

# LAW SOCIETY SUBMISSION

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## **IMPLEMENTATION OF THE O'MALLEY REPORT RECOMMENDATIONS**

**DEPARTMENT OF JUSTICE AND EQUALITY**

**September 2020**

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## 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

- 1.1 The O'Malley Review Group ('the Review Group') was established to explore what reforms might be introduced to protect victims of sexual violence during the investigation and prosecution of sexual offences.
- 1.2 The recommendations of the Review Group fall under the following headings:
  - Recommendations aimed at improving the investigation and prosecution of sexual offences (Chapter 3)
  - The extension, to other categories of sexual offences, of the legal provisions around anonymity and on limiting media reporting (Chapter 4)
  - The introduction of statutory preliminary trial hearings (Chapter 5)
  - Extension of free legal aid advice to other sexual offences and of legal representation to victims of sexual assault (Chapter 6)
  - Improved information and support services for victims (Chapter 7)
  - The establishment of a register of qualified intermediaries (Chapter 8)
  - Sentence discount for a guilty plea (Chapter 9)
  - Training for Judges and legal practitioners around dealing with vulnerable witnesses and awareness of trauma (Chapter 10)
- 1.3 The Law Society ('the Society') has considered the recommendations and provides the following observations for the Department's consideration.

### **Chapter 3 - Investigation and prosecution of sexual offences**

The Society endorses the recommendation that Garda Protective Service Units continue to be rolled out across the country as soon as possible. The Policing Authority is monitoring the roll out of these units as part of An Garda Síochána's Policing Plan. These units (which deal with victims of sexual crime, human trafficking and domestic abuse) are comprised of specialised investigators who are best placed to provide relevant and timely information to victims of sexual offences.

The Society supports the recommendation that there should be consistent and embedded training for all Gardaí (including new recruits) on the principles and practices of engagement with victims of sexual offences. It is noted that such training might include information on a victim's rights, the legal obligations to victims, the impact of trauma on victims and education around rape myths. The Society recommends that any such programme should also provide best practice guidance on the taking of a statement of complaint from a victim of sexual violence.

The need for the improved education, training and professional development of Gardaí was identified by the Commission on the Future of Policing (COFI) as an area which required development and investment<sup>1</sup>. The COFI Implementation Group could usefully be involved in the implementation of this recommendation.

The Review Group recommended that the availability and geographical spread of specialist interview suites for young children and other witnesses should be kept under review. It is our understanding that there are currently nine such interview suites in the country only one of which (Galway) is in line with the Barnahaus model. Barnahaus facilitates a child being interviewed in a child-friendly environment and ensures that associated medical and social supports are met at one location. The Society recommends that the Departments of Justice & Equality, Children & Youth Affairs and Health should take the Barnahaus model into consideration when funding any additional suites.

In other jurisdictions, legal provision has been made to pre-record cross-examinations. This reduces and, on occasion, may preclude the need for complainants to provide evidence in person during a trial thereby reducing stress. The Department may wish to give consideration to introducing similar provisions.

The Society supports the DPP's proposal to establish a specialist sexual offence unit within her office and the funding (already committed to by government) required to support such a unit should be provided.

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<sup>1</sup> Commission on the Future of Policing (September 2018), chapter 20

#### **Chapter 4 - The extension, to other categories of sexual offences, of the legal provisions around anonymity and on limiting media reporting**

The Society welcomes the proposal to extend the anonymity provisions of the Criminal Law (Rape) Act 1981 to victims of offences contrary to sections 21 and 22 of the Criminal Law (Sexual Offences) Act 2017 and to persons accused of offences contrary to sections 3 to 8 of the Criminal Law (Sexual Offences) Act 2017.

The proposal to repurpose the words 'publish' and 'broadcast' in the Criminal Law (Rape) Act 1981 to incorporate social media is very much welcomed as is the proposal to extend section 6 of the Criminal Law (Rape) Act 1981 (which excludes members of the public from a trial or hearing) to include other sexual offences.

The Society endorses the recommendation that restrictions on public attendance would be extended to other named sexual offences but considers that it should also extend to the District Court in respect of all sexual offence hearings.

The Society supports the extension of the *in-camera* rule to all court hearings of sexual offences, including relevant bail applications.

## **Chapter 5 - The introduction of statutory preliminary trial hearings**

### *Preliminary Trial Hearings*

The Society welcomes the proposed introduction of preliminary trial hearings. The legislative scheme supporting the introduction of preliminary hearings has not yet been published and as such, it is difficult to comment in any substantive way on the proposal. However, it is noted that preliminary trials will address significant legal issues which will influence how a trial proceeds before a jury. In that regard, the Society considers that the fairness of the trial would be best protected if there was judicial continuity from the preliminary hearing through to the conclusion of the trial.

### *Disclosure*

It is especially important for victims to know at an early stage what medical or counselling information might be considered relevant for disclosure. Often this information becomes available very late in the process which causes great distress. The recommendations around improving the disclosure schemes for these categories of documents are welcome.

The introduction of a similar section 19A procedural provision for medical records to that which exists for counselling records would enable the courts to be proactive in accessing and determining the relevancy of medical records. The HSE and Tusla would therefore have a role in the implementation of a statutory scheme around disclosure. Both should be involved in the implementation of the recommendation that a statutory obligation should be placed on statutory bodies and government funded bodies to provide medical or counselling information promptly to the DPP for an assessment of relevancy.

The DPP and An Garda Síochána have a role in the development of a Code of Practice around the disclosure of digital material e.g. phone records and social media posts, and the Society endorses the recommendation.

### *Applications to Cross Examine as to Sexual History*

The Society agrees that applications made under section 3 of the Criminal Law (Rape) Amendment Act 1981 (to cross examine a victim as to sexual history) should be heard at a pre-trial hearing.

The current provision enables an application to be made during the trial in exceptional circumstances and the Society recommends that the provision be retained.

### *Appointment of Intermediaries at a Pre-trial Hearing*

The application to appoint an intermediary and a ground rules hearing could usefully be run at a preliminary trial hearing together with any other applications for special measures. This would provide clarity for legal practitioners as to how a trial will be conducted.

### *Criminal Legal Aid Scheme*

The introduction of a preliminary trial hearing procedure will require that practitioners prepare for, attend and present legal issues of significant complexity to these hearings. As such, the Society strongly endorses the recommendation that the criminal legal aid scheme should be reviewed to ensure that legal practitioners are appropriately remunerated for work associated with preliminary trial hearings and will be glad to engage further with the Department on the issue.

## Chapter 6 - Free legal aid for advice and legal representation

The Society strongly supports the proposal to amend section 26(3A) of the Civil Legal Aid Act 1995 to provide free legal advice to victims of sexual assault and to victims of offences which are contrary to section 3 to 8, 18, 21 and 22 of the Criminal Law (Sexual Offences) Act 2017. The proposal that advice would be free for parents/guardians of a child or a person with a mental illness or intellectual difficulties is welcomed. The right of victims of sexual assault to have free legal representation in applications to cross examine as to sexual history is also very positive.

The Criminal Justice (Victims of Crime) (Amendment) Bill 2018 proposed the introduction of a statutory entitlement for legal aid for victims of sexual offences as follows:

*“where the alleged offence involves sexual violence, gender based violence or violence in a close relationship, that the victim be provided with relevant information and legal advice by a solicitor funded by the Minister advising the victim of the process involved and actions required in order for criminal proceedings in respect of the alleged offence to be brought and heard.”*

The Society supports the recommendation that victims would have access to legal advice at the earliest stage, when it is most important. The Society is strongly of the view that a victim should be entitled to engage a solicitor of their choosing. Legal advice from a solicitor with practical criminal experience would enable the victim to be better informed around the process from making of a complaint right through to the appeal of a conviction. A comparison can be drawn with the Garda Station Legal Advice Scheme where arrested suspects are entitled to access to legal advice immediately. The Scheme is means tested and while there are deficiencies (the current level is well below the living wage and so, excludes anyone in low paid employment or those with considerable living expenses), it is operable on arrest. The Society envisages a similar scheme for victims of sexual offences which would become available as soon as a complaint is made.

In its submission to the Review Group, the Society recommended that the provision of access to high-quality legal representation for sexual offence complainants and witnesses should continue throughout the trial process. We continue to hold that view.

Regarding the proposal to provide court appointed representation for lay litigants who wish to cross examine victims, the Society cautiously supports the provisions on the proviso that the related rules and conditions will require detailed consideration by the Department, in conjunction with the Society and the Bar Council.

## Chapter 7 - Improved information and support services for victims

A strong theme runs through the O'Malley Report ('the Report') regarding the need to better equip victims with information to enable them to exercise their rights and improve their understanding of the criminal justice system as they navigate through the process. The Report makes the following recommendations:

- Department of Justice and Equality should establish a website containing comprehensive information for victims of sexual offences;
- Gardaí should develop an app to provide information to victims (addressing their language and other needs);
- Extension of support for victims in court, currently available in in the CCJ, to other venues around the country;
- Extension of witness familiarisation visits to the District Court; and
- Provision of free legal advice to an increased number of victims of sexual offences.

The Society agrees that sources of information for victims need to be consolidated and a cross governmental response to the provision of information is necessary. This should include providing information to parents/guardians around Tusla procedures (as concurrent child welfare concerns or childcare proceedings are often a factor). The Society recommends that any website, as well as being provided in a sufficient number of languages, should be developed in consultation with the National Adult Literacy Agency (NALA) in order to maximise accessibility.

COFI recommended significant investment in technology to enable An Garda Síochána to support the delivery of services<sup>2</sup>. In that regard, it seems appropriate that the recommendation on the introduction of an app would be addressed as part of that body's implementation process.

The recommendation that victim support services for court attendance (similar to those available in Dublin) would be extended nationally requires not just increased funding for victim support organisations, it also requires investment in the courts infrastructure in order to provide a safe space within court buildings for victims and their families.

Investment in non-governmental agencies will allow them to train and educate their staff/volunteers to provide a service that is supportive, informed and one which respects the judicial process which is an imperative.

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<sup>2</sup> Commission on the Future of Policing (September 2018), chapter 21

## **Chapter 8 - A register of qualified intermediaries should be introduced**

The role of an intermediary is to provide an independent service to the court. The independence of the registered intermediary is fundamental to ensuring the fairness of the trial process. As such, the need to provide an accredited system of intermediaries is of utmost urgency. Intermediaries should be appointed by the court and the Courts Service should be consulted on the implementation of this recommendation.

In Northern Ireland, the registry of intermediaries serves not just victims of crime but also vulnerable defendants so that they can understand questioning and are not disadvantaged by their age or disability. The scheme is funded by the Ministry of Justice.

It is important that the Department engages with bodies which provide training for speech and language therapists, psychologists and other specialists who work with people with intellectual and physical disabilities. The Department may also wish to consider engaging with CORU to develop an accreditation process for a register of intermediaries. It is imperative that any such scheme should operate to ensure the independence of the intermediary.

## **Chapter 9 - Reduce delay by providing sentence discount for guilty plea, appointment of additional Judges and the commission of further research on processing of sexual offence cases**

The Chapter 9 recommendations are welcomed.

It is noted that the Sentencing Guidelines and Information Committee established pursuant to the Judicial Council Act 2019 held its first meeting in July.

## **Chapter 10 - Develop and implement specialised training for members of the Judiciary and legal professionals dealing with sexual offences**

The Society endorses the recommendation that there should be specialised training for legal professionals dealing with sexual offence cases. It is widely accepted that outcomes could be greatly improved if all stakeholders were provided with the opportunity to better understand societal attitudes, rape myths and stereotyping in relation to sexual violence and victims of sexual crime. Training could also include information around trauma and how it impacts on the delivery of evidence.

### *Programme Around Trauma Awareness Skills for Lawyers*

In 2019, the Society launched an education series for members entitled '*Trauma Awareness Skill Training for Lawyers working with Children and Young People*'. The programme, which was delivered over six sessions, involved non-government organisations, psychologists, academics and legal practitioners. It focused on taking instructions from a child/young adult who had been a victim of trauma and understanding child development as well as advice for practitioners around how to protect against vicarious trauma. The Society believes that this CPD series could be adapted to incorporate the training recommendations in respect of practitioners. It could include, for example, education around rape myths, training around the role of intermediaries, the purpose of ground rules hearings and a greater understanding of disabilities.

### *Annual Criminal Law Conference*

The Society, through its Criminal Law Committee, hosts an annual conference which focuses entirely on criminal practice. Our next conference (currently postponed until March 2021) could provide the requisite training for criminal practitioners envisaged in the Report.

### *Advocacy Training*

For criminal solicitors, education needs may also include advocacy training around the examination and cross examination of vulnerable victims. The Covid-19 emergency will limit capacity to do advocacy training given the participatory nature of the training.

## *CPD Points Scheme*

The Society does not operate an accreditation scheme for specialist practitioners. The introduction of such a scheme would be a matter for the Legal Services Regulation Authority (LRSA). The suggestion in the Report that the Society would provide the names of practitioners who have completed relevant CPD courses raises some important issues for the Society, not least around data protection. While the Society is committed to providing training to practitioners in line with the recommendation, it should be borne in mind that it may not be the only entity offering such training to practitioners (and therefore may not have knowledge of training undertaken elsewhere).

The Society is concerned that a defendant accused of a sexual offence could be preventing from accessing a criminal legal aid panel solicitor of their choice due to the absence of a record of that solicitor having undertaken such training. The ability to engage a solicitor of one's choice is an important right accruing to any defendant. In that regard, the *Law Society of Ireland v the Competition Authority, O'Neill, High Court, 21<sup>st</sup> December 2005* is of relevance.

## **Conclusion**

The Society welcomes the Report's recommendations and looks forward to the role it will play in educating practitioners to provide a better informed and more rounded legal service to victims of sexual violence.

The Society will be glad to participate in any proposed implementation group related to the training recommendation as well as any other areas where that may be of assistance.

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