THE REPORT ON PROTECTIONS FOR VULNERABLE WITNESSES IN THE PROSECUTION AND TRIAL OF SEXUAL OFFENCES

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In early August 2020, the Department of Justice and Equality published the report of a Working Group which I chaired on Protections for Vulnerable Witnesses in the Investigation and Trial of Sexual Offences. The Working Group was established in the aftermath of a high-profile rape trial in Belfast involving four men, including two well-known rugby players, all of whom were acquitted. That trial attracted enormous publicity and, unfortunately, the complainant's name seems to have been revealed on social media. It would have been different if the trial had been held in this jurisdiction where the public would have been excluded and the defendants would have remained anonymous. Nonetheless, the then Minister for Justice, Charlies Flanagan TD, took the view, rightly as it transpired, that this was an opportune moment to review the protections available for victims of sexual crime at key stages of the criminal process.

Our remit was to consider the treatment of "vulnerable witnesses" as opposed to "victims." This was appropriate because a defendant may also be vulnerable by virtue of age or disability, as may other persons who are called to testify. However, the bulk of the report is devoted to the treatment of victims who, in sexual offence cases, are predominantly women or children. In keeping with best international practice, we recognised that a witness may be vulnerable, not only because of youth or disability, but also because of the nature of the alleged offence and the stressful and, at times, traumatic, experience of having to testify at a criminal trial. When viewed from this perspective, virtually all sexual offence victims may be classified as vulnerable.

I am happy to say that when we presented out report to the Minister for Justice and Equality, Helen McEntee, TD, she took a deep personal interest in it, and undertook to initiate a ten-week implementation period. Impressively, she and her departmental officials, together with representatives from other key agencies, made good on that promise. In late October, the Department published

Supporting a Victim's Journey: A Plan to Help Victims and Vulnerable Witnesses in Sexual Violence Cases. This detailed document sets out the steps that will be taken to give effect to the recommendations (of which there are about 60 in all) made in our report. For instance, it deals at length with the steps the Government proposes to take to promote awareness about the meaning and importance of consent.

Because this conference is being held remotely and the time for each presentation is strictly limited, I will deal with only four issues covered in the Report:

- Intermediaries
- Legal information and advice for victims of sexual crime
- Delay in the criminal justice system
- Training.

This paper is also shorter than usual, because the Working Group's Report and the Implementation Plan recently published by the Department of Justice and Equality are both available on the Department's website (www.justice.ie).

INTERMEDIARIES

Intermediaries often have a critical role in assisting children and persons with disabilities to give evidence. In fact, the availability of intermediary assistance can make all the difference in terms of being able to bring a successful prosecution. An intermediary is a person, usually with a professional background in speech and language therapy, psychology or a cognate discipline, who has the skills and expertise to assist witnesses who have communication difficulties. Such assistance is most likely to be needed by children or persons with disabilities who are called to give evidence. It is not only persons with mental disabilities who may need the help of an intermediary. A person with a severe physical disability, perhaps resulting from a brain injury or a degenerative disease, may also require such assistance.

The Criminal Evidence Act 1992 provides of the use of intermediaries. Section 14, as originally enacted, provided that when a person under the age of 17 years is giving evidence through a live television link in a trial for a sexual or violent offence, the court may require that any questions put to the witness be put through an intermediary. The intermediary may put the questions to the witness "either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his age and mental condition the meaning of the

questions being asked." By virtue of s. 19 of the 1992 Act, this and certain other provisions of the Act, apply to witnesses with a "mental handicap" who are aged 17 years or older. The law is now effectively the same save that the age has been raised to 18 years and a further provision has been inserted (by the Criminal Justice (Victims of Crime) Act 2017, s. 30 to the effect that an intermediary may also be used in proceedings for any other offence where the victim is under 18 years and giving evidence by live television link. In such a case, the court may direct that questions be put to an intermediary if satisfied that the interests of justice so require.

As envisaged by the Criminal Evidence Act 1992, therefore, the role of the intermediary is essentially an interventionist one. The intermediary is there to interpret, as it were, for the witness the questions being put to him or her by the questioner (who will almost invariably be the lawyer for either the prosecution or the defence). However, as the experience of other jurisdictions shows, intermediaries may also serve an important advisory role, and the Working Group believes that intermediaries could usefully serve such a function in Ireland as well. This, in effect, would have the intermediary assess the witness prior to the relevant proceedings and then advise counsel and the court as to any communication difficulties the witness has, and to recommend any steps that should be taken to address them. In many cases, those steps might amount to nothing more than taking care to ask questions in short, simple sentences.

Further, the Criminal Evidence Act 1992 provides for the use of intermediaries at the trial only. Yet, intermediary assistance may also be needed during the police questioning of a potential witness, including a suspect. After all, the quality of the evidence gathered at that preliminary stage may be crucially important, both in relation to prosecution decisions and, in the event of a prosecution, at the trial itself. Nowadays, the Gardai have special interview suites in various locations throughout the country for interviewing young victims. These can easily accommodate the presence of an intermediary. We have therefore recommended that intermediary assistance should be available, where necessary, at the police questioning of vulnerable persons in sexual offences cases.

In organisational terms, we have recommended that a cohort of appropriately qualified intermediaries be recruited, trained and placed on a register of intermediaries. They can then be called upon to act as needed. The Department of Justice and Equality has accepted our recommendations and sets out in its recent Implementation Plan the steps being taken to give effect to them.

INFORMATION AND ADVICE FOR VICTIMS OF SEXUAL CRIME

In recent years, there have been many suggestions that a victim of sexual crime should have separate legal representation throughout a trial. We are not recommending this, and for a few reasons. First, the criminal trial is a binary contest between the state (as represented by the prosecution) and the accused. It would take very compelling reasons to upset this balance, and it would be even more questionable to do so in respect of one category of offence only. Secondly, the trial itself is only one stage of the overall process at which a victim may need advice and information. The criminal process may be viewed as a continuum punctuated by key decisional moments of which the trial is just one, albeit a central and crucially important one. But earlier along that continuum are decisions relating to the charges to be brought, bail, the choice of venue (in some instances) and so forth. But it is also important to recognise that the trial itself is not always the end of the process. If there is a conviction, there may be one or more appeals against conviction, sentence or both. If a convicted person is sentenced to imprisonment, as he almost invariably will be in a serious case, he may eventually qualify for early release, through parole or some similar mechanism. Victims obviously have a strong interest in all of these decisions, and it is essential to have an effective system in place for advising them accordingly.

We have therefore recommended a number of things. First, we propose the creation of a dedicated website, which would be easily accessible and widely publicised and which would bring together all the information which a victim of sexual crime may need from the immediate aftermath of the offence to the conclusion of the process. Secondly, we recommend that every victim of sexual crime should have access to legal *advice.* This should be available irrespective of whether or not there is a prosecution. As it happens, there is already a provision, though little known, in the Civil Legal Aid Act 1995 (s. 26(3A)) to the effect that the Legal Aid Board shall grant legal advice to a complainant in a prosecution for certain specified sexual offences. We recommend that this should be extended to provide for such advice even in cases where there is no prosecution and that the range of offences to which it applies should be extended. We further acknowledge that the Legal Aid Board and its solicitors are often greatly overburdened with work. It should however be possible to introduce a kind of voucher system which would permit a victim to go to a solicitor in private practice to get such advice. Care would have to be taken, however, to ensure that any solicitor offering such advice has the necessary

experience and expertise in criminal law and in proceedings relating to sexual offences in particular.

As all participants in this conference will be aware, the Sex Offences Act 2001 provides for the grant of legal representation, free of charge, to a victim in the event of an application being made during to question a victim under s. 3 of the Criminal Law (Rape) Act 1981 (about other sexual experience). We recommend that this provision be retained but also extended in some important ways. First, any application due to be made under s. 3 should be flagged to the trial court well in advance, preferably at a preliminary hearing, so that the Legal Aid Board is in position to instruct a counsel of the same level of seniority to represent the victim. Secondly, we recommend that it should be possible for the assigned counsel to continue to represent the victim while the questioning about other sexual experience, if permitted, is taking place.

Of course, we accept that there are many other ways in which victims can be, and actually are, assisted. We commend the court familiarisation facility which the DPP's office provides for victims, as well as the tremendous contributions made by victim support groups and those who, again entirely voluntarily, offer a court accompaniment service for victims.

I might interpolate at this point one general concern that forms a theme running through the Working Group's Report, and this is the need for a consistent standard of service throughout the country. It is widely agreed that the Criminal Courts of Justice in Dublin has excellent facilities and the same holds true of some newly constructed court buildings elsewhere in the country. However, many sexual offences are tried in the Circuit Court (and indeed some in the District Court). For instance, all the new offences created by the Criminal Law (Sexual Offences) Act 2017 are triable in the Circuit Court. It is important that victims should have access to the same range and standard of services irrespective of the venue in which a case is tried.

REDUCING DELAY

Delay was one of the recurring themes in the consultations we had with victim support groups and others. Their concern about this issue is, I might add, entirely legitimate and understandable. Obviously, when it comes to discussing delay in any criminal justice context, a distinction must be drawn between, on the one hand, those time periods which are necessary for the investigation of offences, decisions on prosecution, the making of disclosure, time for the

preparation of the defence and so forth and, on the other, unwarranted or avoidable delay. It is the latter that should be the focus of our attention. I had initially hoped that it might be possible to include in the Report a detailed empirical analysis of the progress of a sample of, say, 50 cases, from the time when the offence was reported to the Gardai until the matter was ultimately disposed of by verdict or appeal, as the case may be, but ultimately that did not prove possible. However, there is no reason why such an exercise should not be undertaken by others in order to identify any recurring problems and possible solutions to them.

Appointing or assigning additional judges to the senior criminal courts is the remedy most commonly suggested to deal with delay, and the Working Group does not deny that this could make a significant contribution to resolving the problem. I want to make clear therefore that we are not in any way opposed to the appointment or assignment of additional judges if it appears that this would help. However, we are also conscious that there may be deeper systemic problems that may need to be addressed first. Perhaps the greatest cause of concern, from what we heard at least, is that trials must often be adjourned or postponed at the last minute. Sometimes, of necessity, the adjournments have to be for a considerable period of time, and this can obviously be a source of stress for victims, defendants and family members of both.

We do not suggest that there is any one panacea to this problem but one key suggestion we make – and of course we are by now means the first to so do – is that a formal system of preliminary or pre-trial hearings should be introduced. There is an entire chapter of the Report devoted to this topic. The hope is that at such a hearing, the court could be informed if a case is actually ready for hearing and, if not, of the steps necessary to address any outstanding issues. One of those issues may well be disclosure which is also addressed at length in Chapter 6 of the Report. At the very least, this might reduce, if not eliminate, the number of instances in which a trial has to be adjourned at the last minute. There has been draft legislation (in the form of the heads of a Criminal Procedure Bill) in existence for several years to introduce preliminary hearings. The Department of Justice and Equality has now promised that the draft legislation will be published before the end of this year. This is to be welcomed.

TRAINING

The idea of ongoing training for lawyers and judges used to be a rather contentious, even emotive, issue. Just as the Roman poet Juvenal asked *quis custodiet ipsos custodes?* ("who will guard the guards themselves?"), lawyers (especially senior ones) and judges would ask: "Who, pray, are you suggesting should give us the training?" Nowadays, however, there is much more acceptance of the need for ongoing professional development. Indeed, the Judicial Council Act 2019 provides for the establishment of a Judicial Studies Committee tasked with providing ongoing training for judges, and it includes a non-exhaustive list of matters on which training should be provided including dealing with victims of crime and the conduct of trial by jury. Our report therefore recommends that the Committee in question should consider giving priority to training in respect of dealing with crime victims.

Each of the two legal professions has its own CPD system, and all practising members of each profession must accumulate a certain number of points annually through attending courses, seminars and so forth. Obviously, not all members of the professions need special training in relation to dealing with victims of sexual offences. It is only necessary for those whose professional work will or may involve such dealings. The Working Group gave considerable thought as to how such training might most effectively be provided. Eventually, we decided that it was probably best to delegate responsibility for the matter to the professions themselves. We therefore recommend that each profession should require those of its members who have professional dealings with victims of sexual offences, to undergo special training.

Very briefly, what we recommend in Chapter 10 of the Report is that existing CPD systems should be revised so as to require that relevant lawyers (those dealing in a professional capacity victims of sexual crime) take a foundational course, followed periodically by additional or refresher courses. The professional bodies may incorporate this into their existing CPD programme or else make it an additional requirement. It will be part of the implementation process to draw up an appropriate training programme. In terms of monitoring and implementation, any state body responsible for briefing or assigning lawyers to deal with sexual offence victims or for admitting lawyers to the criminal legal aid panel will be entitled to seek from the relevant professional body a list of those who have completed the approved training course.

As already noted, the content of the training programmes is a matter to be determined, but I hope that, essentially, they will provide an opportunity for lawyers to engage with other professionals who deal with victims and, indeed, other vulnerable witnesses in sexual offence cases. Training can be dialogic rather than one-way. Lawyers have much to learn from other professionals such as therapists, but those other professionals can doubtless learn much from their engagement with lawyers. The same, indeed, hold true of judicial training. It is to be expected there will be a certain amount of trial and error at the beginning but, over time, it should be possible to develop effective training programmes that will be practically useful and beneficial to all concerned.