

LAW SOCIETY SUBMISSION



REVIEW OF THE INVESTIGATION AND PROSECUTION OF SEXUAL OFFENCES

PROFESSOR O'MALLEY WORKING GROUP: CRIMINAL JUSTICE
STRATEGIC COMMITTEE

DEPARTMENT OF JUSTICE AND EQUALITY

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Introduction

The Law Society of Ireland ('the Law Society') welcomes the opportunity to contribute to the review of the investigation and prosecution of sexual offences initiated by the Minister for Justice and Equality through the Review Group chaired by Professor O'Malley.

The Law Society is the educational, representative and regulatory body of the solicitors' profession in Ireland. This submission is based on the views of members of the Law Society's Criminal Law Committee and Human Rights and Equality Committee. The Committees are comprised of solicitors who have extensive experience and expertise in the practice of criminal law and from working on national and international human rights issues.

Representatives from the Committees met with Professor O'Malley in January 2019 to provide views. This submission reflects the Society's recommendations for consideration by the Review Group in its ongoing examination of this complex area of law.

The Society wishes to commend the approach adopted by the Review Group of consulting with relevant and diverse stakeholders to inform their research. We would also like to wish the Review Group every success with the preparation of their final Report for the Department of Justice and Equality.

Framework: Review of Investigation and Prosecution of Sexual Offences - Seven Key Elements

The Review Group was established to explore what reforms might be introduced to ensure that victims of sexual violence are not further traumatised by the trial process, and that perpetrators of such serious crimes are held to account.

The Terms of Reference task the Review Group with examining the adequacy of the mechanisms available in law and practice to protect vulnerable witnesses during the investigation and prosecution of sexual offences including, in particular, the following seven key elements:

- Access to specialist training for An Garda Síochána, members of the judiciary and legal professionals dealing with sexual offences;
- Practical supports for victims through the reporting, investigation and trial processes;
- Provision of additional legal supports to witnesses during the court process;
- Examination of measures in place to protect vulnerable witnesses during evidence, including the use of measures such as pre-recorded evidence or video-link;
- Causes of delay in sexual offence trials, and the effect of delay upon vulnerable witnesses;
- Use of pre-trial hearings to determine evidential issues including conflicts of evidence and sexual experience evidence;
- Provision for restrictions on public attendance at, and media reporting on, trials of sexual offences.

The Law Society carefully considered these seven key elements and, accordingly, we have set out each of our recommendations below.

Summary of Law Society recommendations

The Law Society's recommendations are made within the framework of the Review Group's Terms of Reference as follows:

1. Develop and implement specialised training for members of An Garda Síochána, the judiciary and legal professionals dealing with sexual offences
2. Develop and deliver practical supports for victims through the reporting, investigation and trial processes
3. Provide additional free legal supports to sexual offence witnesses/complainants before and during the court process where necessary and appropriate
4. Introduce measures to protect vulnerable witnesses including pre-recorded/video-link evidence, early depositions and prohibiting personal cross-examination of sexual offence witnesses/complainants by accused persons
5. Reduce delays in sexual offence trials with case management systems, adequate resources and specialised courts
6. Introduce pre-trial hearings to determine evidential issues and examine the current process for disclosure of medical/counselling notes
7. Restrict public attendance at sexual offence trials in the lower courts and ensure accurate reporting by media and on social media

1. Develop and implement specialised training for members of An Garda Síochána, the judiciary and legal professionals dealing with sexual offences

1.1. The Review Group is examining access to specialist training across a range of criminal justice stakeholders.

1.2. Specialised training and awareness raising for all relevant parties dealing with sexual offence cases is crucial to the improvement of the investigation and prosecution of sexual offences. Such training would enable the use of varying techniques, in terms of the interview process for a witness/complainant of a sexual offence.

1.3. Outcomes could be greatly improved by providing all stakeholders with the opportunity to become aware of and understand the societal attitudes, myths and stereotypes in relation to sexual violence and victims of sexual crimes. Training could also include information about trauma and how it impacts upon the delivery of evidence.

1.4. Accordingly, the Law Society recommends the development and implementation of a specialised training programme for members of An Garda Síochána, the judiciary and legal professionals dealing with sexual offences.

2. Develop and deliver practical supports for victims through the reporting, investigation and trial processes

2.1. The Society recommends the provision of practical supports for victims/complainants across all stages from reporting, investigation through to sentencing.

2.2. Supports could include the development of clear information about the rights of victims of sexual offences including, for example, leaflets and videos. In addition, information and support provided by appropriate specialist agencies/organisations such as the Rape Crisis Centres (RCCs) can be very beneficial in helping victims understand the stages and processes involved throughout.

2.3. Targeted assistance, including the provision of “intermediaries” or communication experts, who translate evidence for particularly vulnerable persons (for example, those in prostitution; young people; homeless people; people with mental health issues, etc.) can be especially helpful.

3. Provide additional free legal supports to sexual offence witnesses/complainants before and during the court process where necessary and appropriate

3.1. The Law Society supports the Criminal Justice (Victims of Crime) (Amendment) Bill 2018 proposed by Jim O'Callaghan, TD. The Bill proposes the introduction of a statutory entitlement to 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.”

3.2. The Law Society recommends that sexual offence witnesses/complainants have access to separate free legal advice both at pre-trial and post-trial stages of sexual offence cases. Such advice is especially important when preparing impact statements and when responding to enquiries relating to those statements.

3.3. The Legal Aid Board may be perfectly placed to deliver timely legal advice and support to victims of sexual crimes. One option might be for the Legal Aid Board to establish a dedicated panel of solicitors for sexual offence cases similar to its panels of solicitors available to provide legal services at certain inquests.

3.4. In addition, the Society recommends the provision of access to high-quality legal representation for sexual offence witnesses/complainants throughout the trial process, including, in particular, access to the book of evidence. While such legal representation of complainants would occur during the trial process and would go beyond the provision of legal advice, it could be designed in such a way as to not form part of the trial process *per se*.

4. Introduce measures to protect vulnerable witnesses including pre-recorded/video-link evidence, early depositions and prohibiting personal cross-examination of sexual offence witnesses/complainants by accused persons

4.1. A number of measures to protect vulnerable witnesses during evidence are already in place which could be extended to sexual offence witnesses/complainants. For example, the use of pre-recorded evidence or video-link; something which allows evidence to be gathered shortly after the offence/initial report to An Garda Síochána. The use of measures such as pre-recorded evidence and video-links has a potential to assist vulnerable accused/defendants as well.

4.2. In addition, the Law Society recommends early deposition which can be especially helpful for victims who may be young, vulnerable or require assistance with capacity. Early deposition enables lawyers to provide full and high-quality advice to complainants and defendants. It is also beneficial to pre-record cross-examinations at the same time as early deposition. This reduces, and, on occasion, may preclude, the need for complainants to provide evidence in person at trial. The effect is a reduction in the traumatisation for the victims of sexual offence.

4.3. Personal cross-examination of victims of sexual crimes by an accused can be very problematic and damaging for complainants. The situation arises where an accused does not instruct a solicitor or barrister to represent them during their trial. [Section 14C](#) of the Criminal Evidence Act 1992 as inserted by [section 36](#) of the Criminal Law (Sexual Offences) Act 2017 allows courts the discretion to prohibit cross-examination by accused persons of witnesses under the age of 18. The Society recommends extending this protection to sexual offence witnesses/complainants who are over the age of 18.

5. Reduce delays in sexual offence trials with case management systems, adequate resources and specialised courts

5.1. One of the possible reasons for delay in sexual offence cases may be the need for a case management system. The Society recommends the introduction of active and robust case management systems from the outset of the investigation stage to the conclusion of the trial. The establishment of an adequately resourced framework which defines how disclosure of evidence should operate and manages cases progressing to trial will greatly assist in reducing delays.

5.2. The allocation of adequate resources to both An Garda Síochána, Specialist Units and the Courts Service, alongside procedural reforms could also greatly reduce delays in sexual offence trials.

5.3. Specialist courts, where judiciary can be rotated, would deliver considerable benefits in terms of reducing delays and improving case management outcomes and importantly court user experience.

6. Introduce pre-trial hearings to determine evidential issues and examine the current process for disclosure of medical/counselling notes

6.1. The Law Society supports the introduction of pre-trial hearings which determine evidential issues. This offers considerable benefits to everyone concerned.

6.2. In addition, the current process for disclosure of material from a complainant's medical/counselling notes merits examination and reform. It is especially important for

complainants to be informed at the outset about the type of material which can be disclosed from their medical and/or counselling notes. In addition, the Courts must discern the material which can be disclosed in the context of a careful balancing of privacy rights. Specialised judicial expertise in criminal law practice greatly assists deliberations about the type of material which should be disclosed. Accordingly, the Society recommends that the Review Group examine the current process for disclosure with a view to developing appropriate reforms.

7. Restrict public attendance at sexual offence trials in the lower courts and ensure accurate reporting by media and on social media

7.1. While restrictions on public attendance are only currently available in the higher courts, it would be beneficial to extend these to the lower courts for sexual offence trials. The Law Society supports the extension of the *in camera* rule to all court hearings of sexual offences, including relevant bail applications.

7.2. In addition, in relation to media reporting on trials of sexual offences, the Society recommends the development of specific guidelines for the reporting of such trials in order to ensure accurate coverage. The Society encourages the Review Group to carefully examine the many challenges posed by the use of social media during trials and its impact on both, complainants and defendants with a view to introducing appropriate guidelines/restrictions.

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