balancing the rights of victim-survivors of sexual offences. On the issue of the defendant's rights to a fair trial – an often-raised concern - it was held in *Dinc*²⁶ that the measures implementing pre-recorded cross-examination did not undermine the defendants' right to a fair trial, and stated that:

There is nothing inherently unfair in restricting the scope, structure and nature of cross examination and or in requiring questions to be submitted in advance... it is the judge's duty to control questioning of any witness and to ensure it is fair both to the witness and the defendant²⁷.

In fact, there is evidence to suggest that the introduction of pre-recorded cross and re-examination may in fact benefit the defendant as there that a “combination of admissions and focussed cross-examination could produce a powerful defence case; more powerful than a defence advocate putting to a witness a whole series of propositions only to be met with the answers: "No", "I don't understand" or "I don't remember.”²⁸

Drawing on the reasoning in *Dinc*, NWC would argue that far from amounting to an unfairness for the defendant the *status quo* amounts to a gross unfairness for the victim-witness. The absence of sufficient protective and special measure reflects a serious violation of the victim-survivor's right to be treated with dignity, respect and not be re-victimised through the trial process. We would also like to raise the significant issues surrounding questions and evidence that is put to a victim-witness during their cross-examination. In spite of statutory protections to guard against such, all too often, the defence rely on discredited myths and stereotypes about victims to reinforce aspects of the case that are consistent with rape myths²⁹. Where

the jury's ability to “read” a witness's body language; whether video testimony might create emotional distance between the witness and the jury, and; possibly lack the immediacy and persuasiveness of live testimony.

²⁶ *R v Dinc (Zafer)* [2017] EWCA Crim 1026 (CA (Crim Div))

²⁷ *Ibid*, at 263

²⁸ *Ibid*, at 264

²⁹ J. Temkin, J. Gray and J. Barrett, 'Different Functions of Rape Myth Use in Court: Findings from a Trial Observation' (2018) 13(2) *Feminist Criminology* 205-226, at p 205

pre-recorded cross- and re-examination is provided for at a preliminary trial hearing a judge can carefully screen and consider questions and evidence and, where necessary, can edit these out of the final version that is used at trial. To realise this end, we would recommend that mandatory Ground Rule Hearings also be introduced at the preliminary trial.

Recommendation

- Legislate and adequately resource provision for pre-recorded cross- and re-examination of victim-witnesses in all rape and sexual assault cases.
- Ensure that such facilities are available throughout the country.

5.0 Privacy Rights of Victim-Survivors of Rape and Sexual Assault

Disclosure of personal and deeply private information, such as medical records and/or counselling notes have deeply chilling effect on victim-survivors of all cases, especially so for victims of sexual offences given the nature of these offences. As noted in the O'Malley Review, the provisions that are designed to safeguard the victim-survivors right to privacy are seldom, if ever, used³⁰. NWC would like to reiterate the concern expressed in the Review about the lack of application S.19A³¹ and call for this to be urgently reviewed.

If a victim-witness is unaware or not supported in understanding S.19A this raises serious concern about how the law is operating *de fact*. The sole purpose of S.19A is to safeguard the privacy of the victim-witness. A victim-witness is entitled, not only to be heard, but to be legally represented at the disclosure hearing. The reality that this right is most often waived is deeply concerning. Clearly the 'balance' that S.19A seeks to strike, as between the accused right to a fair trial and the victim-witnesses right to privacy, in reality results in a clear unbalanced in favour of the accused to the detriment of the victim-witness. Whilst we acknowledge and welcome the strict conditions that are imposed in respect of counselling notes by the DPP this does not, in our opinion, sufficiently uphold the privacy rights of victim-

³⁰ O'Malley, at p. 78

³¹ Criminal Evidence Act 1992 (as amended)

survivors. Similarly, in respect of medical records NWC calls for them to be included in S.19A also so as to better protect the privacy rights of victim-witnesses.

Given the deeply personal nature of counselling notes, and the evident lack of meaningful protections provided to victim-survivors we would serious question the appropriateness of the necessity to disclose counselling notes or medical records. Similar to protections pertaining to evidence on previous sexual experience (S.3 of the Criminal Law (Rape) Act 1981) we would recommend that a similarly restrictive approach be adopted in respect of counselling notes and medical records. In that, 'where a form of questioning is allowed, it should be confined only to what is *strictly necessary* and should never be utilised as a form of character assassination of a complainant [emphasis added]'³².

The question of whether counselling notes are ever considered 'strictly necessary' would of course rest with the presiding judge. However, given the deeply personal nature of counselling notes and their inherent subjectivity it is hard to imagine situations where they would/could be deemed to be 'strictly necessary', but for in the most exceptional cases. This, coupled with the clear lack of *de facto* protection available to victim-witnesses would strongly suggest that they should not form part of rape and sexual assault trials, except in exceptional circumstances. As such, we would call for a reversal of the current trend of counselling notes almost never being excluded to a position where they are almost never *included* in trials.

Recommendation

- A review of how S.19A is operating is urgently needed.
- Greater protections are needed to safeguard the privacy rights of victim-witnesses in rape and sexual assault trials especially in relation to counselling and medical records.
- Medical records should be included in S.19A also so as to better protect the privacy rights of victim-witnesses.

³² DPP v GK [2007] 2 I.R 92 at 103-104

6.0 Conclusion

This submission has outlined some of the reforms that are necessary to ensure that a victim's testimony is the best evidence that it can be at trial. Furthermore, we have called for the expansion of the availability of special measures to victim-survivors of rape and sexual assault to reduce, as far as possible, the re-traumatisation and re-victimisation of survivors that is caused by the trial process itself.

There is a great deal of reform being undertaken to improve the justice system for victim-survivors of sexual offences and we commend all those that are working so hard to bring about this change. Despite being somewhat behind some of our common law neighbours, this has afforded us the opportunity to learn from others experiences and to 'leap-frog' over practices that have not been effective. As such, we are calling on you to go from limited 'Pigot'³³ to 'Full Pigot'³⁴ in order to better protect the rights of survivors that have, for too long, been so poorly served by the justice system.

Although arguably beyond the scope of this submission we would also call on you to examine further the trial rules and procedures as they relate to other aspects of the criminal trial process. In particular, the myth-based narratives that continue to plague rape and sexual assault trials. In most cases, the judge's direction or charge to the jury comes too late to disrupt these as juries process information as it is presented. They rarely, if ever, consider all of the information at together in deliberations. Given the importance of ensuring that trials are fair and impartial processes, we feel that this needs to be examined separately and in greater detail. The myth-based narratives remain particularly pervasive in relation to myths around female alcohol consumption, female sexual activity, the 'unreliability' of women³⁵.

³³ Some facilitates for pre-recorded evidence-in-chief

³⁴ Pre-recorded evidence-in-chief and pre-recorded cross- and re- examination

³⁵ See further, Emma Henderson, Kirsty Duncanson, A LITTLE JUDICIAL DIRECTION: CAN THE USE OF JURY DIRECTIONS CHALLENGE TRADITIONAL CONSENT NARRATIVES IN RAPE TRIALS? (2016), Law Journal Volume 39(2), p. 260

Judicial charges and directions to the jury should be based on Judicial Guidelines that are drafted and regularly reviewed by the Judicial Council. These are essential in challenging and displacing 'rape myths' and misunderstandings that permeate rape and sexual assault trials. In particular, guidelines should include directions on consent, reasonable belief, and corroboration warning.