RCNI Submission on the General Scheme of the forthcoming Criminal Justice (Community Sanctions) Bill 2014

April 2014

Introduction – Rape Crisis Network Ireland Overview:

1.0 **Rape Crisis Network Ireland broadly welcomes the forthcoming Criminal Procedure Bill 2014, as set out in the General Scheme.** In particular, RCNI welcomes the introduction of Preliminary Trial Hearings in Head 2 as an important measure to help reduce unnecessary and stressful pre-trial delays and uncertainty for victims of sexual crimes, having campaigned for their introduction since 2008.

Rape Crisis Network Ireland: Aims, Activities, Goals, Members, Staff, links with NSC and LISC

2.0 **RCNI** is the national representative body for its 13 member Rape Crisis Centres**.** The RCNI role includes the development and coordination of national projects including expert data collection, supporting Rape Crisis Centres to reach best practice standards, legal advice and policy development, and influencing national policy and social change**.** Our member Rape Crisis Centres provide free advice, specialised counselling, advocacy and other supports such as Court and Garda accompaniment, for survivors of sexual abuse in Ireland, including a growing number between the ages of 14 and 18. The RCNI Legal Director has chaired the Legal Issues Sub-Committee of the National Steering Committee on Violence against Women from September 2008 to date[1]. As the Committee will be aware, in 2011 LISC produced a detailed submission to the NSC setting out its analysis of the advantages of pre-trial procedures in criminal courts, following the lead of several other bodies[2].

3.0 **This Submission – Structure:**

This submission is made on a Head by Head basis, beginning with Head 2, and is limited to those Heads which are most relevant to victims of sexual violence crimes.

1. **Head 2:** This submission supplements the RCNI Policy Paper entitled "Reducing Delays in Court: RCNI Policy Paper on Case Management and Pre-Trial Hearings in the Criminal Courts", published in 2012 and available online through the weblink below[3]. This Policy Paper represents RCNI's position on preliminary trial hearings in some detail, and as far as Head 2 is concerned, it stands as RCNI's submission to the Joint Oireachtas Committee, subject only to some supplementary remarks and updates listed below under **Head 2.**

[1] NSCVAW is a high-level multi-agency advisory body, chaired by the Head of Cosc, the National Office for the Prevention of Domestic, Sexual and Gender-Based Violence. Its remit includes making recommendations to Government and relevant State agencies for the improvement of existing services and structures which affect victims of both domestic and sexual violence.

[2] The analysis and recommendations of the LISC submission are mirrored in the RCNI Policy Paper referred to at note 3 below.

[3] http://www.rcni.ie/wp-content/uploads/RCNICaseManagementandPreTrialHearingspositionpaperMay12.pdf. The document may be forwarded to the Clerk to the Committee on request to the RCNI office as an electronic attachment and/or in hard copy, if for any reason this weblink does not work properly.

2. Heads 3, 8 9: The balance of this submission is on these three Heads of the General Scheme of the Criminal Procedure Bill 2014, following the order of the Scheme.

3. Executive Summary: Checklist of RCNI Recommendations on the General Scheme of the Criminal Procedure Bill 2014.

4. Appendices

- Appendix I: List of RCNI policy papers relevant to the topics addressed in the General Scheme of the Criminal Procedure Bill 2014
- Appendix II: LISC composition and remit – an explanatory note

4.0 Head 2 - Preliminary Trial Hearings: RCNI Supplementary Remarks and Updates since the publication of the original RCNI Policy Paper on Case Management and Pre-Trial Hearings in the Criminal Courts in May 2012.

4.1 Head 2 (1) and (2): These two subheads give a power to a "judge of the court concerned" on the court's own motion or on the application of the "prosecutor or the accused", to hold one or more preliminary trial hearings. They do not make preliminary trial hearings mandatory. In our view, preliminary trial hearings must be mandatory to be effective, that is, to reduce unnecessary delays and increase certainty (for complainant victims of sexual violence in particular but also for others concerned in the trial process), and to increase the efficiency with which trials on indictment are conducted. If it is possible to circumvent preliminary trial hearings, there is a great risk that the desired benefits for complainants (and others, including the Courts Service) of reduced delays and greater certainty and efficiency under a mandatory system of pre-trial hearings, will not appear. Indeed, there would be more uncertainty and additional stress for complainants, as they would have to await a decision on whether there would be a preliminary trial hearing at all. It does not seem to us fair or appropriate that complainants should have to deal with an extra level of uncertainty as to which trial system they will have to face. It also seems to us, with great respect, potentially difficult and wasteful of resources for all others concerned in any trial on indictment to have to make a decision whether or not to hold/apply for a preliminary trial hearing. If judge, prosecutor and accused know that they must be ready for a preliminary hearing by a certain time, they will concentrate their minds and their efforts to ensure that they are ready for it, as far as possible. It should be noted that all three would still have to read the papers, where appropriate take instructions, and consider the case in order to work out whether to hold/apply for a preliminary hearing, if preliminary trial hearings remained optional, so any time and money saved by not holding a preliminary hearing in every case might well not be significant.

We cannot find an example of a system of optional pre-trial hearings for trials on indictment at least, in another jurisdiction, nor can we find any recommendation that such a system be introduced, in any of the reports which examined the issue over the last decade or so (listed in the RCNI Policy Paper at page 5 footnote). Finally, we note that the pilot Practice Directions on Pre-Trial Procedure in the Dublin, Midlands and South Eastern Circuits introduced over the last two years, do not make any reference to any opt-out possibility.[4]

[4] See for example, the Dublin Circuit Practice Direction on Pre-Trial Procedure, available online through this weblink: http://www.courts.ie/courts.ie/library3.nsf/16c93c36d3635d5180256e3f003a4580/41fc36c4b425f33a80257a9b004e85f5?OpenDocument – which refers to "all cases"

Further on Subhead 2(2), it seems to us that this subhead might be worded more strictly to make it clear that a second or subsequent preliminary trial hearing will be held only if the interests of justice make it necessary, such as in a situation where there has been a significant change of circumstances since the last hearing – in order to ensure that neither party is tempted to avoid a full hearing by re-applying for one or more essentially unnecessary additional preliminary hearings. The principle that as far as possible, everything which can be dealt with in advance of the trial is addressed at one preliminary hearing, should be reinforced by Rules of Court setting out the limited circumstances in which a second or subsequent preliminary hearing will be allowed.

RCNI recommends accordingly that preliminary trial hearings are made mandatory for all trials on indictment.

4.2 Head 2(3): RCNI welcomes this provision.

4.3 Head 2(4) (a) & (b): (admissibility of evidence and prohibition respectively) RCNI notes that these provisions are very broad and general, and that the approach is much more permissive than that put forward in its own Policy Paper and some others (for instance, the 2007 Report on "Balance in the Criminal Law")[5]. While our own Paper envisaged a scenario where the trial judge dealt with all preliminary matters[6], and the General Scheme adopts the opposite solution whereby all preliminary rulings are binding on the trial judge, whoever made them, nevertheless we remain concerned that Subhead 2(4) (a) and indeed, Subhead 2(5), as drafted might be broad enough to permit "trials within a trial" to become commonplace. If such "trials within a trial" were to give the defence the opportunity of a "dry run" at the evidence as a matter of routine, this would be extremely traumatising for complainants and would risk having the effect of increasing already high rates of attrition. Our Paper recommends that preliminary hearings on the admissibility of evidence be limited to those cases where the success or failure of the prosecution hinges on one vital piece of evidence, for example where a hard drive with child pornography on it is the only evidence capable of securing a conviction and that evidence will not admitted if it shown that the search warrant under which it was seized, - was obtained and/or executed in an illegal manner. Not only is this more efficient with regard to scarce resources, it is much more humane for complainants.

While we understand of course that the intention of this General Scheme is to make preliminary rulings on admissibility of evidence binding on the trial judge and we accept that this makes sense as a general principle, nevertheless in our view the General Scheme must avoid at all costs the spectre of repeated cross-examination of complainants occurring as a matter of routine[7]. They will be cross-examined all over again, with the added value for the defence of their previous preliminary hearing testimony, if the evidence in issue is admitted, unless this is prevented either by more restrictive wording in the statute itself or in the Rules of Court accompanying it. We also submit with great respect that a more restrictive approach is now appropriate, given that the EU Directive establishing minimum standards on the rights, support and protection of victims of crime puts the onus on the

[5] "Balance in the Criminal Law Review Group Final Report 2007, available online at: http://www.justice.ie/enJELR/BalanceRpt.pdf/Files/Balance/Rpt.pdf

[6] See in particular, paragraph 1.16 on pages 14-15 of our own Policy Paper, full reference thereto at note

[7] Of course this may be unavoidable under Section 3 Criminal Law (Rape) Act 1981 (as amended) proceedings, but in that scenario, the complainant at least has the right to her/his own legal representation on the application for leave to adduce the evidence. Our concern is to ensure that double cross-examination of complainants (who will be unrepresented if the point is not a Section 3 one) remains restricted and that opportunities for it do not expand unnecessarily.

State to ensure that measures are in place to "avoid unnecessary questioning concerning the victim's private life not related to the criminal offence", at Article 23(2), where those victims have specific needs (victims of sexual crime do).[8]

RCNI recommends that any Head 2(4)(a) and Head 2(4)(b) wording and any accompanying Rules of Court preclude repeated cross-examination of complainants on the same issue(s) in both Preliminary Trial Hearings and full trial proceedings; that the limited circumstances in which it is possible are identified clearly, and exclude Head 2(4)(b) applications altogether; and that the statutory provisions, and any accompanying Rules of Court, give clear powers and duties to the judge to prevent or restrict any cross-examination of complainants which attempts to go/does go beyond those limited circumstances. Such a proactive approach by the court to repetitive and/or oppressive questioning of victims, sometimes with dubious if any relevance to the issues in the trial, could do much to reduce the justifiable fears of many victims that the court process may be as traumatising as the crime itself, or even, more so.

Head 2(4) (c), (d), (e) and (f): RCNI agrees that all these matters should be on the list. Perhaps at (f), efficient administration of justice, or Case Management could be considered as a basis on which the court might make an order, provided of course that this principle did not in conflict with due process and/or the interests of justice in a particular case. We would suggest that this Head also include an explicit provision giving the judge both the power and the duty to make enquiries of both parties at the Preliminary Trial Hearing about administrative and (usually) non-contentious matters, such as facts, reports, statements etc which may be agreed, dates on which witnesses cannot attend, arrangements for video-recorded and video-link evidence, translators, and so on. Both parties could be encouraged to give their views on the time needed for the trial itself, having regard to these practical arrangements. Their answers should be recorded and the judge should have the power to make binding rulings on these matters as well, where appropriate. This process should ensure both more accurate time estimates for trials and more streamlined and efficiently run trials, by obliging everyone involved to focus on the real issues at an early stage.

RCNI recommends that this Head be amended to include specific Case Management powers and duties for the judge at the Preliminary Trial Hearing, to enquire, record and give directions on routine administrative and other non-contentious matters, such as agreed statements, reports, and so on.

Head 2(5): RCNI agrees that rulings made in preliminary trial hearings should be binding at trial – otherwise there is likely to be a proliferation of applications at trial in essence aimed at setting aside earlier rulings.

Head 2(6), 2(7), 2(8), 2(9): RCNI does not object to any of these provisions, except to the extent that in our view, the complainant should be entitled to attend any Preliminary Trial Hearing of a trial in which s/he is concerned directly as of right.

RCNI recommends that this Head be amended to provide for the right of the complainant (or other victim) to attend any Preliminary Trial Hearing of a trial in which s/he is concerned directly and to be

[8] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum rights, support and protection of victims of crime and replacing Council Framework decision 2001/22/JHA, available online through this weblink: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0029&from=EN

accompanied by a support person, unless the court rules otherwise in the interests of justice. Where a judge is asked to so rule or considers that such an order may be appropriate, the complainant/victim should be allowed to be heard.

Head 2(11): RCNI is concerned that this provision as drafted might be seen as over-permissive. In our respectful submission, the aim of this provision should be to ensure that such applications are only made during the trial where necessary in the interests of justice (perhaps because something which could not have been foreseen has arisen for the first time at trial) and are not a matter of routine and/or unfettered choice of the parties. Otherwise there is a real risk that the worthy purposes of this Head will be undermined.

RCNI recommends that the circumstances in which an order listed at paragraphs (a) to (f) of subhead (4) may be made at trial, should be defined clearly and restrictively in this Head.

Head 2(12): RCNI notes that in this subhead, Rules of Court "may" provide for notice, pleadings and the hearing of evidence under subhead (4). In our respectful submission, Rules of Court must provide for all these matters, otherwise the purposes of this Head will not be given real effect. In this regard, the anecdotal feedback which has reached us about the operation of the existing Practice Directions on Pre-Trial Procedures reveals that the time limit before trial (four weeks) is too short to work properly in practice, and a period at least twice as long has been suggested to us. It seems to us very much in the interests of complainants in sexual violence cases that Preliminary Trial Hearings take place well in advance of the trial date, as the risk of the trial cracking must surely increase if the preliminary hearing date is too close to the trial date to give the parties a reasonable opportunity to ensure that all necessary arrangements, rulings, etc are in place before the trial itself.

RCNI recommends, in line with its recommendation above on Head 2(1) and Head 2(2), that Rules of Court provide for "notice, pleading and the hearing of evidence under subhead (4)", and in line with its recommendation above on Head 2(4) (a) and (b), that the approach taken by these Rules of Court is as restrictive possible in relation to the cross-examination of complainants in sexual violence cases at Preliminary Trial Hearings.

Additional Recommendation:

RCNI recommends that Head 2 might be amended to include express reference to those matters which are listed under Article 23 of the EU Directive (Right to protection of victims with specific protection needs during criminal proceedings) and which refer to court proceedings. This Head should include express powers to make orders in relation to the following checklist at Article 23(2):

- " measures to avoid visual contact between victims and offenders during the giving of evidence, by appropriate means including the use of communication technology;
- measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;
- measures to avoid unnecessary questioning concerning the victim's private life, not related to the criminal offence; [this one has been referred to above] and
- [the last one is already covered by subheads 2(6) through 2(9)]

5.0 Head 3 – Constructive Acquittal: RCNI welcomes this provision, as it seems to us to make it easier for the prosecution to appeal an acquittal.

6.0 Head 8 - Substitution of Section 34 of Criminal Procedure Act 2010: RCNI welcomes this provision, as it seems to us very much in the best interests of complainants/victims that the

prosecution should have notice of a defence application to adduce expert evidence, at least 28 days before the first hearing of the case.

7.0 Head 9 – Provision of Information to Juries: RCNI welcomes these provisions, as in its view this information will assist the jury in remembering, ordering and evaluating the evidence. Taken together with a more proactive approach to case management at both the preliminary hearing and full trial stages, they should provide juries in sexual violence (and other) trials with much greater continuity and clarity. This can only be in the interests of complainants, and ultimately of justice itself.

8.0 Executive Summary – List of RCNI recommendations made in this submission:

- **RCNI recommends** [accordingly] that preliminary trial hearings are made mandatory for all trials on indictment (see Head 2(1) and Head 2(2);
- **RCNI recommends** that any Head 2(4)(a) and Head 2(4)(b) wording and any accompanying Rules of Court preclude repeated cross-examination of complainants on the same issue(s) in both Preliminary Trial Hearings and full trial proceedings; that the limited circumstances in which it is possible are identified clearly, and exclude Head 2(4)(b) applications altogether; and that the statutory provisions, and any accompanying Rules of Court, give clear powers and duties to the judge to prevent or restrict any cross-examination of complainants which attempts to go/does go beyond those limited circumstances. Such a proactive approach by the court to repetitive and/or oppressive questioning of victims, sometimes with dubious if any relevance to the issues in the trial, could do much to reduce the justifiable fears of many victims that the court process may be as traumatising as the crime itself, or even, more so.
- **RCNI recommends** that this Head [2] be amended to include specific Case Management powers and duties for the judge at the Preliminary Trial Hearing, to enquire, record and give directions on routine administrative and other non-contentious matters, such as agreed statements, reports, and so on.
- **RCNI recommends** that this Head [2] be amended to provide for the right of the complainant (or other victim) to attend any Preliminary Trial Hearing of a trial in which s/he is concerned directly and to be accompanied by a support person, unless the court rules otherwise in the interests of justice. Where a judge is asked to so rule or considers that such an order may be appropriate, the complainant/victim should be allowed to be heard.
- **RCNI recommends** that the circumstances in which an order listed at paragraphs (a) to (f) of subhead [2] (4) may be made at trial, should be defined clearly and restrictively in this Head [2].
- **RCNI recommends,** in line with its recommendation above on Head 2(1) and Head 2(2), that Rules of Court provide for "notice, pleading and the hearing of evidence under subhead (4)", and in line with its recommendation above on Head 2(4) (a) and (b), that the approach taken by these Rules of Court is as restrictive possible in relation to the cross-examination of complainants in sexual violence cases at Preliminary Trial Hearings.
- **RCNI recommends** that Head 2 might be amended to include express reference to those matters which are listed under Article 23 of the EU Directive (Right to protection of victims with specific protection needs during criminal proceedings) and which refer to court proceedings. This Head should include express powers to make orders in relation to the following checklist at Article 23(2):

    - " measures to avoid visual contact between victims and offenders during the giving of evidence, by appropriate means including the use of communication technology;
    - measures to ensure that the victim may be heard in the courtroom without being present, in particular through the use of appropriate communication technology;

- measures to avoid unnecessary questioning concerning the victim's private life, not related to the criminal offence; [this one has been referred to above] and
- [the last one is already covered by subheads 2(6) through 2(9)]

Rape Crisis Network Ireland
4, Prospect Hill, Galway

24 April 2014

LPD/1

Appendix I:

Selected List of RCNI Position Papers and Submissions relevant to this Submission, in chronological order:

1. RCNI Submission to Joint Oireachtas Committee on Justice, Equality and Defence on Sexual Violence and the Criminal Justice System, available online through this link http://www.rcni.ie/wp-content/uploads/RCNISubmissiononSexualViolencetoJointOireachtasCommitteeonJusticeEqualityandDefenceJune2013FINAL.pdf

2. "Reducing Delays in Court: RCNI Policy Paper on Case Management and Pre-Trial Hearings in the Criminal Courts" (expanded version, 2012), available online at: http://www.rcni.ie/wp-content/uploads/RCNICaseManagementandPreTrialHearingspositionpaperMay12.pdf

3. RCNI Submission on the Community and the Criminal Justice System (2011), available online at: http://www.rcni.ie/uploads/RCNISubmissionOnTheCommunityCriminalJusticeSystemAug11.pdf

Appendix II:

LISC composition: The Legal Issues Sub-Committee is a sub-committee of the National Steering Committee on Violence against Women, on whose behalf it conducts research and discussions and formulates agreed recommendations on domestic and sexual violence legal issues, wherever possible and appropriate. It works to an NSC agreed annual Work Plan based on the National Strategy to prevent Domestic, Sexual and Gender-Based Violence[9]*, and in addition addresses legal issues whenever requested to do so by NSC. Like the NSC itself, it is a multi-agency body, whose volunteer membership meets quarterly and includes senior and junior representatives from the Law Library, a Law Society representative, a Legal Aid Board representative, domestic and sexual violence NGO representatives (in the case of sexual violence, this means both RCNI and Dublin Rape Crisis Centre), and representatives from An Garda Siochana, the Department of Justice, the Probation Service, and the Courts Service. All members are encouraged to contribute their views, and all recommendations put forward are agreed by LISC members. The variety of experiences, roles and perspectives within LISC has allowed it to make informed and thoughtful recommendations, well grounded in the daily reality of our justice system.*

Its remit is purely ***advisory*** *and non-executive, as is that of the NSC itself.*

[9] available online in both summary and full form at www.cosc.ie/publications