

LAW SOCIETY SUBMISSION



VICTIM'S TESTIMONY IN CASES OF RAPE AND SEXUAL ASSAULT

**SUBMISSION TO THE JOINT OIREACHTAS COMMITTEE ON JUSTICE
FEBRUARY 2021**

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

Introduction

We appreciate the opportunity to provide our comments and recommendations to the Joint Committee. This submission has been produced with input from the Divisional Protection Services Unit (DPSU) in Dundrum, Victim Support at Court (VSAC), the Department of Health and the Office of Director of Public Prosecutions which is greatly appreciated by the Society.

For the purpose of this submission, ‘victim’ or ‘complainant’ refers to any person making a complaint in cases concerning rape, sexual assault and any sexual offences.

Summary of Recommendations

The Society recommends implementation of the following:-

- i. Training of judges and other legal personnel in dealing with victims of sexual offences. Placing emphasis on a trauma-informed approach to victims in their entirety as well as their testimonies.
- ii. Separate legal representation for victims at sexual offence trials irrespective of whether questioning of previous sexual experience is to occur.
- iii. Public awareness to be raised of victim rights legislation, the victims’ charter and how to access the criminal justice system by way of lodging formal complaints.
- iv. Co-operation amongst stakeholders and all agencies in the provision and exchange of information, particularly in relation to services for victims, including access to counselling records (where necessary and appropriate) and access to support services.
- v. Standardisation of services nationwide for court facilities for victims, their families and supporters.

Commentary

Testimony in the area of rape and sexual offences is currently guided by juxtaposing the constitutional and legal rights of both the accused and the complainant. Article 38.1 of the Constitution provides that ‘No person shall be tried on any criminal charges save in due course of law’ ensuring a right to procedural fairness from the time of an accused persons arrest to completion of any trial or sentence hearing. Complainants, as members of the public, are also protected by Article 40.3 of the Constitution under Article 40.3 which provides that ‘The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen’.

The criminal justice system is obliged to conform with fundamental rights as set down in our constitution. This conformity extends to both complainants and defendants in criminal trials and is the cornerstone of ensuring fair procedures for both and safeguarding the right to liberty, the right to bodily integrity and the right to fair procedures. A sexual offence is undoubtedly a violation of a person’s constitutional right to bodily integrity and any complainants of such an offence are therefore entitled to benefit from the State’s onus to protect and assist victims of these offences, and to administer justice accordingly.

The European Court of Human Rights has also recognised that crimes relating to sexual offences are repugnant to the rights enshrined in the European Convention on Human Rights.

Courts have recognised that sexual offences are a gross violation of a person's constitutional and human right to bodily integrity and personal autonomy. Sexual offences are viewed as some of the most grievous offences, victims have referenced their bodies as crime scenes, their memories, thoughts and emotions surrounding the offence as well as the questioning and scrutiny of their testimony in the criminal justice system. Sexual offences can, of course, cause bodily harm but the act itself is also the cause of ongoing sequelae in the form of psychiatric and emotional damage to the complainant, which can be long term or lifelong. The criminal justice system, and attending court to provide evidence of their ordeal, can be re-traumatising for victims and can invoke a reoccurrence in previously assuaged physical and psychological symptoms. Sexual offences occurring in a family unit can also disrupt that family unity, the effects of a sexual offence perpetrated against a family member can result in a ripple effect of lifelong and lasting familial disharmony often spanning across generations. Court attendance to provide testimony can exacerbate and put these issues under a spotlight for each victim depending on their individual circumstances.

In terms of providing evidence in cases of sexual offences, there are currently a wide range of rights, measures and facilities provided and designed with victims at the heart of concern. These special measures are available for all vulnerable witnesses, bearing in mind that vulnerable witnesses may include witnesses who are not the direct complainant in the case. In some circumstances, defendants can also be vulnerable witnesses, who are under the auspice of a difficulty or sensitivity, such as age, ill health or incapacity.

Victims of sexual offences, unlike any other offence, enjoy and retain a right to anonymity, provided by Section 7(1) of the Criminal Law (Rape) Act 1981, for the duration of criminal proceedings, including during their testimony. Victims cannot be publicly identified and this right continues after trial, regardless of the outcome. Victims have the right, after conviction, to waive their right to anonymity and the accused can then be named. This right starts as soon as the accused is charged with a sexual offence and remains the right of the victim until the completion of the criminal proceedings. The courts take this right very seriously, any publication or broadcast found in breach of this legislation, is punishable by a term of three years imprisonment, a fine, or both.

Sexual offence trials and by consequence, victims' testimony in same, are heard 'in camera' in the absence of the public, to protect the anonymity of the victim. Section 6(1) of the Criminal Law (Rape) Act 1981, as amended by Section 11 of the Criminal Law (Rape) (Amendment) Act 1990 provides that 'the judge, the justice or the court, as the case may be, shall exclude from the court during the hearing all persons except bona fide representatives of the press and such other persons (if any) as the judge, the justice, or the court, as the case may be, may in his or its discretion permit to remain'.

Clearly, the legislation takes a firm stance on those to be present for the evidence given in a sexual offence trial, persons will be excluded, unless it detriments the interests of the case. The legislation and the judiciary in making such orders to exclude persons from the body of the court in sexual offence trials, is cognisant that public presence would add to the stress of victims and other witnesses. In an already stressful and challenging environment for the victim, the legislation is mindful of the safety of the victim in terms of re-traumatisation and their right to anonymity. To further the aim of protecting victims through their testimony and the overall trial process, Practice Direction (SC18) restricts use of electronic devices in

court, which would limit the potential for a victim's identity being exposed on social media. Notwithstanding the 'in camera' rule applied to sexual offence trials, victims are always entitled to be supported at court by a parent, partner, relative, friend or other nominated person(s). Victims are also entitled to court accompaniment organised by VSAC, One in Four and the various Rape Crisis Centres countrywide, which are a valuable resource to complainants.

The Criminal Evidence Act 1992 contains a range of invaluable measures to assist vulnerable witnesses in all trials, including sexual offence cases during the course of their testimony. One such measure is the facility for the victim giving evidence in court, to utilise a screen between themselves and the accused. This facility is ordered by the court where it is deemed appropriate on the merits of the case, unless the court considers it contrary to the interests of justice.

Section 14 of the Criminal Evidence Act 1992 provides for the use of intermediaries in giving testimony as part of the trial process. Their sole function is to assist in the communication process, similar to that of an interpreter, their role is to assist in adducing the best evidence, not to advocate or support the witness or accused in any way. Giving evidence can pose a number of difficulties for children or people with particular difficulties or disabilities and since a noteworthy portion of persons who interact with the criminal justice system satisfy the criteria for being a vulnerable person, intermediaries play a vital role in the trial and testimony process. Their involvement is based on the premise that all persons should be assisted to participate in criminal proceedings on an equal footing with others. Consequently, intermediaries are appointed to any witnesses who require assistance, including accused persons.

The benefit of an intermediary to a victim giving testimony in a sexual offence case, is their ability to facilitate communication, using appropriate questioning for the witness's age and level of understanding and particular requirements, to ensure that the victim's evidence to the court is as full and accurate an account as possible. This includes facilitating victims giving evidence by way of video link as well as in court.

The Criminal Justice (Victims of Crime) Act 2017 and the Children's Act of 2001, amended the Criminal Evidence Act of 1992, to provide for intermediaries for all witnesses, including victims. These amendments have the consequence of ensuring that the fullness of the issues at hand is conveyed to the court and that the victim's testimony is, to the largest extent possible, accurately presented in the round. Currently, Irish law allows for intermediaries solely at the trial stage but they have an important role at all stages of criminal procedures. There are many occasions when an interview of an accused at a Garda Station, or a specialist interview with a witness or a victim, would benefit from the presence and expertise of an intermediary.

Section 16 of the Criminal Evidence Act 1992, provides that video recording of any evidence in relation to offences, including sexual offences, through a live television link in proceedings (under Part 1a of the Criminal Procedure Act 1967) is admissible. Video recording of any statement made by any victim under 18 years of age, or those with mental disorders, is also admissible. However, in both circumstances, this evidence is only admissible at trial where the same oral evidence would be admissible and the witness is available at trial for cross examination. The court can refuse to admit this type of video link evidence if it is deemed not to be in the interests of justice of the case. This interest will be assessed on a case by case basis and the particular vulnerabilities or complexities of the victim will be borne in mind throughout the decision-making process.

Notwithstanding the ability of the court to exclude video link evidence, it remains a valuable measure to facilitate victims' testimony. Video link evidence limits the possibility of re-traumatisation of the victim by having to attend court in person thereby making the criminal trial proceeding less stressful for victim and limiting the emotional and psychological detriment they may otherwise have experienced as a result of attending court in person. That is not to say that delivering their testimony by video link will be a panacea for all victims but it may go some way to assuaging some of the anticipatory anxiety and stress associated with giving evidence at trial. Currently Irish law does not allow for recorded cross examinations.

When ascertaining if special measures are necessary, the court must be cognisant of the need to protect the victim from secondary victimisation, intimidation or retaliation. The court must take into account the nature and circumstances of each case, the nature and circumstances of each particular victim as well as any specific complexities which may be relevant to them or the case.

During the course of providing witness testimony, the issue may arise of questioning a victim regarding their previous sexual experiences. Section 3 of the Criminal Law (Rape) Act 1981 makes provision for the questioning of victims relating to previous sexual experiences and the parameters in which that may take place. The application made during trial to question a victim in this regard is made at the trial stage. There is a value in this application being made at pre-trial stage and that concept is addressed as part of the Society's recommendations.

In the event of a successful application by the defence to question a victim regarding their previous sexual history, the victim is entitled to be heard and separately legally represented under the Civil Legal Aid Act 1995. The Legal Aid Board must be immediately contacted and they are obliged to provide representation to the victim at the trial stage. All victims to whom this relates, must be given reasonable opportunity to source representation. This mechanism provides additional support for victims in understanding the legal process of a criminal trial and their rights and role within it. While the legal representative assigned will have no role to play in the victim's questioning, they can offer valuable advice before and after a victim's testimony. There is a concern that, in seeking separate legal representation, there is a possibility that the victim would receive an advisor who may be less experienced in the area of sexual offences as the accused's legal advisors. This is an area which should be reformed as reflected in our recommendations. There is also an argument to be made for victims receiving separate legal representation for the entirety of the trial process, not just in circumstances where their prior sexual experience is to be explored in cross examination, and also an argument that separate legal representation should apply in cases even where no prosecution is advanced. This is also an area for consideration for reform. However, the risk of upsetting the balance between the well-established practice around how criminal trials are conducted and the fair procedures the defence is entitled to is a concern. As always, the rights of the accused must also be considered, as required by the Constitution.

In the event of a successful application to question a victim regarding their prior sexual history, no testimony shall be advanced and no question can be asked in cross examination of the victim, other than in respect of matters to which the trial relates, except with the leave of the Judge. A Judge can allow questioning under Section 3(2)(b) of the 1981 Act, if it would be unfair to the accused to refuse to allow the evidence to be adduced or the question to be asked. It should be noted that the younger the victim is, the less appropriate questioning is as it may be extremely traumatic for a younger witness. Questioning should always be confined to what is strictly necessary in the circumstances and should never be

used as a means to embarrass or distress the victim. As with any method or line of adducing evidence, a balance must be struck between ensuring a fair trial for the accused and respecting the victim's rights to personal privacy and human dignity. Allowing questioning regarding previous sexual history does not grant defence practitioners leave to ask what they wish. Discretion remains with Judges to disallow a question, unless it is in the interests of the case to allow it. In this regard, Judges are always required to be vigilant as to how questioning is conducted.

Victim testimony can also extend beyond the trial hearing itself in the form of disclosure hearings that may take place in advance of the trial. Disclosure hearings governed by Section 19(a) of the Criminal Evidence Act 1992, while not often utilised, occurs where an issue concerning what material is relevant to the court proceedings and what material should or should not be disclosed arises. This usually occurs in relation to Counselling Records of the victim, although this is not the sole source of disclosure hearings. Such documents, being of a highly sensitive, narrative account, their relevancy, complexity and how they should be disclosed and retained, are usually the subject of disclosure hearings, if one arises, in sexual offence cases. When a disclosure hearing is taking place, all victims have the right to be heard and separately legally represented thus broadening the scope for the occasions on which a victim may find themselves addressing the court regarding the matters at hand. If the court orders disclosure where it is deemed to be in the interests of justice to do so, the court can impose any conditions necessary to protect the victim and their privacy. Victims should be aware of all their rights in this regard, not only the right to be heard at any such disclosure hearing, but also in terms of their right to legal representation and the purpose for which their records are being provided. Records are required to be disclosed to avoid the risk of an unfair trial for the accused. Various orders can be made to ensure such records are disclosed respectfully and in accordance with the victim's rights.

To assist victims of sexual offences in attending court to give their evidence, the DPP and AGS offer a victim and witness familiarisation scheme. This involves a visit to a court room, well in advance of the trial, to help the victim to familiarise themselves with surroundings and for the prosecuting Garda and solicitor to explain the various personnel and their roles. This has been of great assistance to victims in relieving some of their stress and anxiety in advance of the court date. Given the intense personal nature of sexual offence trials, there is huge value for victims in knowing the layout of the court room, where facilities are within the court house and to meet with the personnel working on the case, in advance of the trial date. Solicitors and Gardai can obviously not engage in coaching or speaking to the victim with respect to any evidence that may be adduced. However, they can familiarise the victim with the environment and cover procedural issues in order to allay fears to some degree.

On completion of the trial, where a conviction has been secured, victims have a further opportunity to address the court via their Victim Impact Statement. This is a facility available to victims of all crimes and is well utilised in court proceedings. The introduction of Victim Impact Statements through legislation in 1993, gave recognition to victims' rights and copper-fastened a victim's right to be heard at a sentence hearing. Victims can now express the impact the offence has had on them and their lives, in a manner which perhaps had not been available to them as part of their testimony. The right to deliver this statement, either in person or submitted to the judge directly in writing, is highlighted for all victims as a means to have their viewpoint heard by the sentencing Judge. It is noted by many victims who have submitted a statement, that it was a cathartic exercise at the end of a stressful criminal procedure experience.

The effect of the current criminal process on victims and by extension practitioners has resulted in both positive and negative experiences. There is a high risk of re-victimisation and re-traumatisation for victims which is understandable given the nature of the crime and the fact that the court proceedings themselves can be traumagenic. Recounting the incident in the stressful environment of a court room, with the accused and legal personnel who are strangers present, the adversarial nature of cross examination and the sensory and emotional aspects of narrating their experience are all factors which run the risk of causing victims distress and re-traumatisation. Practitioners, and those who attend court in a court accompaniment capacity, have also noted the psychological distress encountered as a consequence of listening to victims relay their personal accounts.

Many victims noted that they felt like mere witnesses in the case and while that is objectively their role in the overall structure of the current criminal process, victims should be a key aspect of the conduct of every trial, bearing in mind the trial itself and the impact it will have beyond the final day in court. Other victims noted that they were profoundly impacted by giving evidence at trial, noting that it brought up reminders of the harm suffered and caused a setback in their psychological and emotional recovery and that the adversarial nature of proceedings made them feel as if they were the person on trial. Victims frequently note that the proximity in court to the accused and the lack of privacy in consultation with legal advisers is an urgent concern.

On the other hand, many describe a largely positive experience, associating attending trial and giving their evidence as an achievement and a re-balancing of the loss of power they may have felt during the commission of an offence. Many victims reference the Gardaí and other professionals they encounter during the process as key to that outcome. An overriding message from victims is they want to be kept apprised of developments and have the process explained to them in advance. Juxtaposed with this however is the requirement that the concept of a fair trial, enshrined in our constitution, is at the heart of every trial.

The following recommendations are made in consideration of improving the administration of justice in sexual offence cases:-

Recommendation I

Training of judges and other legal personnel in dealing with victims of sexual offences. Placing emphasis on a trauma-informed approach to victims in their entirety, as well as during their testimonies.

Professionals dealing with victims in the area of sexual offences would benefit from specialised training to obtain a deeper and more realistic understanding of victims lived experiences. It would also assist in gaining a deeper appreciation for the anxieties that victims may have as the criminal process progresses.

An awareness is needed, by all professionals involved, for the potential of re-traumatisation of victims, through repeated discussion and disclosure of their experience with legal professionals, Gardaí as well as through their testimony itself. Judges and other professionals, must be sensitive to the trauma experienced by all victims of sexual offences, regardless of age, background, gender or their particular circumstance. It should also be borne in mind, that many victims will still be experiencing trauma when they make report to Gardaí and, in those circumstances, an appropriate approach from all professionals would be beneficial. The EU Directive on Victims' Rights has emphasised the need for avoiding the re-traumatisation of victims. Further training in this area would limit the potential for re-traumatisation of victims.

Training for professionals should include education on re-traumatisation and the emotional trauma experienced by victims of sexual offences to allow for a more trauma-informed approach. To that end, Gardaí are often a victim's first point of contact. It is vital therefore, that Gardaí have the requisite training and information to equip them to engage professionally and empathetically with any person reporting a sexual offence. This is already taking place through the formation of DPSUs countrywide. Many Gardaí already fulfil this role in an exemplary fashion. Professionals should be cognisant that victims' interaction with services will inform how, and if, future victims come forward and so, the need to provide a professional service at all times is paramount. This is true of all service providers, not just Gardaí.

Training should also create awareness, among practitioners and Gardaí, of difficulties experienced by vulnerable witnesses, including defendants. It would be desirable to equip lawyers with skills to elicit best evidence in these circumstances. By extension, this would facilitate professionals to have an all-encompassing understanding of their obligations to victims. In this vein, the prospect of attributing intermediaries at every stage of court proceedings, not just the trial, should be explored.

Recommendation II

Separate legal representation for victims at sexual offence trials irrespective of whether questioning of previous sexual experience is to occur.

It would be beneficial, both to victims and to the smooth conduct of all trials, if separate legal representation were to be available to victims, regardless of whether they are to be questioned regarding their sexual history.

When questioning a victim regarding previous sexual experience, it would be preferable if there were additional provisions allowing the victim's barrister to continue to represent them while questioning is taking place - not just in an advisory capacity before and after testimony, as is currently the case.

Separate legal representation could be considered to be extended to include victims of sexual assault and to other victims even where no prosecution is being brought.

It would be in ease of both the trial process and the victims if applications to permit questioning a victim regarding prior sexual experience, could be highlighted at the pre-trial stage, rather than waiting until the trial itself. This would give greater time for the victim to receive the legal advice they are entitled to and would limit the potential for psychological detriment to the victim by bringing such an application during already traumagenic trial proceedings. The Legal Aid Board would need to be immediately informed so they can adequately represent and advise the victim. It would also be desirable if the victim could be represented by a barrister of the same level of seniority as the accused. By making this application at the pre-trial stage, more time would be available to find a suitably experienced barrister for the victim.

Section 26(3a) of the Civil Legal Aid Act 1995 would require amendment to allow representation by the Legal Aid Board of all victims of sexual offences and other victims where no prosecution is being taken.

Recommendation III

Public awareness to be raised of victim rights legislation, the victims' charter and how to access the criminal justice system by way of lodging formal complaints.

The Criminal Justice (Victims of Crime) Act 2017 confers a wide range of rights on victims of crime generally, no less so on those who have been the victim of a sexual offence. All victims should be educated and informed as to their statutory and constitutional rights and greater public awareness of the 2017 legislation would facilitate this.

Interactions with members of the public and Gardaí suggest many complainants are not aware of their rights or the services available. For example, many people are unaware of the facilities provided by Sexual Assault Treatment Units in the aftermath of a crime and how the public may access same in the event they need assistance.

Given the nature of crime, it is often only when people require the service that they seek it out, this is at a time when they are already vulnerable. If public awareness of the legislation and services available was more prominent, it might translate to a greater uptake in service participation at a crucial stage for victims in the immediate aftermath of the commission of an offence. Sexual offences can leave victims severely traumatised and the nature of the crime and sometimes the relationship with the perpetrator, victims can feel isolated and unable to contact support services or unsure of what services are available. Greater public awareness in this area would assist victims at their most vulnerable. This concept is echoed by DPSUs and VSAC who agreed that a major barrier to victims accessing services is the lack of knowledge around what is available and how to secure such access.

Feedback from victims post-trial can inform agencies as to how best to improve communications and services for future reference.

DPSUs have advised that they would like to see victims contact made with victims by support services in the aftermath of a crime, rather than leaving the onus on the victim to contact supports. Many victims can still be in contact with/living with the perpetrator which makes it more difficult to make contact with services through isolation or fear of recrimination from the perpetrator. If a liaison from an agency were to make contact with them, greater uptake may be seen in services available.

VSAC have advised that 80% of their referrals are through the Gardaí. They would like to see greater awareness of their service and the facilities they provide to victims attending court as many are unaware of the facilities offered until quite close to the trial date. It would be preferable that they could avail of assistance throughout the process.

Recommendation IV

Co-operation amongst stakeholders and all agencies in the provision and exchange of information, particularly in relation to services for victims, including access to counselling records (where necessary and appropriate) and access to support services.

Specialised services are available to victims, through the Gardaí, the DPP, Probation Services, Courts Services, VSAC, SATU, DRCC, One in Four and many other organisations nationwide. The perception from those working in these services is that there is little public awareness of what they offer and how they can be accessed, even by other agencies. While these agencies work successfully together on a daily basis, throughout the entire

criminal process, greater cohesion amongst service providers would be of huge benefit in ensuring that victims are adequately informed and sufficiently supported at all times. This could be done through inter-agency meetings and training on the awareness of the role each has to play.

Recommendation V

Standardisation of services nationwide for court facilities for victims, their families and supporters.

The familiarisation service offered by the DPP and AGS should continue in its current format and should be applied consistently across the country with the relevant Gardaí and State Solicitors. From feedback provided, there is a clear need for victims to be kept informed at all stages of the process and the standardisation of services, and further roll out of procedures which have been successful countrywide, would be of benefit both to service users and service providers, to assist in the smooth running of criminal proceedings, thereby minimising the increased risk of delays to trials and further distress for victims.

There have been major improvements to facilities for victims across the country in recent years and continued development and standardisation of same will benefit everyone engaged in the criminal trial process.

Great strides have been made in recent years, notably through the Criminal Justice (Victims of Crime) Act 2017, to promote and support victims' rights, facilitate victim testimony within criminal trial proceedings, the training of legal personnel and the establishment of DPSUs. The establishment of the DPP's Specialised Sexual Offences Unit is another commitment to progress in this area. As the needs of victims evolve, services and professionals will need to adapt accordingly.

There is an ongoing opportunity to develop the potential for victims to engage with the criminal justice system in a more positive and considered way and in a manner that assists with the effective administration of justice and the management of criminal trials.

Conclusion

We hope that the Committee finds these observations and recommendations to be helpful and will be glad to further engage on any of the matters raised.

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