TRIAL VENUE AND PROCESS: THE VICTIM AND THE ACCUSED

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I deliver the following presentation on behalf of the Rape Crisis Network Ireland. The RCNI is an umbrella organisation which has been in existence since 1985 and currently represents 15 member centres.

The mission of the RNCI is to provide support, information, training and development for all member rape crisis centres on the island of Ireland. As an accessible and informed organisation it supports the staff and volunteers of Rape Crisis Centres in the interests of all survivors of sexual violence through raising public awareness and lobbying for change.

Amongst our key objectives are:

- to ensure the highest standards of support and counselling for survivors of sexual violence;
- to undertake research and promote awareness as to the causes, nature and extent of sexual violence;
- to raise public awareness about the issues of sexual violence and the needs of survivors of sexual violence; and
- to campaign for the societal and legislative changes that will help work towards the elimination of sexual violence and sexual abuse.

In the past year the RNCI has made submissions to:

- the National Plan for Women;
- the Review of the Anti-Poverty Strategy;
- the Sex Offenders Bill;
- the Women's National Health Plan;

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- the elections for Government through an election manifesto;
- the corporate plan of the Legal Aid Board; and
- the Working Group on the Jurisdiction of the Courts.

It is in furtherance of this latter submission that I address you today.

Informing the RNCI position on this submission were the nationwide "round table" discussions held earlier this year and an ongoing process of consultation with member centres.

To commence I would like to welcome the opportunity afforded by this conference to put 'centre stage' the views and experiences of survivors who have encountered our criminal justice 'system' in their pursuit of justice.

The aspiration of those who have informed this input is the betterment of the path of those who follow in their footsteps.

My presentation has broad themes and I make no apology for the fact that a number of them fall outside the strict parameters of jurisdiction. The 'system', by which I mean the entire process from the complainant's decision to report (or indeed not to report) through to the prospects of a return to a pre-offence level of functioning, is not viewed incrementally by a survivor. The complainant's experience through each stage of the process informs and impacts upon each subsequent stage, contributing to his/her net evaluation of system; it is appropriate therefore that each stage of the process informs and impacts upon our understanding of their viewpoint.

We live in what an old Chinese curse terms 'interesting times'. These interesting times have seen a percentage increase in the level of reported rape between 1950-1998 of 2,333%.[1] We see a current annual increase of

[1] The Institute of Criminology, U.C.D., *Crime in Ireland: Trends and Patterns, 1950 to 1998*, p. 33.

91% in the reporting of sexual assault.[2] Yet, based on recent research,[3] we know this still to be only the tip of the iceberg.

The status or *locus standi* of the complainant has, until recent times, been largely ignored. Historically it was possible to trawl through countless volumes purporting to give a complete overview of the criminal justice system and not find a single reference to the victim at all. Thankfully things appear to be changing. It may be somewhat cynical of me to suggest why they are at last changing, but the simple fact is that unless we can engage the complainant in the process and halt the current rate of attrition,[4] we can, as a society, abandon hope of providing an effective bulwark of protection to victims of sexual violence.

I. Welcome Reforms

In many respects Ireland can stand proudly over its "respectable body of statute and case law" in the area of sexual violence.

Amongst its worthy achievements:

- The elevation of rape, rape under s. 4 and aggravated sexual assault to the exclusive jurisdiction of the Central Criminal Court. More worthy still was the *raison d'etre* for the decision, in adopting as they did the LRC recommendation, but expressly rejecting the basis for the recommendation, and substituting in its place that "this decision was intended to be seen as an expression of the seriousness with which the government view crimes of rape and aggravated sexual assault" this marker of the "heinous nature"

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[2] An Garda Síochána, *Annual Report 2001*, p. 92.

[3] The SAVI Report calculates adult (female) disclosure of sexual violence to be 7.8%. McGee, Garavan, de Barra *et al.*, *The SAVI Report: Sexual Abuse and Violence in Ireland: A National Study of Irish Experiences, Beliefs and Attitudes Concerning Sexual Violence*, p. 128.

[4] The SAVI Report calculates attrition at 95.1% (p. 135).

and the need to mark "societal condemnation of rape and serious sexual assault".[5]

- The abolition of the mandatory corroboration warning by virtue of s.7 of the Criminal Law (Rape) (Amendment) Act, 1990. The provisions of s. 5 of the Criminal Justice Act, 1993 establishing the complainants right to be heard as to the effect of the offence(s) either by way of victim impact statement or indeed by way of oral evidence.
- The provision of video-link facilities to young and vulnerable witnesses (with leave).
- The introduction of separate legal representation under the Sex Offenders Act, 2001.

II. The Complainant's Trial

A. Reasons for Decisions

As already discussed, in the arena of sexual violence, an overwhelming majority of complainants simply do not engage with the criminal justice system. Of those that do report to the Gardaí, an overwhelming percentage (approximately 75%) find that "their" case is not being proceeded with. Currently they are not informed as to the reason for this prosecutorial decision, and save with the exception of the 2000 DPP's report, we are not able to estimate in even the broadest terms the breakdown of "reasons". In my submission, the context in which we must view the sense of disempowerment felt by the complainant faced with a decision directing no further action is by reference to the nature of crimes of sexual violence. Crimes of sexual violence are, by their nature, crimes of the most profound abuse of power. That the complainant experiences a further sense of powerlessness through the system is well

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[5] Minister Burke speaking in the Dail, 20 November 1990 (402 *Dáil Debates* 1838).

documented.[6] We compound this disempowerment further by failing to afford the complainant a cogent, comprehensible reason for such a decision. I acknowledge that there may be a minority of cases where disclosure of the 'reason(s)' may not be held to be in the 'public interest'; in such cases a mechanism akin to certificates of public interest immunity may be an appropriate compromise. Furthermore I believe such a debate needs to be informed by developments in other like jurisdictions.

There is a clear need for an accountability mechanism that is less cumbersome, and more capable of probing the real reasons for decisions and facts on which they are based, than the judicial review procedure.[7] This need for greater accountability and transparency was legislatively recognised in the U.K. by the Crown Prosecution Inspectorate Act 2000, which established an independent CPS inspectorate; its reports are public and frequently critical.

That a similar tide of opinion is discernable within this jurisdiction is evident from the Courts Service's own annual report:

> [T]he institutions of State can no longer perceive themselves as being exempt from public scrutiny. … [P]ublic bodies [need] to show themselves to be open and transparent in their dealings with the public.[8]

Further the 'reasons' for decisions ought properly to continue throughout the trial process and encompass situations where 'sample' charges are being preferred or pleas to lesser offences are acceptable.

The advantage of such an open policy would in my opinion flow both ways, empowering the complainant and

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[6] See generally Alder, *Rape on Trial*.

[7] See generally Burton, "Reviewing CPS Decisions not to Prosecute", [2001] Crim. L.R. 374.

[8] Courts Service, *Annual Report 2001*, p. 21.

'vindicating' the prosecution as, *per* Lord Bingham C.J., such a decision ought to be supported by the disclosure of fairly full reasons

> ... to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision, and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given.[9]

B. The Provision of Information

Incomprehension as to workings of the judicial system pose significant hurdles to the uninitiated (and all too frequently to the initiated as well!). Many enquiries to the Network seek answers to aid navigation of these unknown waters. I would propose that our education system ought, perhaps as part of the CSPE programme, to chart a course equipping our citizens with at least a rudimentary knowledge. Further and more detailed information needs to be made available to a complainant so that a "High Court application for judicial review seeking an order of prohibition" is not explained to a complainant as "a hearing in the High Court that you do not need to worry about as your attendance is not required".

In charting measures thought to reduce complainants' stress Jenny McEwan cites the provision of "the most extensive information possible about what will happen to them at court" as a key recommendation.[10] I would fully concur with her observation and add what I believe to be an important, though undeniably controversial addendum. I believe it to be the right of all complainants to be informed of

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[9] *R. v. DPP ex parte Manning & Melbourne* [2000] 3 W.L.R. 463, at 478.

[10] McEwan, "Special Measures for Witnesses and Victims" in McConville and Wilson (eds.), *Handbook of the Criminal Justice Process*, p. 242.

the impending release of the defendant in their case, with sufficient safeguards to preclude the possibility of such notice posing a threat to the safety of the defendant. It cannot surely be justified that the first notice a complainant may have of release is when he/she quite literally 'bumps into' the defendant in their home town.

C. Reporting Restrictions/Anonymity

The overwhelming majority of clients in RCCs throughout the country cite the protection of their identity in the process to be of paramount importance and a key determinant as to their willingness to report. The anonymity bestowed upon a complainant by virtue of the Central Criminal Court hearing cases in Dublin only has been welcomed almost universally. The beneficial effect of the exclusive jurisdiction of the Central Criminal Court was an anticipated benefit of the 1990 legislation and indeed was referred to by the Minister thus:

> The legislation goes to considerable lengths to reduce the trauma and to protect the identity of the complainant and the holding of trials in Dublin can only serve to preserve her anonymity far more effectively than could be done if the trial was in her home town.[11]

It must therefore be said that the arbitrary line drawn between offences that must be tried in the Central Criminal Court and those remaining on Circuit (and thus in the locale of either the defendant or the complainant) is incomprehensible, and I would submit unjustifiable. In particular, to leave incest proceedings on Circuit renders 'cosmetic' provisions designed to safeguard the identity and the dignity of the complainant. Evidence of low-grade intimidation abounds where complainants have to share

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[11] Minister Burke speaking in the Dail, 20 November 1990 (402 *Dáil Debates* 1840).

waiting room/cloakroom facilities with the defendant and his family while awaiting hearings. All too frequently the physical environs of the court houses throughout the country make such contact inevitable with no separate waiting facilities being available outside of the capital.

Further, rare as it might be for a native of Connemara to argue in favour of centralisation, a further advantage of such a concentrated nucleus of activity is the more efficient provision of services, in particular the provision of separate legal representation.

D. Other Measures To Ease the Journey of the Complainant

The context in which I believe we should view such measures that have as their core purpose easing the passage of the complainant through the trial process is that adopted by the Scottish Council for Civil Liberties who argued that "matters should not be seen in the 'zero-sum' terms of any gains in rights for complainants necessarily diminishing the rights of the accused or vice versa."[12]

In fact it is the "clear duty of the trial judge to do everything he can, consistently with giving the defendant a fair trial, to minimise the trauma suffered by other participants."[13]

The single most appropriate measure that would best minimise the 'trauma' of a complainant during trial would be the adoption of a rebuttable presumption that special measures must be used for complainants in sexual cases.[14]

Thus the use of screens, video-link, intermediaries and a consideration of pre-taped evidence in chief (having as it does the advantage of being a great deal more 'contemporaneous' than live evidence months, sometimes years after the event) would be the norm, departed from only where the interests of justice so demanded.

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[12] Brown, Burman and Jamieson, *Sex Crimes on Trial*, p. 11.

[13] Per Lord Bingham C.J. in *R. v. Brown* [1998] 2 Cr. App. R. 364 at 371.

[14] See the English Youth Justice and Criminal Evidence Act, 1999.

The Department of Justice has enunciated as a key objective "[t]he need for balance and proportionality ... to find the right balance between the competing rights of the accused, the prosecutor, the victims of crime and society generally".[15]

It is my respectful opinion that we have failed to achieve this balance and that it is time to re-align the position of the complainant within the framework of the criminal justice system. To persuade the complainant to enter the arena we must, as a matter of urgency, confront the reality that the current system is perceived by many as confrontational, humiliating and fundamentally lacking in justice.

E. Delay–The Long Journey

Delay was an expected consequence of the jurisdictional alterations achieved under the 1990 legislation. I know I preach to the converted when I condemn the currently unacceptable levels of delay being experienced by both defendant and complainant alike.[16] However the delay was anticipated, and was indeed the basis for initial opposition when this matter was being debated before both Houses. The Minister himself gave an undertaking to the House to "keep the situation very carefully under review".[17] Failure to so monitor, and to implement the necessary remedial actions, should not be advanced as justification for a down-grading of jurisdiction.

F. To Walk In the Other's Shoes

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[15] Deptartment. of Justice, Equality and Law Reform, *Strategy Statement 2001-2004,* Objective 4.30.

[16] The Courts Service *Annual Report 2001* gives the waiting time as 16 months with 168 cases outstanding as of 31 December 2001 (pp. 72-73).

[17] Minister Burke speaking in the Dail, 20 November 1990 (402 *Dáil Debates* 1839).

To conclude I ask you to embark on a journey, perhaps different from that you have undertaken before, to view our 'system' from a new perspective. Most, if not all of us, believe that we are able to see from the other's vantage point. I ask you to test whether that is truly the case-to have the "gift to see ourselves as others see us".

In lobbying for change, robustly if necessary, I would nevertheless hope to adopt a consensus approach. For too long perhaps, a war of attrition has raged, the dogged defence of one's 'side' all too frequently obscures the bigger picture. We strive ultimately towards the same end-justice as defined by Curzon's *Dictionary of Law* as "[t]he virtue which results in each person receiving his/her due".

It is my great honour on behalf of all survivors of sexual violence to ask only that they receive their due.