

Sexual Violence in Ireland

**A research report by Trinity FLAC,
in association with the Rape Crisis Network**



**Free
Legal
Advice
Centre**

fighting for social justice.

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With thanks to the Rape Crisis Network Ireland.

Trinity FLAC Sexual Violence Legal Research Report

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INTRODUCTION

This report seeks to provide an overview of sexual violence in Ireland. It takes a holistic approach and examines the societal values and political realities which surround the law as much as the law itself. The topic of sexual violence is intimidatingly vast, and pervades most areas of society. The report's focus alternates from broad overviews of the situation to specific case studies, examining sexual violence in particular environments-- e.g., in the LGBT community, the sex industry, and online. All the researchers undertook this endeavour with the knowledge that it is impossible to comprehensively identify every facet of sexual violence, and instead sought the most prevalent and pressing.

The subject of this report was decided on months prior to the revelations of systemic sexual abuse and harassment which overtook the media in late 2017. It is difficult to know whether its publication in the midst of widespread public discussion is fortunate. It can hopefully serve as an aid to those who want a clearer picture on the situation in Ireland. However, it may have been more helpful if it were published at a point where such discussion had quietened, as a means of refreshing the public's memory of a reality often hard to face. Judith Herman refers to the 'episodic amnesia' in modern western awareness of sexual violence, and follows this with her observation that:

"It is very tempting to take the side of the perpetrator. All that the perpetrator asks is that the bystander do nothing. He appeals to the universal desire to see, hear, and speak no evil. The victim, on the contrary, asks the bystander to share the burden of the pain. The victim demands action, engagement, and remembering."

This report highlights Ireland's failures in upholding our responsibility to the victim to act, engage, and remember. It examines the factors that contribute to and sustain the epidemic of sexual violence, and led Catherine MacKinnon to conclude that *"rape, from women's point of view, is not prohibited. It is merely regulated."*

Discussion of sexual violence is inseparable from discussion of gender and the place of women and girls in our communities. While it is important to acknowledge the experiences of men and boys who have gone through sexual violence, the vast majority of sexually violent acts target women and girls and result from the sexist attitudes that society upholds. On this note, and in following with many other Irish papers on this topic, gendered and non-gendered language is used interchangeably throughout the report.

I would like to thank all of those who have helped with this project, from the initial to final stages. Firstly, Caroline Counihan, the legal director of the Rape Crisis Network Ireland, who provided invaluable information about which areas most urgently required examination, who shared many resources to guide the research, and who spoke to the researchers at the very beginning of the project to give them a clear overview of the situation in Ireland. Secondly, Professor Ivana Bacik and Professor Gerry Whyte of the Trinity Law School, who spared time from their busy schedules to lend their expertise and advice. I am also grateful to Sarah Benson, CEO of Ruhama, and Michelle Martyn, Senior Research and Policy Officer of the Irish Penal Reform Trust, who provided guidance in their respective areas of expertise.

I would like to thank everyone else on the Trinity FLAC committee for their continued assistance and encouragement. In particular, the chair, Paul Carey, who provided support at every stage of the process and made the report what it is in its published form. Treasurer and former legal research officer Blánaid Ní Bhraonáin assisted with securing funding, and Niamh Carroll, PRO, designed the cover. Other members of the committee, Ruth Coughlan, Celia Reynolds, Chloe O'Reilly, Adam Geraghty, Alan Eustace, and Caoilainn McDaid, assisted at the editing stage, and I am incredibly grateful to them as well.

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Relevant Legislation

The past few years have seen many changes to the law surrounding sexual violence, and there are further amendments and revisions contained in the bills awaiting Dáil review. However, a backlog of legislation and slow government progress has led many to fear that there may be considerable delay in their enactment.^{1 2}

This section shall examine:

- recent developments in England and Wales, supplying common law context for developments in Ireland over the past few decades, and
- the evolution of modern Irish law concerning sexual violence, outlining a few criticisms, with discussion of the following Acts:
 - Criminal Law (Rape) Act 1981
 - Criminal Law (Rape) Amendment Act 1990
 - Criminal Evidence Act 1992
 - Criminal Justice Act 1993
 - Sex Offenders Act 2001
 - Criminal Justice Act 2006
 - Criminal Law (Sexual Offences) Act 2017

Developments in England and Wales

During the turn of the century, there was a massive overhaul of sexual offence legislation in England and Wales, in the form of the passing of the Sexual Offences Act 2003 (the 2003 Act). The 2003 Act effectively repealed most of the Sexual Offences Act 1956 and clarified previous legislation that lacked in coherence and structure.³ The 2003 Act now governs virtually all offences relating to sexual behaviour.⁴

The Law Prior to the 2003 Act

The 1956 Act reflected nineteenth century attitudes towards sexual behaviour and violence. For example, married women were seen as having no capability or authority to refuse or revoke consent,⁵ and it outlawed gross indecency between men.⁶ The Criminal Justice and Public Order Act 1994 made progressive steps in recognising marital rape

¹ Elaine Loughlin, *Review of system on the cards amid criticism of 'do-nothing Dáil'* The Irish Examiner (17 April 2017)

² Elaine Loughlin, *'Half of Cabinet has yet to enact one bill after year of formation'* The Irish Examiner (2 May 2017)

³ Richard Card, *Criminal Law* (21st edn, OUP 2014)

⁴ *ibid*

⁵ Nicole Westmarland, 'Rape Law Reform in England and Wales' (2004) School for Policy Studies Working Paper Series 7/2004

⁶ Sexual Offences Act 1956 s13

and removing gender specificities for victims of sexual offences. The definition of rape was also amended to cover vaginal or anal intercourse against a woman or a man without their consent.⁷

The controversial ruling in *DPP v Morgan*⁸ found that a man holding an ‘honest belief’ that the woman he was having sexual intercourse with had consented would function as a defence against rape. This decision has attracted widespread criticism, with commentators noting that in most other areas of English Criminal Law, mistaken belief must be held on a reasonable basis.⁹ The decision, only overturned by the 2003 Act,^{10 11} has been referred to as a ‘rapist’s charter.’¹²

Developments in the 2003 Act

The 2003 Act saw a massive upheaval of the pre-existing law, with all but sections 33 and 37 of the 1956 Act repealed. The Act focuses substantially on sexual crimes relating to children, for example through the introduction of an offence that arises from causing a child to watch a sexual act.¹³

The 2003 Act extended the scope of rape to penile penetration of the vagina, anus or mouth of another person without their consent.¹⁴ While the victim’s gender in this new formulation goes undefined, the perpetrator is still always a man. Woman perpetrators are dealt with in other parts of the 2003 Act, such as assault by penetration,¹⁵ an offence of intentional sexual penetration of the vagina or anus of another person with a part of one’s body or anything else, without that person’s consent.

While the 2003 Act did invalidate the law set down in *Morgan*,^{16 17} it did so by limiting the mistaken belief defence to only a reasonable belief, which many feminist critics do not believe to be sufficient.¹⁸

The 2003 Act defined consent as agreement ‘by choice, [with] the freedom and capacity to make that choice.’ The previous requirement of the prosecution to prove the absence

⁷ Criminal Justice and Public Order Act 1994 s142

⁸ [1975] UKHL 3

⁹ Kenneth Arenson, ‘The Queen v Getachew: Rethinking DPP v Morgan’ [2013] 77 Journal of Criminal Law 151

¹⁰ Sexual Offences Act 2003 s 74(1)(c)

¹¹ Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill & Macmillan 2015)

¹² Sara Hinchliffe, Rape Law Reform in Britain, (2000) 37 Society 57

¹³ Sexual Offences Act 2003 s19

¹⁴ Sexual Offences Act 2003 s1

¹⁵ Sexual Offences Act 2003 s 2

¹⁶ Sexual Offences Act 2003 s 74(1)(c)

¹⁷ Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill & Macmillan 2015)

¹⁸ Nicole Westmarland, Rape Law Reform in England and Wales (2004) 7 School for Policy Studies Working Paper Series

of consent, rather than requiring the defence to prove that they had taken steps to ascertain consent, had drawn criticism. Perhaps in recognition of this issue, section 75 of the 2003 Act introduced a number of evidential presumptions under which, if the prosecution proves certain circumstances existed at the time of intercourse, “the complainant is taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.”¹⁹ Some of these circumstances include the threat of violence to the complainant or another person, the use of intoxicating substances and whether the victim was conscious.

Section 76 introduced two conclusive presumptions. Where the defendant deceives the victim to the nature or purpose of the relevant act and where the defendant induces the victim to consent by impersonating someone known to the complainant it is conclusively presumed that there was no consent on the part of the victim and the defendant did not believe there was consent.

Evolution of Modern Irish Law

Historically, law on sexual violence in Ireland has reflected the dominant societal attitudes and concerns of the time.²⁰ This section will trace the development of legislation concerning sexual violence throughout the past few decades, identifying key implications, gaps, and aspects which have attracted criticism.

The Criminal Law (Rape) Act 1981

The Criminal Law (Rape) Amendment Act 1981 (the 1981 Act) contained the first statutory definition of rape. Section 2(1), in line with the existing common law, defined the offence as committed by a man against a woman only, and limited it to sexual intercourse.

Somewhat progressively, the 1981 Act repealed Section 6 of the Criminal Law Amendment Act 1935,²¹ which provided for a lesser punishment for indecent assaults committed by females than males.

Section 7(1) and (6) of the 1981 Act provided for the victim’s anonymity, creating an offence of knowingly publishing the name of a victim or any material which could lead to her identification. This provision recognises the profoundly personal nature of the

¹⁹ Sexual Offences Act 2003 Act s 75

²⁰ McIntyre, McMullan & O’Togha, *Criminal Law* (1st edn, Roundhall 2012) 141

²¹ The Criminal Law Rape (Amendment) Act 1981, s10

evidence victims may have to give at trial,²² as well as the unfortunate stigma still attached to survivors of sexual violence. However, as this anonymity often goes hand in hand with anonymity for the perpetrator, it is susceptible to some criticism (more detailed discussion found in the second section of this paper, covering court procedure).

The Criminal Law (Rape) Amendment Act 1990

The Criminal Law (Rape) Amendment Act 1990 (The 1990 Act) expanded on sexual offences, after the “inadequacy” of common law rape attracted criticism.²³ The offence known as ‘rape under section 4’ can be perpetrated by or against men or women, and covers forms of violence other than penile penetration of the vagina.²⁴ However, section 4 has been criticised for not covering anal penetration by an object, as recommended by the Law Reform Commission.²⁵ The 1990 Act also faced scrutiny for the lack of clarity regarding digital rape, and whether it is covered by section 4.²⁶

Section 5 abolished the common law marital rape exemption, but subsection (2) requires that any prosecution of a husband for raping his wife obtains permission from the Director of Public Prosecutions. Dr Conor Hanly said there “is not [a] clear useful purpose...served by the restriction.”²⁷ No other rape complaints carry such a requirement.²⁸ Susan Leahy noted the first successful prosecution came about only in 2006, sixteen years after the law had changed. As of late 2016, only five convictions have been secured.²⁹

Section 9 states that failure to resist during the assault does not constitute consent and such a defence cannot be argued at trial.

Criminal Evidence Act 1992

This statute provided for the first time that a complainant, when giving evidence, could do so via an intermediary³⁰ or video-link.³¹ Pre-recorded evidence could also be used for child victims up to the age of 14. However, these provisions could only be availed of by

²² Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill Education 2015) 346

²³ McIntyre, McMullan & O’Toigha, *Criminal Law* (1st edn, Roundhall 2012) 143

²⁴ Criminal Law Rape (Amendment) Act 1990, s4: “a penetration (however slight) of the anus or mouth by penis or penetration (however slight) of the vagina by any object held or manipulated by another person”

²⁵ Law Reform Commission, *Report on Rape and Allied Offences*(LRC 24 -1988)

²⁶ Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill Education 2015) 327

²⁷ *ibid*, 318

²⁸ *idem*

²⁹ Susan Leahy, ‘In a woman’s voice: a feminist analysis of Irish rape law’ [2008] *ILT* 203.

³⁰ Criminal Evidence Act 1992, s(14), s(14A)

³¹ Criminal Evidence Act 1992, s(13)

those under the age of 17 or persons with a ‘mental handicap.’ The Rape Crisis Network (RCNI) called for these special measures to extend to all complainants.³²

Criminal Justice Act 1993

Section 5 of the Criminal Justice Act 1993 compels judges, in determining sentences, to consider fully the impact of the offence on the victim, both long-term and immediate.

Sex Offenders Act 2001

The Sex Offenders Act 2001 (The 2001 Act) covers evidence of the complainant’s sexual history. Section 4(a) requires that an application for such evidence to be admitted to trial must occur before the trial has begun or “as soon as is practicable”.³³ A complainant is also entitled to know this application has been made and will receive state funded representation when the judge considers the application. However, the majority of applications made are granted.³⁴ This practice has attracted criticism for its invasiveness and irrelevancy. Some commentators believe its purpose is to blemish the image of the complainant in the eyes of the jury, taking away focus from the actual offence being tried.³⁵ It may also act as a deterrent against many survivors from seeking justice by reporting their assaults or going to trial.³⁶ Senator Ivana Bacik and the RCNI have been greatly critical of the practice. They point out that Section 4A of the 2001 Act is “vaguely phrased” and does not in fact impose any time limitations on applications.³⁷ Furthermore, it creates no actual procedure for informing the complainant that such an application has been made.³⁸ The Oireachtas had recent opportunity to introduce change in this area following the enactment of the Criminal Justice (Victims of Crime) Act 2017,³⁹ but failed to do so.

Criminal Justice Act 2006

Section of the Criminal Justice Act 2006 allows for statements made by a victim or witness, including those recorded on video, to be admissible evidence at trial in lieu of oral testimony, so long as certain requirements have been fulfilled. This can combat potential intimidation. In *DPP v O’Brien*,⁴⁰ a case involving sexual offences against

³² RCNI Position Paper, *Submission on Sexual Violence: Recommendations for Reform of the Criminal Justice System* (2013), 15

³³ Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill Education 2015) 346

³⁴ RCNI Position Paper, *Previous Sexual History Evidence and Legal Representation* (2012) 5

³⁵ Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill Education 2015) 345

³⁶ RCNI Position Paper, *Previous Sexual History Evidence and Legal Representation* (2012) 2

³⁷ *ibid*, 6

³⁸ *Ibid*, 7

³⁹ This Act will be discussed in the Court Procedure and Vulnerable Witnesses section

⁴⁰ IECCA 103

children, the Courts considered the provision for the first time and confirmed that the statements must be voluntary, reliable and either made under oath, affirmed or contain a statutory declaration as to their truth.⁴¹ The Court refused to allow an appeal in this case on questions of the statement's reliability and the contention that the Section applied only to gangland offences. Assurance that Section 16 is applicable in cases involving sexual offences is encouraging for victims or witnesses intimidated by or discouraged at the thought of being compelled to give spoken evidence at trial.

Criminal Law (Sexual Offences) Act 2017

The most recent legislation dealing with sexual violence, the Criminal Law (Sexual Offences) Act 2017 places great emphasis on sexual offences against children. Its creation of an offence to purchase sex attracted a lot of public discussion. Also noteworthy was the first ever statutory definition of consent, in Section 48, which required 'free and voluntary agreement'. The previous absence of any such definition had drawn much criticism.⁴² Alongside this definition was a non-exhaustive list of other criteria that would vitiate consent such as sleep, unconsciousness, or the effect of drugs or alcohol.

⁴¹ IECCA 103, 64

⁴² Susan Leahy, 'In a woman's voice: a feminist analysis of Irish rape law' [2008] ILT 203

Court Procedure and Vulnerable Witnesses

Highly important in any discussion of sexual violence are the legal procedures and policies surrounding it. The prosecution process runs the risk of re-traumatizing survivors, and can have lifelong negative effects on children.¹ Having prohibitive practices deters reporting of sexual crimes and participation in the legal process. In 2015, the RCNI reported that only 35% of service users reported the crime to the Gardaí or other formal authority.²

This section shall examine:

- sentencing, with specific attention to mandatory sentences and sentencing re-offenders,
- vulnerable witnesses, with specific attention to legislative failings, the situation in England and Wales, and procedures surrounding pre-recorded evidences, and
- court procedures, with specific attention to time limits and delays, pre-trial procedures, the anonymity provided to defendant's in rape trials, the use of sexual history in cross-examination, and the Criminal Justice (Victims of Crime) Act 2017.

Sentencing

Sexual violence can be implicitly condoned through lenient or inadequate sentencing. Many commentators have called attention to the lack of sentencing guidelines for sexual offences in Irish law. It is submitted that there is a lack of and urgent need for judicial guidelines for sentencing in rape and sexual assault cases. Ireland's sentencing remains largely up to the discretion of the courts, the only formal guideline being maximum sentences as dictated by legislation. The Irish Penal Reform Trust (IPRT) believes that this could be remedied with the introduction of sentencing guidelines or a Sentencing Council.³ RCNI has called for sentencing guidelines to be developed as a matter of urgency,⁴ with Director Fiona Neary commenting that the "lack of clarity and information on sentencing is unhelpful" to the victims, and adds to the already arduous court process.

However, there are some important judicial statements on the proper approach to the sentencing of rape, also applicable to other sexual offences. In *DPP v Tiernan*⁵ it was

¹ Graham Davies, 'Protecting the Child Witness in the Courtroom' (1992) 1 Child Abuse Review 33

² Rape Crisis Network Ireland, Rape Crisis Statistics and Annual Report 2015

³ Irish Penal Reform Trust, *Sentencing Proposals: Sexual Offences* (2017)

⁴ RCNI, 'Consistency of sentencing in sexual violence cases urgently needed' (Press Release, 11 June 2013)

⁵ [1988] I.R. 250

held in the Supreme Court that, save for in the most exceptional cases, rape should always incur an immediate and substantial custodial sentence. While there have been examples of suspended sentences, which generally incur widespread media condemnation, largely it is very rare in rape cases.⁶

Sentencing Reoffenders

The Criminal Justice (Commission of Sexual Offences) (Amendment) Bill 2017 calls for stronger deterrents in law to prevent serial offending. The State has identified the need for tougher sentencing for repeat offenders in certain circumstances,⁷ but the regulation of sentencing for repeat sex offenders is currently not provided for in Irish law.

In many cases, the Criminal Court of Appeal has come to the decision that the crime committed is not enough to warrant a life sentence, despite the fact that the accused has multiple past convictions of crimes of the same nature.⁸ In one high profile example of January 2007, Carney J. sentenced Gerard Kelly to life imprisonment for the rape of a young women that occurred just months after he was released after being convicted for a similar charge. The Criminal Court of Appeal overturned this decision with the opinion that the rape was not of such an exceptional nature to warrant the severity of the sentence. They reduced his sentence to 13 years, despite the fact that Kelly had previously served 18 years in both England and Ireland on rape charges.⁹ The Rape Crisis Network Ireland said it highlighted the failure of the Irish legal system in dealing with sex crimes. It called on the legal system to deal with known high-risk serial rapists by linking sentencing with risk reduction and pre-release assessment.¹⁰

Mandatory Sentencing

While acknowledging that sexual offences are among one of the most grave and harmful categories of crime, the IPRT has voiced concern for negative consequences¹¹ that may result from proposals in the Criminal Justice Bill,¹² noting that mandatory sentencing regimes can be a detriment to the reduction of crime, as they are extremely costly, with the annual price of accommodating an imprisoned person being €69,421 in

⁶ Thomas O'Malley, *Sexual Offences: law, policy and punishment* (2nd edn, Round Hall Sweet & Maxwell 2013)

⁷ Criminal law Act 2007

⁸ People (DPP) v RC [2008] IECCA 82; People (DPP) v P.S. [2009] IECCA 1; People (DPP) v G.K. [2008] IECCA 110; People (DPP) v Power, Central Criminal Court, February 16, 2009

⁹ Patricia McDonagh and Tim Healy, "Fury after serial rapist's sentence cut to 13 years" (1st August 2008)

¹⁰ *ibid*

¹¹ Irish Penal Reform Trust, *Sentencing Proposals: Sexual Offences* (2017)

¹² Criminal Justice (Commission of Sexual Offences) (Amendment) Bill 2017

2016.¹³ Such a system may also divert attention away from other more appropriate types of rehabilitation and aids for victims. Findings from the Irish Law Reform Commission (ILRC) have shown that there is little evidence to support the theory that mandatory sentences function as a deterrent, and they have published two reports both recommending that no new mandatory sentencing schemes should be introduced.¹⁴

Length of Sentencing

The average sentence for rape has increased incrementally in the last ten years with the current average being 10 years, compared to nine years and 3 months in 2005.¹⁵ However, for some commentators the concern is not the average length, but the inconsistency between sentences which risk deterring survivors from getting involved in the criminal justice system.

Vulnerable Witnesses

Part III of the Criminal Evidence Act, 1992 (“the 1992 Act”) introduced a package of reforms to the Irish adversarial trial process for the benefit of vulnerable witnesses. However, it came under criticism for its perceived inadequacy and further legislative reform was necessary.

The recently enacted Criminal Law (Sexual Offences) Act 2017 (“the 2017 Act”) adapted the special measures regime as part of its more general reform of sexual offences law. However, it focused primarily on child victims of sexual offences.

The main criticisms of the 1992 Act concern the quality of the legislative drafting, and the failure to provide sufficient resources for actually enforcing the special measures in practice.

Quality of Legislative Drafting

S.13(1)(a) provided a presumption in favour of child witnesses testifying via video-link, but gave no indication of which factors the court should consider in rebutting the

¹³ Irish Penal Reform Trust, *Facts and Figures*, <<http://www.iprt.ie/prison-facts-2>> accessed 21/12/2017

¹⁴ Law Reform Commission: *Report on Mandatory Sentences* (2013) and *Strategic Review of Penal Policy* (Rec. 34, Sept 2014)

¹⁵ Conor Gallagher, “Rape sentences averaging 10 years after rise over last decade” *The Irish Times* (23 May 2016)

presumption. There was also no guidance as to the weight judges should attach to testimony given through video-link.

S.14 of the legislation also allowed for intermediaries who may deliver evidence on behalf of a vulnerable witness. However, this has gone unenforced by the courts due to the lack of guidance provided regarding surrounding procedure. Although this special measure was commenced in 1997, it was only in 2016, almost two decades later, that such an intermediary was first appointed before an Irish court. There is no body of appropriately qualified experts to draw from in appointing intermediaries, and indeed no clarity on what qualifications ought to be necessary. This has also meant that there is no available research on how a service like this may incentivise vulnerable witnesses to further participate in the criminal process.

Lack of Sufficient Resources

The current special measures regime does not have sufficient state resources for adequate and effective implementation. As seen above, there is no official group of intermediaries to provide the services promised in the 1992 Act. There has also been massive failure in setting up mechanisms for video-link witness testimony, with the first successful application for the service occurring in 2010.¹⁶ This had particular ramifications for trials happening in rural areas.

Changes to Procedure in England and Wales

Taking a case against an alleged sexual offender can be a long and arduous process, a reality that can deter survivors from participating in a trial or even from reporting the incident to the Gardaí.

Pre-Recorded Evidence

Cross examinations in sexual offence cases can be invasive, often questioning the victim's past sexual experiences and credibility, and otherwise traumatising given the onus on the vulnerable witness to relive their assault in an unfamiliar venue full of strangers, some of whom may seriously doubt the witnesses testimony.

In 2017 England and Wales introduced new legislation that allowed victims of sexual assault to submit their evidence by means of a pre-recorded video. This evidence will

¹⁶ Miriam Delahunt, 'Improved measures needed for vulnerable witnesses in court' *The Irish Times* (December 7 2010)

stand in the place of a cross examination. It was introduced following its successful testing in cases of child sexual abuse. They have been found to limit the retraumatisation of which the child is at risk. They have also had the unforeseen side effect of defendants being more likely likely to enter an early guilty plea having seen the extensive video evidence against them.¹⁷

These changes have been largely welcomed, and research in England shows that the methods of delivering evidence, whether through an intermediary, pre-trial evidence, or video-link, have little to no impact on jury decisions.¹⁸ This is in response to criticism that these procedures may disadvantage the accused.

Ireland fails to match this level of protection for vulnerable witnesses. The current legal position is that the victim may give a pre-trial recorded statement which can be used instead of examination in chief. However, they must also be available for cross-examination at trial, and use of cross-examinations prevails in cases where the victim is older than 17. In 2015 cross-examination on past sexual history occurred in 42 percent of rape trials.¹⁹ This practice is especially suspect given that, in 2015, 89% of perpetrators were known to their survivors, and may potentially have had past consensual sexual relations with them.

In England and Wales, the following services are also provided:

- A witness may give evidence in court from behind a screen, so they cannot see or be seen by the defendant. This method has however attracted some criticism, and pre-recorded evidence and cross examination is generally preferred.
- A witness may share their evidence with the court via a live television link from a separate location.
- A witness may communicate in court with the help of an intermediary. This is a person such as a social worker who will ensure that the victim understands the questions posed and that their evidence is stated in the most effective manner possible.

¹⁷ Hannah Summers 'Rape Victims to be Spared the Ordeal of Cross-Examination in Court' *The Guardian* (March 19 2017)

¹⁸ Graham Davies, 'Children in the Witness Box: Bridging the Credibility Gap' (2017) 15 Sydney Law Review 283

¹⁹ Conor Gallagher "Many rape victims still face court questioning on sexual history" *Irish Times* (March 27 2017)

General Court Procedure

Time Limits and Delays

Time limits do not apply in cases of rape and often a lengthy delay can occur between the crime taking place and the actual trial. This is one of the factors that deters survivors from participating in the criminal process, as seen by the low reporting rate of sexual offences in Ireland, as well as exacerbating their trauma and stress.²⁰ It is a particular risk to survivors of child sexual abuse, as delays can mean that while they may have started out the process as a minor, by the time the case reaches trial they are legally an adult, and can lose the legal protections afforded to children.

Pre-Trial Procedure

Prior to the trial, victims may organise a meeting with their legal representation in order to find out information about court procedure. Victims may also visit the courtroom before the commencement of the trial to potentially make the experience less daunting. The Gardai run a Domestic Violence and Sexual Assault Investigation Unit, who oversee sexual offence cases.²¹ This was provided for under section 26(3) of the Civil Legal Aid act. The Gardai are also responsible for informing the victim of their right to legal aid if they cannot afford a lawyer. At this early stage the accused may accept a plea bargain, should they be offered one, which would prevent the victim from going through a trial process.

Anonymity

Cases dealing with rape and sexual assault are generally held in camera, meaning no member of the general public may enter the courtroom. Under section 11 of the Criminal Law (Rape) (Amendment) Act 1990, the judge may exclude everyone aside from “officers of the court,” people directly associated with the proceedings and members of the press. This section also provides that a relative or friend may accompany the victim, but only if they are a minor. The verdict will be announced in open court. The defendant may remain anonymous unless they are convicted and the victim may remain anonymous throughout and in the aftermath of the proceedings. Section 7 of the Criminal Law (Rape) Act 1981 further says that a convicted person must remain anonymous if their name could potentially reveal the identity of the complainant.

²⁰ Rape Crisis Network, Reducing Delays in Court, Expanded Version, 2012

²¹ Ivana Bacik, Catherine Maunsell and Susan Gogan, “*The Legal Process and Victims of Rape*” (The Rape Crisis Network Ireland 1998) 254

Between 2011 and 2014, 49% of those convicted of sexual offences were not named in the aftermath of their conviction. The risk is a type of 'jigsaw identification', whereby, without naming the person in question, enough information is provided that they may be indirectly identifiable.

Other countries have seen criticism of providing the accused with anonymity, with victim advocacy groups in the UK saying they perpetuate the myth that women often make false accusations, and that removing anonymity may mean other victims come forward against the accused.²² However, these ideas may not be transferable to a country like Ireland, with a small population and tight-knit communities, as well as a previously mentioned high rate of perpetrators who are known to the survivors, which increases the likelihood of them being identifiable through the naming of the perpetrator.²³

Victim's Prior Sexual Experience

The victim's previous sexual experience is an issue that may be broached during cross-examination and this can be a source of great fear and anxiety for the victim. Furthermore, it seems to run counterintuitive to modern understandings of sexual violence and consent. Special rules are taken into account in terms of this evidence. The approval of the judge is required for such evidence to be admitted into court. This is provided in section 3 of the 1981 Act as amended by section 13 of the 1990 act. The current test is that "it would be unfair to the accused person to refuse to allow the evidence to be adduced."²⁴ However, it appears rare that this test is not met, with 42% of cross-examinations in rape trials in 2015 seeing such evidence produced.²⁵

The Criminal Justice (Victims of Crime) Act 2017

The Criminal Justice (Victims of Crime) Act 2017 (The 2017 Act), gives effect to a 2015 European Directive establishing the 'rights, support and protection of victims of crime.'²⁶ While the 2017 Act only came into effect in late November of 2017, many of the services required by the Directive were already running, such as mechanisms for requesting reasons from the Director of Public Prosecutions should they decide not to prosecute (and, in fact, sexual offences are the most likely to be declined to be

²² Robert Booth, 'Rape suspects 'should not be named'' *The Guardian* (February 17 2013)

²³ Conor Gallagher, 'Untangling the vexed question of anonymity in sex cases' *The Irish Times* (March 3 2014)

²⁴ Ivana Bacik, Catherine Maunsell and Susan Gogan, "*The Legal Process and Victims of Rape*" (The Rape Crisis Network Ireland 1998) 255

²⁵ Conor Gallagher "Many rape victims still face court questioning on sexual history" *Irish Times* (March 27 2017)

²⁶ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57

prosecuted²⁷), and the Garda Victim Service Office which acts as a liaison between those who have reported crimes and the Gardaí.

The 2017 Act aims to create a more victim-centred criminal justice system and improve victims' access to justice.²⁸ It puts in place certain special protections for victims that the Irish system was previously lacking.²⁹

Part 2 of the 2017 Act entitles the victim of a crime to receive information upon first contact with the Garda Síochána or the Ombudsman Commission on the criminal justice process and their role within that process.³⁰ This information includes but is not limited to the availability of support services such as psychological support and alternative accommodation; the availability of protective measures, particularly where the victim is a child and the availability of legal advice and legal aid.³¹

Victims are also entitled to information relating to significant developments in the investigation,³² and a summary of the reasons behind decisions either not to prosecute or not to continue investigating, and to request a review of the decision.³³ However, these reasons may not be particularly detailed or tailored to the specifics of the case. For example, a victim may simply be told that there was insufficient evidence.

A victim's right to information under the 2017 Act does not infringe upon the protections granted to a suspect with regards to the processing of their private information for the purpose of investigation and prosecution of an offence under EU Directive 2016/680.³⁴ Under Article 4 of the Directive, processing of information shall be lawful, non-excessive and secure against "accidental loss, destruction or damage".³⁵ A victim's right to information is further limited where the disclosure of information would "interfere with the investigation of an alleged offence, prejudice ongoing or future criminal proceedings in

²⁷ 'DPP defends low prosecution rate for sexual offences,' RTE News, 25 November 2017.

²⁸ Deputy Frances Fitzgerald "Criminal Justice (Victims of Crime) Bill 2016: Second Stage ((Dail Eireann Debates, Wednesday, 1 March 2017) <<https://beta.oireachtas.ie/en/debates/debate/dail/2017-03-01/42/>> last accessed 16 November 2017

²⁹ *ibid*, s 16 and s 18

³⁰ Criminal Justice (Victims of Crime) Act 2017, s 6(1)(e)

³¹ Criminal Justice (Victims of Crime) Act 2017, s 6(1)(a); s 6(1)(g)-(h); s6(1)(n)

³² *ibid* s 7(2)(a)(i)-(iv)

³³ *ibid* s 7(2)(c)-(d); 8

³⁴ Directive 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L119/89

³⁵ *ibid* art 4

respect of an alleged offence, endanger the personal safety of any person, or endanger the security of the State."³⁶

Under the new Act, victims are entitled to be accompanied by a person of their choice, while making a complaint and while being interviewed.³⁷ Where the victim is a child, and in the absence of a parent or guardian, the Garda Síochána, the Ombudsman Commission or any other relevant authority have a duty to provide a relevant person to accompany the victim to any interviews and court proceedings which they are required to attend.³⁸ In determining who is an appropriate person to accompany a child, the relevant authorities are required to have regard to the views of the child, taking into account his or her age and level of maturity.³⁹

Section 14 of the 2017 Bill sets down certain factors the Gardaí Síochána may consider in order to identify any protective measures or special measures which may be necessary due to the victim's vulnerability to "secondary and repeat victimisation, intimidation and retaliation."⁴⁰ The factors include the nature and severity of the offence, the personal characteristics of the victim including their gender, race and sexual orientation and whether the motivation for committing the alleged offence was based on the personal characteristics of the victim.⁴¹

Section 16 sets out the special measures that may be implemented during investigations. This includes a victim being informed of their right to request that the interview be carried out by a person of the same gender.⁴² Special measures during criminal proceedings set out under section 18 include exclusion of the public; the right of the victim to not be questioned about elements of their personal life which is immaterial to the case and the ability to give evidence through a live television link or a screen.⁴³ The court may exclude members of the public or certain individuals during criminal proceedings and give directions restricting the admissibility of evidence or cross-examination which relates to the private life of the victim and is immaterial to the proceedings. This may only be done where it is satisfied that such action is necessary to protect the victim from secondary and repeat victimisation, intimidation or retaliation.⁴⁴

³⁶ Criminal Justice (Victims of Crime) Act 2017 *ibid* s 10(1)

³⁷ *ibid* s 11(1); s 13(2)

³⁸ *ibid* s 17(1)

³⁹ *ibid* s 17(2)

⁴⁰ *ibid* s 14(1)

⁴¹ *ibid* s 14(2)

⁴² *ibid* s 16(1)(b)

⁴³ *ibid* s 18(2)

⁴⁴ *ibid* s 19 and s 20

Fourthly, Section 29 of the Act amends the Criminal Evidence Act 1992 by inserting section 14(A) which enables the court in cases where the interest of justice requires it, to direct that the victim give evidence behind a screen in order to prevent the victim from seeing the accused.⁴⁵ This protective mechanism is available to all victims upon application, and applies to victims of relevant offences under 18 years of age.⁴⁶ Section 29(d) also inserts section 14(C) into the Criminal Evidence Act 1992 which prohibits judges and lawyers from wearing gowns and wigs when a person under 18 years is giving evidence either in relation to a relevant offence under s 12 of the Criminal Evidence Act 1992 or an offence of which the child is a victim.

Conclusion

In conclusion, while recent years have seen some procedural reform, there are still defects.

With regard to sentencing, the main issues identified are:

- the lack of sentencing guidelines in Irish law,
- the failure to sentence repeat offenders appropriately, and
- the issue of mandatory sentencing.

It is noted that sentencing is a key and integral part of the court process and improvements in it would be beneficial to the victims and the justice system as a whole.

In the examination of vulnerable witnesses, focus was given to:

- the failure of the 1992 Act with regard to adequate drafting and provision of resources, and
- services like pre-trial cross examination, video-link, and screens, as available in other common law jurisdictions such as England and Wales.

Lastly, general court procedures were discussed:

- delay in the prosecution of sexual offence cases,
- pre-trial procedure,
- the pros and cons of anonymity being given to the accused,
- the frequent inclusion of sexual history in cross-examinations, and
- recent changes to trial and pre-trial procedures brought by the 2017 Act.

⁴⁵ *ibid* s 29(d)

⁴⁶ The relevant offences to which this section applies are set out under s 12 of the Criminal Evidence Act 1992 as amended by s 29(a) of the Criminal Justice (Victims of Crime) Act 2017

Sexual Violence in the LGBT Community

There are no specific references to lesbian, gay, bisexual, or trans people in the law surrounding sexual violence in Ireland, despite research recommending protections for LGBT survivors of sexual violence. This lack of legislative response may be in part due to the dearth of domestic research on the LGBT community in general but specifically on the way in which the community is impacted by sexual violence, and the sidelining of the experiences of LGBT individuals in public discussions of sexual violence.

Keeping in mind the limited nature of existing research, this section will provide:

- an overview of the report on sexual violence in the LGB community by the RCNI, the only comprehensive existing national research into the subject,
- a discussion of the LGBT-specific barriers to accessing the law,
- a discussion of the hard to reach nature of the Irish LGBT community,
- a discussion of the situation of LGBT asylum seekers,
- a discussion of existing supports for LGBT survivors of sexual violence, and
- a discussion of the lack of hate crime legislation in Ireland.

The RCNI Report

In 2016, the RCNI released a report titled “Finding a Safe Place: LGBT Survivors,”¹ (‘The RCNI Report’) providing the most thorough overview of sexual violence in the Irish LGBT community. However, due to the limited number of trans people who used RCNI services, no data was released regarding the trans experience for fear of risking their privacy. The experience of sexual violence by trans people in Ireland will be discussed in further detail later in this section.

The RCNI report found that in the previous year, 88 LGBT people reported to crisis centres, totalling just 4% of all individuals reporting to these crisis centres in that year; 72% of these individuals were women, 28% men. However, this is probably a result of the lower likelihood of LGBT survivors accessing support services rather than lower likelihood of them being targets of sexual violence. In fact, other research shows much higher rates of sexual violence experienced by LGBT people by virtue of their sexualities in Ireland.²

The RCNI report gave the following key findings:

- In 2013, 4% of sexual violence attending 15 Rape Crisis Centres for counselling and support identified as lesbian, gay or bisexual (LGB).

¹ “Finding a Safe Place: LGBT Survivors of Sexual Violence and Disclosure in Rape Crisis Centres”, RCNI, 2016

² Gay and Lesbian Equality Network, The LGBT Ireland Report, 2016. This report cited the number at 14.9%, as recorded by interviewing 268 college-going LGBTI individuals

- LGB survivors disclosed higher levels of multiple incidents of sexual violence than heterosexual survivors (26% compared to 15%).
- Gay/bisexual men disclosed almost twice the levels of rape of heterosexual men (63% compared to 34%)
- Lesbian/bisexual women disclosed higher rates of abuse by male and female perpetrators abusing together (10%) than heterosexual women (2%).
- 47% of LGB survivors waited over ten years to report the abuse compared with 21% of heterosexual survivors.
- 25% of LGB survivors disclosed first to a friend, compared to 12% of heterosexual survivors. 28% disclosed to parents or other family, compared to 39% of heterosexual survivors.
- All LB survivors who became pregnant as a result of rape terminated the pregnancy.³

Barriers to Accessing Support Services and the Legal System

Of their LGBT clients, RCNI reported that only 37% reported the crime to the police or other authorities.⁴ First contact with gardaí was most likely to occur at either the time of the abuse or 10+ years following the offence.⁵ This is a much longer gap than typical for non-LGBT survivors. Only 6% of LGBT people reported their abuse between 5 years and 10 years after the abuse occurred, compared to 30% of straight individuals.

Almost all research into sexual violence against LGBT people and the LGBT survivors of such violence has concluded that there are particular vulnerabilities that LGBT survivors face.

Studies have shown that factors affecting reporting include a belief that nothing will be done to help the affected survivor or that the survivor believes they will experience discrimination from authorities and resources.⁶ In these cases, LGBT survivors may have fears about the consequences of reporting where no protection would be provided. A 2016 report by the now-defunct GLEN found many LGBT study participants wanted increased Garda training with regards to LGBT issues in order for them to feel safer and less isolated.⁷

Stonewall⁸ reports particular concerns experienced by LGBT sexual violence survivors, such as being controlled by threats from current or former partners of

³ "Finding a Safe Place: LGBT Survivors of Sexual Violence and Disclosure in Rape Crisis Centres", RCNI, 2016, 18

⁴ Ibid, 15

⁵ Idem

⁶ "EU LGBT survey: European Union lesbian, gay, bisexual and transgender survey", European Union Agency for Fundamental Rights ('FRA'), 2014

⁷ Gay and Lesbian Equality Network, The LGBT Ireland Report, 2016

⁸ <https://www.stonewall.org.uk/help-advice/criminal-law/domestic-violence> LGBT organisation based in Scotland which provides support, advice and information on domestic abuse for UK survivors

being outed if they report their abuse, or of deserving the abuse for transitioning in the case of transgender individuals.⁹

While no relevant research exists in Ireland, other jurisdictions have long noted the increased risk of domestic abuse for bisexual women.¹⁰ In studies of South Asian bisexual/lesbian women in America, one reason for not engaging with domestic abuse services and the criminal justice system is fear of their experience being used to support bigoted views of the LGBT community as violent and predatory.¹¹

Although the same resources are in theory available to LGBT survivors as heterosexual survivors of sexual violence, the RCNI report cites less awareness of these resources, often caused by services having no specific mention of LGBT policies, as a core issue preventing participation.¹²

“Hard to Reach” Nature of the LGBT Community

Hard to reach communities are noted by sociologists as social classes who due to factors such as marginalisation, stigma, nomadism, illiteracy or not speaking the dominant language of the country they are in, are difficult to gather data on and provide services for. In Ireland, despite recent strides towards equality, most notably the 2015 marriage referendum, the LGBT community still qualifies as such a group.

The RCNI report identified a need for the LGBT organisations and first responders to engage more with the issues of sexual violence, in particular through online resources. To this end, in 2014, GLEN founded the website StopLGBTthatcrime.ie, designed as a safe space for LGBT people to report harassment and violence online in order to get better statistics on LGBT abuse. National organisations, such as the Crime Victims Helpline, referred clients to this website when relevant. Unfortunately, GLEN and thus the website were shut down this year following issues with the Charity Regulator and a review of expenditures within GLEN.¹³ The gaps left by these closures have not yet been filled.

The RCNI report also recommended that LGBT and sexual violence organisations engage in “inter-agency co-operation,” that further research be done into LGBT issues surrounding sexual violence (such as barriers to disclosure and appropriate

⁹ *Ibid*, “Domestic Violence: A resource for Trans People”

¹⁰ Centres for Disease Control and Prevention, press release on interpersonal and sexual violence by sexual orientation
https://www.cdc.gov/media/releases/2013/p0125_NISVS.html

¹¹ Prajna Paramita Choudhury, ‘The Violence That Dares Not Speak its Name: Invisibility in the Lives of Lesbian and Bisexual South Asian American Women’ in Shamita Das Dasgupta (ed), *Body Evidence: Intimate Violence against South Asian Women in America* (Rutgers University Press 2007)

¹² “Finding a Safe Place: LGBT Survivors of Sexual Violence and Disclosure in Rape Crisis Centres”, RCNI, 2016. Also, resources such as COSC and Tusla make no direct references to LGBT issues on their websites, leaving survivors with little help for LGBT-specific concerns

¹³ ‘Gay and Lesbian Equality Network to close after recent controversy,’ *The Independent*, (18 May 2017)

responses by services), and proper research to be done on transgender and intersex sexual violence as there is almost no such data in Ireland to date.¹⁴

The consequences of the LGBT community's hard-to-reach nature is exacerbated by their sidelining in any national discussion of sexual violence. The invisibility this creates is acknowledged by the RCNI in their report, which states: "we need to have a conversation on the matters raised in this report. The issue of sexual violence and the LGBT community encompasses vulnerabilities that are sometimes universal, sometimes targeted at LGBT people because they are LGBT or sometimes involves sexual violence between LGBT people."¹⁵

LGBT Asylum Seekers and Sexual Violence

Issues for LGBT asylum seekers who have been subject to homophobic and/or transphobic sexual violence have arisen in Irish deportation cases. In *M v Minister for Justice, Ireland and the Attorney General*,¹⁶ Ryan J determined in the High Court that an LGBT person seeking asylum based on persecution based on their status as an LGBT person must prove that the persecution they faced was "State-sponsored."

¹⁷ This line of court reasoning has been since approved in other cases, such as *ZK v Refugee Appeals Tribunal*,¹⁸ where McDermott J found that the Tribunal had failed to make a fair decision when it didn't consider whether the applicant was homosexual and whether Georgia, the applicant's home country, provided sufficient "State protections" for LGBT people. This is potentially an expansion of the *M* judgment, as it opens up the possibility that sexual violence against LGBT people, not committed directly by an agent of the State, but somehow otherwise facilitated by the State, may qualify as grounds for refugee status.

However, there is room for further expansion, as it implies that sexual violence could not be a sole grounds for LGBT asylum claims where the risk was high but not State-sponsored. There are no similar cases taken by transgender asylum seekers, and while probable that the courts would apply much the same reasoning as seen in *ZK*, the current gap raises some concern. The Gender Recognition Act 2015 recognises transgender identity where certificates are issued. An equivalent certificate is less likely to be available to a transgender individual coming from a country with less inclusive laws, and in general asylum seekers often face problems in obtaining necessary documents from their country of origin if that country is

¹⁴ "Finding a Safe Place: LGBT Survivors of Sexual Violence and Disclosure in Rape Crisis Centres", RCNI, 2016, 19

¹⁵ *Idem*

¹⁶ [2010] IEHC 519

¹⁷ *Idem*

¹⁸ [2014] IEHC 543

engaged in conflict. Whether this recognition requirement would cause difficulties for transgender asylum seekers is unclear.

Existing Supports for LGBT People

COSC now provides a list of Garda Liaison Officers who have special training to assist with LGBT concerns and reports of sexual violence. A full list of the Officers trained for this purpose and their location is provided on the COSC website – a comprehensive guide can also be found on www.LGBT.ie.¹⁹ This list shows how few Gardaí are trained and available for this purpose in rural Ireland, and it is noteworthy that there is only one instructor listed to providing training for such Gardaí. This mirrors the general lack of resources available to LGBT people in rural areas especially.

The RCNI report recommended in particular that visibility of the existing services to LGBT people must be increased, that building trust in these confidential services for LGBT people should be more strongly encouraged and that developing online resources for first responders and practitioners would be hugely beneficial to these ends.²⁰ In the RCNI report's forward, the first and one of the three main points they emphasise is that "rape crisis centres have been and are safe spaces for LGBT survivors."²¹

The IPRT's report on LGBT prisoners in Ireland, "Out on the Inside,"²² made reference to cases of sexual violence and harassment. They noted that:

*"research consistently shows that LGBT prisoners are amongst those with the highest rates of sexual victimisation [...] As a result, the UN considers protection from rape and sexual assault to be the main need of LGBT prisoners."*²³

One core issue within the penal system is identifying cases of coercive as opposed to consensual sexual activities, and therefore due to barriers deterring reporting, such as fear of repeat victimisation, the report highlighted the likelihood of under-reporting.²⁴

¹⁹ http://www.LGBT.ie/attachments/_attachment_ELO%20LGBT%20as%20of%2026%20MAY%202014.pdf

²⁰ RCNI "Finding a Safe Place: LGBT Survivors of Sexual Violence and Disclosure in Rape Crisis Centres" (2016)

²¹ Idem

²² IPRT "Out on the Inside: The Rights, Experiences and Needs of LGBT People in Prison" (2016)

²³ Ibid, 24-25

²⁴ Ibid, 26

Hate Crime Legislation and Relevant Existent Legislation

Currently there exist no hate crime legislation in Ireland. The EU LGBT Survey repeatedly highlights a need for anti-hate legislation to be implemented by member states, specifically mentioning services for reporting crimes.²⁵

The UK has legislation to a similar effect. While not hate crime legislation, section 146(2) of the Criminal Justice Act 2003 makes crimes based on a victim's gender identity or sexual orientation an aggravating factor of the crime, which must be explained by the judge when directing juries in criminal cases. On its face, this ought to cover circumstances where someone has been sexually assaulted or raped due to their gender identity or sexual orientation.

The Irish branch of the European Network Against Racism have mounted a campaign called "Love Not Hate" to lobby for the introduction of hate crime legislation in Ireland, which would be more stringent than what is found in the UK. They propose a "Criminal Law (Hate Crime) Bill" on their website, which includes rape and sexual assault. The RCNI report also strongly recommends that hate crime legislation be introduced in Ireland.²⁶ The lack of legislation has been at different points linked to the low reporting and prosecution rates of crimes against LGBT people, as well as other marginalised communities.

Available Information on the Experiences of Transgender People

Internationally, transgender people are recognised as particularly vulnerable to sexual violence.²⁷ In Ireland, TENI produced a report²⁸ citing statistic of up to 36% of trans participants having suffered sexual harassment, 12% sexual assault and 6% rape purely because of being transgender.²⁹ The report also noted that 'fear of sexual violence' and 'knowledge of sexual violence against others' was higher among transgender people than the general population.³⁰ This study also reported harassment (non-sexual) by police or other authority figures in daily experiences at 12%, and fear of such experiences at almost 30%.

This suggests that fear and experience of harassment by police and services would be a major barrier to accessing support for transgender people, and with nearly no

²⁵"EU LGBT survey: European Union lesbian, gay, bisexual and transgender survey", European Union Agency for Fundamental Rights, 2014, 16; "EU LGBT survey: European Union lesbian, gay, bisexual and transgender survey", European Union Agency for Fundamental Rights, 2014, 42

²⁶ "Finding a Safe Place: LGBT Survivors of Sexual Violence and Disclosure in Rape Crisis Centres", RCNI, 2016

²⁷ 'EU LGBT Survey', n8 pg56: "A third (34 %) of all transgender respondents say they were physically or sexually attacked or threatened with violence in the five years preceding the survey, compared with, for example, around a quarter of all lesbian, gay and bisexual respondents."

²⁸ "Speaking from the Margins, Trans Mental Health and Wellbeing in Ireland", TENI, 2013

²⁹ Ibid, 35

³⁰ Ibid, 36

other research into transgender sexual violence this report should be taken as a sign that transgender people are at particularly high risk of both sexual violence and not reporting said violence due to either real or feared harassment.

Conclusion

In conclusion, there is a notable lack of legislative attention to LGBT individuals affected by sexual violence. This report has highlighted a few key issues:

- the underreporting and under-engagement with relevant services by LGBT people who have experienced sexual violence, often caused by fear of further discrimination or lack of awareness of the services,
- the lack of domestic research, particularly with regards to the trans community,
- the question of recognition for transgender asylum seekers and the limited scope for applying for refugee status as a result of homophobic or transphobic sexual violence in one's country of origin, and
- the absence of legislation against hate crimes, despite both domestic and international calls for it.

Impact of Alcohol and Nightlife on Sexual Violence

Alcohol and nightlife have a very real effect on sexual violence,¹² and Ireland in particular has a strong history of alcohol use and abuse. The Health Research Board's National Alcohol Diary Survey found that 150,000 Irish people are dependent drinkers, over a million Irish people are harmful drinkers, and that binge drinking makes up 75% of alcohol consumption.³

Many recent high-profile Irish cases of sexual violence have connections with alcohol and/or attendance at nightclub venues, such as an unconscious 19-year-old woman 'allegedly raped by two men in The Wright Venue,'⁴ a woman in her early 20s who 'left a nightclub with a man but was attacked shortly after leaving the popular nightspot,'⁵ or where a man was convicted for 'taking part in the gang rape of a woman he met at a nightclub.'⁶

This section shall examine:

- the statistical ties between alcohol and sexual violence,
- the likelihood of victim blaming in sexual violence cases tied to alcohol consumption or nightlife,
- how sexual consent operates under the influence, and
- the use of date-rape drugs in nightlife.

Statistical Link of Alcohol with Sexual Violence

When discussing the prevalence of sexual violence and its link with alcohol and nightlife, we can see that young adults are particularly vulnerable. The 20 to 29-year-old demographic, which has been shown to be the heaviest drinkers, are also the most at risk of alcohol-fueled sexual violence.⁷ A 2015 survey found a quarter of female students in Trinity College Dublin had been subjected to an unwanted sexual experience, in contrast with 5% of male students.⁸

¹ NE Marion and WM Oliver, *Drugs in American Society: An Encyclopedia of History, Politics, Culture and the Law* (ABC-CLIO 2014) 31

² Rape Crisis Network Ireland, 'National Statistics 2015' [2015] 29

³ <<http://alcoholireland.ie/facts/alcohol-related-harm-facts-and-statistics/>> accessed 10 November 2017

⁴ Ken Foy, 'Two questioned over horrific rape of teenager in top nightclub' *Irish Independent* (Dublin, 4 August 2017)

⁵ Ken Foy, 'Gardai probe alleged rape after woman left popular Dublin nightclub' *Irish Independent* (Dublin, 3 May 2017)

⁶ Declan Brennan, 'Four Years for Part in Gang Rape' *Irish Times* (3 June 2017)

⁷ <http://alcoholireland.ie/irelands-per-capita-alcohol-consumption-increased-2016/> accessed 12/11/2017

⁸ Aine O'connell, 'TCDSU Launch Sexual Consent Survey' *The University Times* (Dublin, 29 January 2015)

76% of defendants in Irish rape cases had been drinking at the time of the alleged offence.⁹ This is not a phenomenon unique to Ireland, with similar numbers reported globally. The US Department of Justice, in their 2003 report on acquaintance rape of college students, found that in over three-quarters of college rapes, the offender, the victim, or both had been drinking.¹⁰ Also in America, in 47% of sexual assaults the victim had been drinking alcohol, and in 69% of sexual assaults the perpetrator had been drinking.^{11 12}

Alcohol, Nightlife, and Victim Blaming

It is more likely that blame will be assigned to drunken victims of rape rather than sober victims. Women who are raped or assaulted under the influence can be assumed to have “caused her rape by suggesting her consent through her alcohol consumption” or “not taking the precaution of staying sober”.¹³ When the alcohol consumption happens on a night out, the responsibility placed on a survivor for the violence they endured is further exacerbated by accusations of recklessness or inappropriate conduct. This culture of victim blaming results in the victim being less likely to report the rape or sexual assault they experienced, either because they blame themselves or because they think that people will not believe them. The Gardaí and juries in trials are also less likely to believe them or find against their assailant. As stated by American judge Kushner J: “If push comes to shove, a girl who has been drunk is less likely to be believed than one who is sober at the time”.¹⁴ She herself was accused of victim-blaming for her comment: “How I see it is burglars are out there and nobody says burglars are OK but we do say: ‘Please don’t leave your back door open at night, take steps to protect yourselves.’”.¹⁵ Having such a bias present even in the judiciary makes the already difficult tasks of securing a conviction and avoiding retraumatization in the trial process even more daunting for complainants who were drunk or on a night out at the time of the assault or rape. The inverse of this is that perpetrators who were drunk at the time of committing an act of sexual violence can be seen more sympathetically and as less responsible for their criminal behaviour.

⁹ <http://alcoholireland.ie/facts/case-studies-kids/> accessed 11/11/2017

¹⁰ Acquaintance Rape of College Students, Rana Sampson, 2003, US Department of Justice

¹¹ <https://www.campussafetymagazine.com/safety/sexual-assault-statistics-and-myths/> accessed 14/11/2017

¹² JG Silverman, 'Dating violence against adolescent girls and associated substance use, unhealthy weight control, sexual risk behavior, pregnancy, and suicidality' [2001] 5(1) *Journal of the American Medical Association* 286

¹³ P Macneela and T Conway, 'Young People, Alcohol and Sex: What's Consent Got to Do With it?' [2015] Commissioned by Rape Crisis Network Ireland (RCNI)

¹⁴ Sam Lister, 'Female judge accused of 'victim blaming' after warning women 'get drunk and risk rape'' *Irish Independent* (11 March 2017)

¹⁵ Kevin Rawlinson, 'Judge accused of victim-blaming in comments on rape case' *The Guardian* (10 March 2017)

Alcohol, Nightlife, and Consent

Section 48 of the recent Criminal Law (Sexual Offences) Act 2017 provides the first ever statutory definition of consent in Ireland, and along with that, explicitly says that the effect of alcohol can render someone incapable of consenting at all.

Alcohol consumption in Ireland has been said to have a key role in “hookup culture and sex.”¹⁶ Intoxication has a significant impact on consent, up to the point of vitiating it. This has been the topic of much discussion in Ireland in recent years.¹⁷

Alcohol makes unplanned sex more likely to occur but less likely to be founded upon direct communication. Ambiguous and dangerously subjective ideas of body language and tacit consent can replace actual discussion, both of which are particularly unreliable when either the person interpreting the perceived tacit consent or the person being perceived as tacitly consenting are intoxicated.¹⁸

Irish young people have been found to have limited understanding of sexual acts which occur without consent, or with parties who are too drunk to legally give consent. In focus groups conducted in the National University of Ireland, Galway, students dealt with a hypothetical scenario involving non-consensual penetrative sex between ‘Fred’ and a ‘blackout-drunk Jane.’¹⁹ They believed that Jane's extreme intoxication in fact meant that it was impossible to ‘make an attribution of rape’, perhaps relying on outdated beliefs that some resistance on the part of the victim is necessary for non-consensual sex to qualify as rape, despite Ireland specifically legislating against use of this defence.

²⁰

While survivors of sexual violence are less likely to be believed if they were drunk, alcohol consumption is seen as a defence for the perpetrator, as excusing themselves from their responsibility to ensure consent.

In nightlife and party settings, women often experience social pressure to ‘go along with’ sexual acts. In these night-time venues, interactions between prospective partners are said not to be ‘value-free,’ as there was pressure perceived by women to go along or

¹⁶ Pádraig Macneela and Thomas Conway, ‘Young People, Alcohol and Sex: What's Consent Got to Do With it?’ [2015] Commissioned by Rape Crisis Network Ireland 6

¹⁷ For example the winner of the 2015 Irish Book Awards “Asking for It” by Louise O’Neill deals with sexual assault under the influence of alcohol and drugs

¹⁸ Pádraig Macneela and Thomas Conway, ‘Young People, Alcohol and Sex: What's Consent Got to Do With it?’ [2015] Commissioned by Rape Crisis Network Ireland 15

¹⁹ *ibid* 18

²⁰ The Criminal Law (Rape) Amendment Act 1990 Section 9

acquiesce to the partner's intentions, due to real or feared social pressure and a desire not to be seen as 'frigid.'"²¹

Use of Date-Rape Drugs

Date-rape drugs have been defined as '[a]ny substance that is administered to lower sexual inhibition and enhance the possibility of unwanted sexual intercourse.'²² Also known as 'club drugs', they accommodate sexual violence by causing the drugged person to become weak, dizzy and often unconscious, making it easier for the perpetrator to assault them. More often than not, these drugs also cause memory loss, so the survivor may not even remember the attack.

Date-rape drugs are generally used on nights out, due to the high levels of alcohol consumption. This consumption aids the sexual predator in two main ways. It makes the victim less aware of their surroundings and therefore less likely to suspect that they are being drugged. Secondly, it is easy to conceal drugs like these by slipping them into drinks.

Common examples of date-rape drugs are Flunitrazepam (Rohypnol), also known as 'roofies'; Ketamine; and Gamma Hydroxybutyric Acid (GHB), also called liquid ecstasy. While there has been discussion of introducing test-kits for date rape drugs in bars, which has been supported by the RCNI, the Gardaí policy remains erring on the side of caution and throwing out any drink that was left unattended as a preventative measure.

However, alcohol may be the most popular date-rape drug in Ireland. Between the years 2000 and 2005, there was no conclusive evidence of any use of such drugs at all in Ireland, but alcohol was an element of 80% of rape cases.²³ Alcohol functions as a date-rape drug as it causes confusion and sometimes unconsciousness, making people less capable of defending themselves from sexual violence. It has been suggested that its popularity as a date-rape drug is due not just to its effectiveness, but also to its widespread availability, unlike the other aforementioned drugs.²⁴

The phenomenon of topping up drinks without the drinker's knowledge is a commonplace predatory behaviour. This practice compromises autonomy to such an extent that, even if verbal consent was given, severe intoxication would mean that that consent cannot and should not be seen as legitimate.

²¹ Pádraig Macneela and Thomas Conway, 'Young People, Alcohol and Sex: What's Consent Got to Do With it?' [2015] Commissioned by Rape Crisis Network Ireland 1

²² RCNI, 'Alcohol as a 'Date-Rape' Drug' < <http://www.rcni.ie/alcohol-as-a-date-rape-drug/>> accessed 8 December 2017

²³ Idem

²⁴ Idem

Conclusion

The link between the use of alcohol and sexual violence is plain and unambiguous. By its very nature alcohol renders people more vulnerable, reducing awareness, decision-making capacity, physical autonomy, as well as commonly causing memory loss.

This section identified the following key issues:

- a strong statistical link between alcohol consumption and sexual violence, highlighting the importance of addressing this issue,
- an increased risk of victim blaming for survivors of sexual violence who were intoxicated at the time, to the extent of compromising the likelihood of their assailant being punished,
- an increased risk of survivors of sexual violence being doubted if they were intoxicated at the time of the attack, tied to misunderstandings of consent,
- an increased risk of perpetrators not being viewed responsible for committing sexual violence if they and/or their victim were intoxicated at the time, and
- use of date-rape drugs and in particular alcohol in nightlife culture.

Sexual Violence in Migrant and Traveller Communities

In theory, laws against sexual violence extends to all those within Irish borders. However, migrant women share particular vulnerabilities in situations of sexual violence, and in 2016, comprised 28% of the new women seen in Women's Aid's One to One support service.¹ In recognition of what Women's Aid considers the key barriers for migrant survivors,² this section shall examine:

- dependency for immigration status,
- ineligibility for social welfare, and
- language barriers, as well as
- the situation for those in the State illegally.

It will then examine the situation of women seeking asylum, with a focus on:

- experiences of sexual violence prior to their arrival in Ireland, and
- vulnerability to sexual violence and lack of resources in the Direct Provision system.

The research will finally consider the Traveller community, examining:

- the prevalence of sexual violence in the Traveller community,
- social attitudes towards the Traveller community,
- the impact of the Habitual Residence Condition on Travellers, and
- cultural awareness of sexual violence.

The Situation for Migrant Women

Dependency for Immigration Status

If a survivor of sexual abuse (in this case under the heading of domestic violence, with 24% of disclosures of domestic violence against women to Women's Aid in 2016 involving sexual abuse³) is dependent on their abusive partner in order to ensure their immigration status, serious issues can arise for them. The Victims of Domestic Violence Immigration Guidelines⁴ covers how Irish immigration system handle such cases.

This document is directed at the survivor themselves, and functions as a guide for them to apply for independent immigration status. It states that '[one does] not have to remain in an abusive relationship in order to preserve [their] entitlement to remain in Ireland.'⁵ However, this is not always the case.

¹ *Women's Aid Impact Report 2016*, 5

² *ibid*

³ *idem*, 2

⁴ INIS, *Victims of Domestic Violence Immigration Guidelines (Note for Website)*

⁵ *ibid*

Applications for independent immigration status are required to be made in writing and should that application be successful, there is a registration fee of €300. While this fee has certain exemptions, none of them are tailored to helping survivors of sexual violence.⁶ For survivors of partner-committed sexual violence who are not in their country of origin, who may be unfamiliar with Irish laws and the English language, and who may have no community ties or supports, the task of applying for immigration status can be very difficult.

The application also requires evidence to support the victim's claim of having been domestically abused. The category of documents suggested include:

- Protection Order, Safety Order or Barring Order from the courts.
- Medical reports indicating injuries consistent with domestic violence. Details of doctor and dates of consultations.
- A Garda report of incidents of domestic violence.
- A letter from a State body (such as the Health Service Executive) indicating that it is dealing with your case as an issue of domestic violence.
- A letter of support from a domestic violence support organization.
- Any other evidence indicating that you are the victim of domestic violence.⁷

The vast majority of these require that the victim has already effectively separated from their partner. The notion that an individual who is solely reliant on their abusive partner would consider going to Court, the doctor, the Gardaí, or another State Body, before their own safety in the State has been guaranteed, demonstrates a fundamental misunderstanding of the situations many of these individuals find themselves in.

Ineligibility for Social Welfare

In cases where the survivor was or is out of the labour force, their dependency on their partner is often economic as well as status-based. The fee early on in the application process is discouraging. Therefore these dependencies can be mutually reinforcing.

These women, should they leave their spouse, will have three months to seek employment and may not be a burden on the state.⁸ The Habitual Residence Condition (HRC) is attached to most Irish social welfare schemes, and determines who may claim it. The 'nature and pattern of [one's] employment' is a factor in determining habitual residence, as is familial or community ties to an area.⁹ Many migrant people fail to meet the HRC, and this leaves those in abusive relationships with a very difficult choice.

⁶ Irish Naturalisation and Immigration Service, *Registration fee, payment & exemptions*

⁷ Victims of Domestic Violence Immigration Guidelines, no 4

⁸ Citizens Information, *Residence requirements for social assistance in Ireland*

⁹ *ibid*

As the Social Welfare Appeals Office rarely publishes their decisions on the HRC, and there is a high rate of decisions being overturned on appeal, it is very difficult for migrant women to have any reasonable expectations when they seek

The simple question of where these people go is a serious one. If they do not meet the habitual residence condition, a shelter will not be able to collect payment for hosting them, and therefore they will not be able to stay.¹⁰¹¹

Partly because child benefit schemes are only available to those who meet the HRC, the pressure on migrant women to stay with violent partners increases when there are also children involved.

The Situation for Those in the State Illegally

A significant lacuna in the provision exists for situations in which the victim is unlawfully present in the State. The Government policy discussed above only concerns those in the state legally,¹² which will have a deterring effect on unlawfully present victims seeking support. While the document ensures that any evidence of domestic violence can be considered in a leave to remain application made subsequent to a notification to deport, it does not guarantee it would be successful or even persuasive.

Language Barriers in Seeking Support

In 2016, 495 calls to Women's Aid's National Freephone Helpline were from migrant women.¹³ Women's Aid's telephone interpretation service guarantees that a caller can speak to someone in their own language within a minute,¹⁴ making the process more accessible and less intimidating, and providing a gateway into the network of support available to otherwise isolated victims of domestic abuse. However, in other contexts of accessing support, language differences are not so smoothly facilitated.

Conclusion

The approach to migrant victims of domestic abuse has failed to account for their isolation. There is a significant problem when the laws designed to protect against violations of fundamental human rights fail to protect all categories of victims, regardless of race, nationality, or legal status.

The following key issues were identified:

¹⁰ Anthea McTeirnan, 'Migrant women experience high level of domestic violence,' *The Irish Times* (8 October 2014)

¹¹ Safe Ireland, *Report on the impact of the Habitual Residence Condition on women seeking protection and safety for themselves and their children from a domestic violence perpetrator 4*

¹² Victims of Domestic Violence Immigration Guidelines, no 2

¹³ Women's Aid Report 2016 no 1

¹⁴ Anthea McTeirnan, 'Migrant women experience high level of domestic violence,' *The Irish Times* (8 October 2014)

- the process of gaining independent migrant status can be overly complex and costly,
- the lack of access to state welfare schemes can further deter migrant women from leaving abusive partners,
- survivors of domestic abuse who are in the State illegally have virtually no support available to them, and
- there is still progress to be made with regards to facilitating the language differences of migrant survivors of domestic abuse.

The Situation for Asylum Seekers

Experiences of Sexual Violence Prior to Arrival in Ireland

Although it is difficult to conclusively measure it, conflict leads to higher sexual violence rates in two ways: directly, as the combatants use sexual violence to demoralise populations, as a means of perpetrating genocide, or to reward themselves;^{15 16} and indirectly, by creating a general culture of sexual violence, which is exacerbated by psychological trauma and distress, and because of the lack of ordinary security forces to provide protection for ordinary crimes.^{17 18 19} There is a high instance of past experiences of sexual violence in asylum seekers. RCNI's 2013 study on the situation of asylum seekers found a significantly higher incidence of rape (91%) than average. 46% of the perpetrators were members of the security forces, 52% of incidences included more than one perpetrator, and 90% of the sexual violence was inflicted alongside additional forms of violence, which is 20% higher than in the experiences of sexual violence of the general population.²⁰

These past experiences leave this group in a very vulnerable position, with many suffering from post-traumatic stress disorder, and therefore in great need of support upon their arrival in Ireland. However, the conditions of Direct Provision centres are not always conducive to that.

Experiences of Sexual Violence Subsequent to Arrival in Ireland

Direct Provision has become one of the most controversial state schemes in recent years, in part due to the risk it creates for women and girls. The stay of someone seeking asylum was not expected to last more than six months, but in 2016, the

¹⁵ Michael Kaufman, 'Sexual Violence in Conflict and Post-Conflict: Engaging men and boys,' Men Engage UNFPA Advocacy Brief (2012)

¹⁶ RCNI, *Asylum Seekers and Refugees Surviving on Hold*, 22

¹⁷ Michael Kaufman, 'Sexual Violence in Conflict and Post-Conflict: Engaging men and boys,' Men Engage UNFPA Advocacy Brief (2012)

¹⁸ RCNI, *Asylum Seekers and Refugees Surviving on Hold*, 22;

¹⁹ Dara Kay Cohen, Amelia Hoover Green, and Elisabeth Jean Wood, 'Wartime Sexual Violence: Misconceptions, Implications, and Ways Forward' (2013) USIP Special Report, USIP, Washington DC: Special Report 323

²⁰ RCNI, *Asylum Seekers and Refugees Surviving on Hold* (2014)

average Direct Provision resident remained there for over two and a half years, with 7.8% of asylum seekers remaining for more than seven years.²¹

Several issues have been raised regarding the direct provision system and its role in increasing the risk of sexual violence. The first is poverty. Under direct provision, asylum seekers are housed in centres where food, washing, electricity, heating, and basic supplies are given to them along with a stipend of €21.60 a week, after a recent increase by €2.50 per week, the first since 2000.²² This, along with the general ban on work, leaves asylum seekers, primarily women, more vulnerable to trafficking and prostitution.²³ While a recent Supreme Court judgment found an absolute ban on asylum seekers working unconstitutional, they have allowed the Government to maintain significant limitations. While it is not yet known what these limitations shall be, it is very possible that for many in the asylum seeker system work will still not be a possibility.

The second is the psychological effect of living in these facilities which, in conjunction with the horrific experiences asylum seekers have faced until then, can lead to low self-worth, leaving individuals particularly susceptible to sexual violence.²⁴ It must be noted that statistics on the prevalence of sexual violence in direct provision centres are rare and at risk of inaccuracy, given the low reporting rate among this community. As 46% of asylum seekers using RCNI services had experienced sexual violence at the hands of security forces, a subsequent mistrust and fear of authorities may be likely. This resistance to accessing support can increase the likelihood of an individual enduring long-term sexual violence.

There is only one woman-only direct provision centre, which in 2016 was able to house 36 women, with all others living in mixed-gender centres.²⁵ The gender imbalance in these centres is sometimes severe, with one centre for example reporting 102 male and 2 female residents.²⁶ This includes women who have been subjected to intensive sexual violence and human trafficking, which the Irish Human Rights and Equality Commission has opined contravenes the Convention on the Elimination of All Forms of Discrimination Against Women.²⁷ Privacy in these centres is minimal, with shared bathroom and shower facilities, no private cooking facilities, and often shared bedrooms.²⁸ These conditions cause additional stress for survivors of sexual violence, due to real and perceived fears, as well as exacerbating

²¹ Reception and Integration Agency, *Annual Report: 2016* 15

²² Sarah Bardon, 'Asylum seekers to get extra €2.50 per week to live on' *The Irish Times* (14 June 2017)

²³ RCNI, *Asylum Seekers and Refugees Surviving on Hold* (2014)

²⁴ *ibid*

²⁵ Reception and Integration Agency, *Annual Report 2016* 18

²⁶ Glenvera Centre, Co. Cork; Reception and Integration Agency, *Annual Report 2016* 16

²⁷ Irish Human Rights and Equality Commission, *Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women: Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports* (2017)

²⁸ Akidwa, *No Place to Call Home: Executive Summary* (2012)

symptoms of post-traumatic stress disorder. Reports of harassment and propositioning have emerged from Direct Provision centres as a result of these conditions.^{29 30 31} AkiDwA, the Migrant Women's Network, has reported avoidance behaviours such as urinating in buckets at night to avoid using shared bathroom facilities.³²

Often asylum seekers may have been forced to come without their families, or the members of their family who fled with them died en route or were separated from them, which leaves them in situations of isolation, which in turn adds to their vulnerability to sexual violence. This is the case in particular for young people, who make up a disproportionate percentage of the asylum seeking community, and who have often spent a significant amount of their life either in situations of conflict, in refugee camps, or in transit, meaning that the likelihood of having a formal education is low, and self-worth is often even more so.³³

Conclusion

Asylum seekers face unique struggles when it comes to preventing and promoting recovery from sexual violence. This section has identified the primary reasons for this as:

- past experience with sexual violence which leaves many victims with Post-Traumatic Stress Disorder, and a fear of authorities which leads to a lower likelihood of reporting the violence,
- the work ban and incredibly small allowance may lead them to engage in unsafe and coercive sexual activity for money,
- The lack of privacy and security, and the mental ill-health associated with Direct Provision expose asylum seekers to significant risks of sexual harassment and violence.

Sexual Violence in the Travelling Community

Prevalence of Sexual Violence in the Travelling Community

Less than 1% of sexual violence victims who reported to Rape Crisis Centres were members of the Travelling community,³⁴ but given how they account for an equally small fraction of the general population, this does not indicate lower rates of sexual violence proportionally. Traveller women are believed to be less likely to report

²⁹ Irish Human Rights and Equality Commission, *Ireland and the Convention on the Elimination of All Forms of Discrimination Against Women: Submission to the United Nations Committee on the Elimination of Discrimination Against Women on Ireland's combined sixth and seventh periodic reports* (2017) 18

³⁰ Kitty Holland, *Men Look Creepy at You: Children in Direct Provision Speak Out*, The Irish Times (July 2017)

³¹ RCNI, *Asylum Seekers and Refugees Surviving on Hold* (2014)

³² Akidwa, *No Place to Call Home: Executive Summary* (2012)

³³ RCNI, *Asylum Seekers and Refugees Surviving on Hold* (2014) 19

³⁴ Rape Crisis Network Ireland, *RCNI Rape Crisis Statistics and Annual Report* (2015)

sexual violence than women from the settled community.³⁵ As Travellers are seen as a hard to reach group, there is a lack of statistics relating to instances of sexual abuse amongst Traveller women. This can also be linked to their low engagement with support services.

As they face serious discrimination in many social contexts, survivors of sexual violence can have real or perceived fears of interacting with services provided by those outside of their community. Irish Travellers have an 84% unemployment rate, with 55% of Travellers leaving school at fifteen and 90% completing all of their formal education by the age of seventeen.³⁶ 12.2% of Irish Travellers live in temporary accommodation, and there are over 2,700 Travellers living without running water.³⁷ According to Pavee Point, Nearly one-fifth of Travellers lack proper accommodation.³⁸ This pattern is not unique to Traveller women alone, but is a well-established characteristic of all minority ethnic groups.³⁹

Two main aims have been put forward as attempts to address issues of social exclusion, marginalisation, and domestic violence amongst minority ethnic groups around the globe. The first focuses on giving victimised women a voice in society to seek help and be heard, the second on recognition of the structural barriers which prevent these women being heard in the first place. Gender, race, and social discrimination being amongst these structural barriers.⁴⁰ These barriers place Traveller women at a higher risk of sexual violence. Pavee Point have urged the Government to address the stigmatisation, inequalities and habitual residence conditions faced by travellers in our society which will in turn have the effect of reducing the risk of sexual violence faced by traveller women.⁴¹

Impact of Habitual Residence on the Travelling Community

Given their traditionally nomadic lifestyle, their low employment rate, and their low engagement with community services, social welfare is often rendered inaccessible for Travellers by the HRC. They are often living in sites located on the outskirts of towns and suburbs removed from essential amenities within the community such as the Gardai, social welfare resources, help and support groups, and recreational centres.⁴²

³⁵ Rape Crisis Network Ireland, *Rape and Justice in Ireland: An Introduction and Executive Summary* (2009)

³⁶ CSO, *Irish Census Reports* (2016)

³⁷ UCD-led All Ireland Traveller Health Study Research Team, *All Ireland Traveller Health Study* (2010)

³⁸ Elaine Edwards, 'Nearly one-fifth of Travellers lack proper accommodation' *The Irish Times* (19 May 2016)

³⁹ Natalie J Sokoloff, and Ida Dupont, 'Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence against Marginalized Women in Diverse Communities' (2005) 11 *Violence Against Women*

⁴⁰ UCD-led All Ireland Traveller Health Study Research Team, *All Ireland Traveller Health Study* (2010)

⁴¹ Pavee Point Travellers Centre, *Supplementary Submission to the Joint Oireachtas Committee on Justice, Equality and Defence on the Issue of Sexual Violence*

⁴² Pavee Point Travellers Centre, *Position Paper on Impact of Habitual Residence Condition on Travellers and Roma* (2011)

In addition to this, the European Commission has said Ireland's National Traveller Roma Integration Strategy is incompetent, only satisfying four out of the necessary twenty-two benchmarks for the strategy to improve the situations of Traveller and Roma communities with regards to the HRC.⁴³ If a Traveller woman is suffering from domestic abuse it makes it significantly harder for her to seek help, often forcing women to remain in dangerous situations against their will.

Awareness of Sexual Violence in the Travelling Community

A report by Exchange House Travellers Service posed the question of levels of awareness of the issue of domestic violence amongst Traveller men, also discussing sexual violence.⁴⁴ All the participants associated different connotations with the phrase 'sexual violence,' with responses such as 'not having sex' being suggested as a contributing factor to this kind of violence. This demonstrates a lack of education on the matter, education which it is likely most Travellers would want to access. The low rates of literacy and the issues the Travelling community face in accessing education in general likely compounds the lack of knowledge surrounding sexual violence.

Conclusion

In an attempt to identify the particular obstacles of Travellers who have endured sexual violence, this section came to the following conclusions:

- cultural, social, and economic marginalisation of the Travelling community, puts them, and especially Traveller women and girls, at particular risk of sexual violence,
- this economic marginalisation is further exacerbated by the HRC, which makes social welfare inaccessible for many Travellers, and
- there is a lack of information on sexual and domestic violence targeted at the Travelling community.

⁴³ Pavee Point Travellers Centre, *Supplementary Submission to the Joint Oireachtas Committee on Justice, Equality and Defence on the Issue of Sexual Violence*

⁴⁴ Exchange House Travellers Service, *Project on Domestic Violence with Traveller Men* (2007)

Online Harassment and Sexual Cyber Bullying

With the meteoric rise in access to and use of social media over the past decade, our society and laws have in some ways struggled to keep up. In the context of sexual violence, this has allowed perpetrators to utilise new tools for harassment and abuse with limited consequences, as well as creating a forum in which children are particularly vulnerable and unprotected.

This section shall examine:

- the law as it stands today in Ireland,
- the responsibility of online platforms for inappropriate material,
- the particular vulnerability of young people,
- the extraterritorial effect of laws against online sexual violence, and
- the laws surrounding online harassment and sexual cyberbullying in other jurisdictions.

Irish Law on Online Sexual Violence

Many commentators on internet regulations have suggested that criminal legislation is only appropriate after failure of civil law and oversight mechanisms.¹ However, with the spread of online-based abuse, there is a simultaneous call for a strong legislative response. There currently exists no Irish legislation criminalising cyber sexual violence, specifically revenge porn. Revenge porn has various definitions, a phrase “used interchangeably with ‘non-consensual sexting’ and ‘involuntary porn’ which refer to the distribution of sexually explicit or intimate images”². Other terms such as harmful communication, or the ‘intentional victim shaming of individuals’ have also been used.³

Currently cases of revenge porn, and other occurrences of online abuse and harassment, are taken under section 10 of the Non-Fatal Offences Against the Person Act 1997, which covers general harassment. However, the language of this section is not always directly transferable to cases of online harassment. For example, the persistence of the harassment is taken into consideration under the Act, but this may not be a suitable consideration in an online case. Online, one single action can have

¹ Report on Harmful Communications and Digital Safety, Law Reform Commission 2016, 39

² Nicola Henry, Anastasia Powell, ‘Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law’ (2016) 25 Social and Legal Studies 397

³ Report on Harmful Communications and Digital Safety, Law Reform Commission 2016

continuous and dramatic effect on an individual's life.⁴ The absence of law accounting for these practices is facilitating sexual cyberbullying.⁵

Other forms of sexual violence facilitated by the internet include child grooming, stalking, and the non-consensual recording of sex.⁶ The Harassment, Harmful Communications, and Related Offences Bill 2017 seeks to criminalise cyberstalking, revenge porn, and online threats. However, it fails to remove the requirement of persistence from online harassment cases. The backlog of prospective legislation currently in the Oireachtas, and the fact that it is a private member's Bill, make it difficult to know when or if it will be made law.

In regard to punishment, the Law Commission Report argue that taking or distributing an intimate image without consent should be a summary offence only, with a Class A fine and/or up to 6 months imprisonment.⁷ It also states that there is no need to legislate against offences by children under the age of 17 if there is no malicious intent.⁸

Many other jurisdictions already have laws in place protecting people from online sexual violence, such as the UK, the Philippines, Japan, and Canada.⁹ Canada, England and Wales, Scotland, and the Australian state of Victoria, have legislated against once-off harmful communications such as "non-consensual distribution of intimate images with intent to cause harm" referred to as "upskirting" and "down-blousing," the terminology itself indicating that it targets exclusively women and girls.¹⁰

The Responsibilities of Online Platforms

Some websites are specifically dedicated to revenge porn, such as Is Anyone Up?, which was closed down during an FBI investigation. Other social media websites such as Twitter, Reddit and Facebook also platform revenge porn, along with pornography websites such as Pornhub.

Facebook, Twitter, Reddit, and Google now all expressly disallow the non-consensual posting of intimate imagery on their sites. Users must report explicit imagery which violates the Terms of Service and these websites rely on user enforcement. Google,

⁴ Rape Crisis Network Ireland, Discussion Document on Cyber-harassment, 2017

⁵ Report on Harmful Communications and Digital Safety, Law Reform Commission 2016, 100

⁶ Nicola Henry, Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25 Social and Legal Studies 406

⁷ Report on Harmful Communications and Digital Safety, Law Reform Commission 2016, 115

⁸ Report on Harmful Communications and Digital Safety, Law Reform Commission 2016, 106

⁹ Nicola Henry, Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25 Social and Legal Studies 401

¹⁰ Report on Harmful Communications and Digital Safety, Law Reform Commission 2016, 6

Bing, and Yahoo have offered a platform for the request of removal of non-consensual sexually explicit images.¹¹

Pornhub, the largest pornography site on the Internet, announced a reporting option for victims of revenge pornography. However they do not require uploaders to verify that images are consensual.¹² Reddit requires that users verify explicit posts are consensual by taking a photograph of themselves along with a card showing their username. These websites and social media platforms have power to limit revenge porn, but it is often argued that they do not do enough.

The RCNI states that an offence aimed at internet service providers (ISPs) of failing to take down material upon request of an affected person, such as a victim of cyberbullying, does not exist in current legislation.¹³ Australia's Private Sexual Material Act 2015 states that the onus is on the website operator to take all steps to ensure that another person providing the image has verified that they own the image and/or that the image is being distributed with the subject's consent. It has been criticised as not placing enough responsibility on the website to monitor and manage illegal behaviour.¹⁴

Young People in Online Spaces

In 2012, a survey found that nine out of ten Irish teenagers had at least one online profile. It also found that one fifth of nine to ten year olds, 42% of eleven year olds, and 61% of twelve year olds use social networking sites despite being underage according to the sites user policy.¹⁵ A survey the following year found that 10% of teenage boys and 12% of teenage girls reported being bullied online.¹⁶ In 2014, an RTE Primetime Investigation revealed how thousands of pictures of Irish teenage girls ended up on hardcore pornography sites without their knowledge. In 2017, 32% of children had not spoken to their parents about online safety in the last year, and 69% of teachers felt ill-equipped to teach online safety.¹⁷ Recent research also revealed that 34% of pre-teens regularly talk to strangers online.¹⁸ This demonstrates the need for an effective legislative response.

¹¹ Nicolas Suzor, Bryony Seignior & Jennifer Singleton, Consensual Porn and the Responsibilities of Online Intermediaries

¹² Nicola Henry, Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25 Social and Legal Studies 404

¹³ Rape Crisis Network Ireland, Discussion Document on Cyber-harassment, 2017 8

¹⁴ Nicola Henry, Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25 Social and Legal Studies 404

¹⁵ Brian O'Neill, Thuy Dinh, 'Social Networking Among 9-16 year olds,' Digital Childhoods Working Paper No. 3 2015

¹⁶ Brian O'Neill, Thuy Dinh, 'Cyberbullying among Irish 9-16 year olds,'

¹⁷ CyberSafeIreland, '2017 Second Annual Report,' 2017

¹⁸ Ciara O'Brien, 'Warning for parents as 34% of pre-teens talk to strangers online,' *The Irish Times* (6 Feb 2017)

The Extra Territorial Effect of Laws against Online Sexual Violence

Laws having extra territorial effect mean people can be prosecuted for acts which take place outside of the State. This would be particularly helpful in legislation against online sexual violence, given the global nature of cyber activity. The RCNI states that “[t]he location of an individual at the time of an incidence of harassment should not negate the protections which could be afforded to a victim.” Also, the identity of the holder of data is not always easily identifiable online. In such a case, it would be helpful to reform the rules on discovery against a person who is not a party to proceedings whether known or not yet known.¹⁹

The Law in England and Wales

In England and Wales, section 33 of the Criminal Justice and Courts Act 2015 introduced the offence of “disclosing sexual photographs and films with intent to cause distress.”

Section 33 applies to the disclosure of “private sexual photographs or films,” private being defined as that not “of a kind ordinarily seen in public.”²⁰ A photograph or film is defined as “sexual” if it “shows all or part of an individual’s exposed genitals or pubic area” or merely if it shows something that the “reasonable person would consider to be sexual.”

The 2015 Act also contains a number of defences for publishing such material: disclosure necessary for the prevention, detection or investigation of a crime,²¹ disclosure for journalistic material in the public interest,²² and disclosure with the reasonable belief that the explicit material had been previously disclosed for reward.²³ There must exist specific intent to cause distress, an intent which can not be conclusively presumed merely by committing the act.²⁴ Those who disclose any form of explicit material without meaning to cause harm or distress, or without appreciating the consequences of such disclosure, may escape liability.

It is worth noting that the legislation equally extends to online and offline disclosure, using no technology-specific wording.²⁵

¹⁹ Rape Crisis Network Ireland, Discussion Document on Cyber-harassment, 2017, 9

²⁰ Criminal Justice and Courts Act 2015, s 35(2)

²¹ Ibid s 33(3)

²² Ibid s 33(4)(a)

²³ Ibid s 33(5)(a)

²⁴ Ibid s 33(8)

²⁵ Criminal Justice and Courts Act 2015, s 34(2)

The introduction of Section 33 has led to an increase in the reporting of distribution activity in England and Wales. Over 1,200 cases have been reported since the coming into force of the Act, in comparison to 149 cases during the previous two and a half years.²⁶ However, only 11% of reports have led to the alleged offender being charged and, in 61% of cases, no action was taken either due to a lack of evidence or the withdrawal of support from the victim.²⁷

Despite this the Crown Prosecution Service, in their Report on Violence Against Women and Girls 2016/17, revealed an increase in convictions under Section 33 of the Act. While the number in 2015/16 was 206, this has risen to 465.²⁸

The Law in Scotland

The offence of “disclosing or threatening to disclose an intimate photograph or film” was introduced by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. A person commits this offence if they disclose, or threaten to disclose, a photograph or film showing someone in an intimate situation. They must intend to cause fear, alarm, or distress, or be reckless as to whether that will be caused. The explicit material must also not have been previously disclosed to the public, either by the individual depicted or with that individual’s consent.²⁹ Although this offence is similar to that in England and Wales-- for example, it not using any technology-specific language-- there are a number of substantial differences.

Firstly, the Scottish offence contains a broader mens rea. It applies not just to an individual who intends to cause distress, but to those who act recklessly. They may also be guilty of the offence for creating feelings of “fear,” “alarm,” or “distress”. The Scottish Act is broader in this sense as the English legislation applies only to “distress”.

The Scottish Act also carries a higher punishment, with a maximum penalty of 5 years’ imprisonment and/or a fine.³⁰ In England and Wales however, the offence carries, on summary conviction, a maximum penalty of 12 months’ imprisonment and/or a fine and, on conviction on indictment, 2 years’ imprisonment and/or a fine.³¹

²⁶ Will Worley, ‘Revenge porn: Hundreds of images of children shared on Facebook and Instagram,’ *The Independent* (24 January 2016)

²⁷ ‘Revenge pornography victims as young as 11, investigation finds’ *BBC News* (27 April 2016)

²⁸ Crown Prosecution Service, *Report on Violence Against Women and Girls 2016/17*, A43

²⁹ Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(1)(c)

³⁰ Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 2(7)(b)

³¹ *Ibid* s 33(9)

The Scottish offence also covers threats to disclose intimate material. This is a very important extension of the offence as the threat to disclose sexually explicit material can be used to control and blackmail the individual depicted.

The Situation in Australia

Facebook, alongside an Australian governmental agency, are currently trialling a new method of preventing sexually explicit images being shared online without consent.³² As Facebook also owns WhatsApp and Instagram, this move may also serve to prevent such images being shared on these platforms.

The new method involves sending an explicit picture that you fear may be shared online to yourself on Facebook Messenger. Facebook will then use its technology to create a digital fingerprint of that photograph. Then, if someone attempts to upload that same image, it will be prevented.

Australia also has an eSafety Commissioner, a statutory body which tackles online abuse, has a reporting system for children experiencing cyberbullying, and removes illegal online content. Ireland establishing a similar office was one of the Law Reform Commission's key recommendations.³³

Conclusion

With the ever-growing presence of social media in our society, it is becoming more and more necessary for the Government to create legislative protections against online abuses. With this observation in mind, this section identified the following key issues:

- there is no law in Ireland tailored to tackling online cases of sexual violence, such as revenge porn or sexual harassment,
- there is no law in Ireland creating a statutory responsibility for internet service providers to effectively monitor the content being posted on their website,
- children are particularly vulnerable in online spaces, which they are accessing at increasing rates, which further underlines the necessity for relevant legislation,
- any law which is enacted to tackle online sexual violence should have an extra territorial effect, and
- the methods of tackling sexual violence chosen by England and Wales, Scotland, and Australia can serve as inspiration to Ireland.

³² Sean Murray, 'Sending nudes to Facebook? Platform trying new way to combat revenge porn' *The Journal* (8 November 2017)

³³ Report on Harmful Communications and Digital Safety, Law Reform Commission 2016, 143

Sexual Violence in Relationships

Intimate partner violence is violence inflicted by a current or former partner. This can lead to lifelong emotional damage, serious physical harm, or loss of life.¹ Intimate partner violence can be physical, sexual, or psychological in nature. A report from Tusla in 2015 showed that one in two Irish women experience sexual harassment at some point, while one in four women experience physical violence.² 31% of Irish women have experienced psychological violence by their partner.³ In 2016, Women's Aid reported that 24% of domestic abuse cases involved sexual violence.⁴ In 2009, 18% of rapes were perpetrated by current or former partners.⁵ Despite this, rape and other forms of sexual violence are generally stereotyped as being committed by strangers, and those violated by partners face greater barriers in pursuing justice.

This section shall examine:

- Irish law on marital rape,
- the barriers faced by those seeking justice for sexual violence committed in a relationship,
- the risk of homelessness for women leaving violent relationships,
- the specific risks for migrant and Traveller women in violent relationships, and
- the issues faced by single parent families.

Marital Rape in Irish Law

During the 20th century intimate partner violence was seen as somewhat acceptable and up until 1990 Irish law held that a husband was incapable of raping his wife,⁶ as seen in the British case of *R v Miller*.⁷ This case highlighted the belief that a woman gave her perpetual consent to sexual relations as part of her marital vows, and therefore could not be raped by her husband.⁸

Although marital rape has since been criminalised in Ireland by introduction of the Criminal Law (Rape) (Amendment) Act 1990,⁹ there has been an incredibly low prosecution rate of such cases, despite 70% of rapes being committed by someone known to the survivor.¹⁰ In Ireland today there are only two standing convictions for

¹ Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill Education 2015) 317

² <<http://www.tusla.ie/services/domestic-sexual-gender-based-violence>> accessed 17/11/2017

³ <<https://www.womensaid.ie/about/policy/natintstats.html>> accessed 02/12/2017

⁴ *Women's Aid Impact Report 2016*, 2.

⁵ Rape Crisis Network Ireland, 'Rape and Justice in Ireland: An Introduction and Executive Summary,' (2009)

⁶ Conor Hanly, *An Introduction to Irish Criminal Law* (3rd edn, Gill Education 2015) 317

⁷ [1954] 2 Q.B. 282

⁸ *ibid*

⁹ Section 500

¹⁰ <http://www.icasa.org/docs/AquaintanceRape.pdf>

marital rape in Ireland.¹¹ One of these men was successfully prosecuted for raping his wife in 1997. In 2002 he was convicted, but the conviction was later quashed by the Court of Criminal Appeal in 2004 and a retrial was ordered. The man was finally convicted again in 2006 at the Central Criminal Court, nine years after his initial conviction.¹² Ten years later, 2016 saw the second and most recent conviction.¹³

Barriers to Survivors of Sexual Violence Committed in Relationships

Only one in ten survivors of sexual violence in Ireland reports the incident. Of that, only 7% go through the court process. Less than 1% see their assailant receive a conviction.¹⁴ Based on a report from 2013, the Central Criminal Court were presented with a total of 567 rape cases. Of this number, 205 defendant's cases went to trial. There were only 35 convictions and 155 acquittals.¹⁵ The conviction rate for sexual offences is consistently notably lower than that of any other crime.¹⁶

When the sexual offence was committed by someone the survivor was in a relationship with, the obstacles become even more immense. People who know their rapist are much less likely to report the crime.¹⁷ The main defence in rape trials is that the complainant had consented to the act,¹⁸ which is easier to argue and more likely to be believed if the complainant was in a relationship with the defendant. Complainants are less likely to have a positive experience with the Gardaí if their assailant is someone they know.¹⁹

The Threat of Homelessness

Ireland is currently facing a housing crisis greater than ever before in its recorded history. There are many risks attached to the housing crisis including homelessness, rocketing rents, and the risk of eviction.²⁰ One in five households are now availing of privately rented accommodation which has led to a dramatic increase in rent rates and the demand for housing is far exceeding supply.²¹ In 2016, there was over 100,000 people on waiting lists for social housing.²² Rent

¹¹ Kitty Holland, 'Marital rape remains extremely difficult to prosecute,' *The Irish Times* (26 July 2016)

¹² *ibid*

¹³ *ibid*

¹⁴ Donal O'Keeffe, 'In Ireland, a man can actually confess to rape and still serve no time in prison,' *The Journal* (15 July 2015)

¹⁵ 'Rape conviction rate offers no protection,' *The Irish Examiner* (26 July 2014)

¹⁶ Seán McCártaigh, 'Sexual offences have lowest conviction rate in country's circuit courts,' *The Irish Examiner* (9 August 2016); Mark Hilliard, 'DPP asked to explain lack of prosecutions in 74 rape, sexual assault cases' *The Irish Times*, (23 May 2016)

¹⁷ Rape Crisis Network Ireland, 'Rape and Justice in Ireland: An Introduction and Executive Summary,' (2009)

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ *ibid*

²¹ < <https://www.focusireland.ie/resource-hub/about-homelessness/>> accessed 25/11/2017

²² Hugh O'Connell, 'The housing crisis may be much worse than we thought,' *The Journal* (7 September 2015)

supplements provided for by the Government are proving to fail covering rent.²³ According to Focus Ireland, in the last week of October of 2017 it was reported that there were 8,492 people homeless throughout the country. It must be noted that this does not include homeless people who are living with parents, family members, or friends to avoid living on the streets.²⁴

The profile of the typical homeless person is shifting as well. Ireland has the most feminised homeless population in Europe²⁵ and 1,493 families accessing emergency accommodation all throughout Ireland.²⁶ A homelessness report from October 2017 shows that 2,250 people are currently in private emergency accommodation which includes hostels and B&Bs.²⁷

This reality has serious ramifications for women in and children of violent relationships. In 2015, 80% of women fleeing from domestic violence and abuse had to be turned away from women's refuges because of ever-rising accommodation problems.²⁸ This is a circular issue, as the reason there is no space for these women is that the current occupants of refuges stay for longer periods of time, as they themselves have nowhere else to go. In 2015, one refuge could only accommodate one out of every ten women who requested a space.²⁹ 23% of families made homeless in March of 2016 said that the reason for becoming homeless was to escape domestic violence.³⁰

Threat of homelessness is currently the main reason women stay in abusive relationships in Ireland,³¹ risking their children's and their own safety, or even lives.

Intimate Partner Violence in Migrant and Traveller Communities

There are additional barriers for migrant and Traveller women who are victims of intimate partner violence.³² Statistics show that these women made up 46% of the total of women seeking refuge in Ireland in 2009,³³ despite being a minority of the overall population. This does not indicate higher rates of relationship abuse within the communities, but rather fewer options being available to those who choose to leave.³⁴ This has been linked by different domestic violence support services to the

²³ < <https://www.focusireland.ie/resource-hub/about-homelessness/> > accessed 25/11/2017

²⁴ ibid

²⁵ Rónán Duffy, 'The feminisation of homelessness: Ireland has far more homeless women than Europe,' *The Journal* (11 July 2017)

²⁶ < <https://www.focusireland.ie/resource-hub/about-homelessness/> > accessed 25/11/2017

²⁷ The Department of Housing, Planning, and Local Government, *Homelessness Report, 2017*

²⁸ Olivia Kelly, 'No space in women's refuges due to Dublin city housing crisis,' (22 July 2015)

²⁹ ibid

³⁰ < <http://www.tusla.ie/services/domestic-sexual-gender-based-violence> > accessed 17/11/2017

³¹ Laura Lynott, 'Homelessness threat means women won't leave abusive relationships,' *The Irish Independent* (17 July 2017)

³² ibid

³³ ibid

³⁴ ibid

Habitual Residence Condition which is tied to Irish welfare schemes and makes them much more difficult to access for migrant and Traveller people.³⁵

Difficulty of obtaining state support for single parent families

In 2013, the percentage of women employed full time in the Irish labour market was 55.1%,³⁶ with the percentage of males employed full time in the Irish labour force at 62.7%.³⁷ 34.9% of women were working part time in Ireland their average working week 18.8 hours, which was below the EU average.³⁸ In 2016, women made up 73% of minimum wage workers in Ireland,³⁹ an 8% increase since the previous year.⁴⁰ 30% of minimum wage workers in 2015 experienced deprivation.⁴¹

Ireland's childcare services are the most expensive in the EU.⁴² In 2016, the average childcare costs in Ireland ranged between 800-1100 euro per month for full time child care. This does not consider what a lone parent would need to earn in order to provide for childcare.⁴³ It is estimated that a lone parent on an average week's wage would have to put aside 40% of their earnings to cover the costs of childcare. The huge costs of childcare mean that for many lone parents, they are almost better off unemployed.⁴⁴ A lot of women who are victims of intimate partner violence fear that by leaving their partners they will not be able to provide sufficiently for their children.

A quarter of families with children are headed by single parents, 84% of whom are women.⁴⁵ 65% of children in consistent poverty during the boom were in single parent homes.⁴⁶ In 2014, lone parents payment was further limited to only being available to parents with children no older than seven.

These economic factors, just like the homelessness crisis, serve as massive barriers to women leaving abusive situations.

³⁵ Safe Ireland, 'Report on the impact of the Habitual Residence Condition on women seeking protection and safety for themselves and their children from a domestic violence perpetrator,' 2013

³⁶ http://ec.europa.eu/justice/gender-equality/files/epo_campaign/131205_country_profile_ireland.pdf

³⁷ ibid

³⁸ ibid

³⁹ Micheál L. Collins, 'Employees on the Minimum Wage in Ireland' [2016] Nevin Economic Research Institute

⁴⁰ Micheál L. Collins, 'A Profile of Those on the Minimum Wage' [2015] Nevin Economic Research Institute

⁴¹ Micheál L. Collins, 'Earnings and Low Pay in the Republic of Ireland: a profile and some policy issues' [2015] Nevin Economic Research Institute

⁴² 'Early Childhood Care in Ireland-- Minding the Future,' Sinn Féin Policy Document (2016)

⁴³ ibid

⁴⁴ ibid

⁴⁵ Census 2016, Central Statistics Office

⁴⁶ Kitty Holland, 'Why Ireland is not a welcoming place for single parents,' *The Irish Times* (27 June 2014)

Conclusion

This section, therefore, makes the following key findings:

- sexual violence committed by a current or ex partner is less likely to be reported or prosecuted,
- the threat of homelessness is a major obstacle in protecting the safety of people at risk of violence from their partner,
- as discussed in section six, members of the Traveller and migrant community are more vulnerable to the risks surrounding leaving violent partners, and
- people with children are dissuaded from leaving violent partners due to the economic dangers of being a lone parent.

Childhood Sexual Violence

Historically, there has been little research on or public awareness of child sexual abuse. It was usually believed that this kind of violence was rare, especially within families, and concentrated in the lowest socio-economic classes. In fact, child sexual abuse is most likely to happen within a family setting, and is no more or less common between different classes.¹ The issue was rarely discussed, with media coverage of the few prosecuted cases scarce and often presented in imprecise, euphemistic language.²

In recent years, however, cases of child sexual abuse have received much public discussion, and our understanding of what classifies as sexual violence has broadened.³ Nevertheless, the exact prevalence of this crime is difficult to determine. Many cases are not reported or are reported years after it happened. Therefore statistics, although already alarming, might fall short when picturing the real extent of child sexual abuse.

This section shall examine the topic with reference to the following issues:

- the prevalence of child sexual abuse in Ireland,
- the Punishment of Incest Act 1908, with specific regard to:
 - sentencing,
 - age limits,
 - media coverage, and
 - relationships covered under the act,
- court procedure for historical child abuse cases, and
- corroboration warnings in historical sexual violence cases.

Child Sexual Abuse in Ireland

The 2002 SAVI Report offered some useful data concerning cases of child sexual abuse and violence in Ireland. The results showed that a fifth of women experienced contact childhood sexual abuse, and one in ten reported non-contact childhood sexual abuse. One in six men experienced contact childhood sexual abuse, and one in fourteen reported non-contact childhood sexual abuse.⁴

UNICEF have reported on worldwide patterns in childhood sexual abuse, and have found that 90% of adolescent girls who have experienced rape knew the

¹ Barry M. Coldrey, 'The Sexual Abuse of Children: The Historical Perspective' (1996) 85 *Studies: An Irish Quarterly Review* 370.

² *ibid*

³ Interagency Working Group on Sexual Exploitation of Children, 'Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse' (ECPAT International and ECPAT Luxembourg, Rachathewi, Bangkok, June 2016), <<http://cf.cdn.unwto.org/sites/all/files/docpdf/terminologyguidelines.pdf>> accessed 4 November 2017.

⁴ Hannah McGee and others, 'The SAVI report: sexual abuse and violence in Ireland. Executive summary' (2002) *Psychology Reports* 15, 6

perpetrator, and only 1% of adolescent girls who have experienced sexual violence seek out professional support.⁵

Several factors that can make a child more vulnerable to sexual violence include:⁶

- stress (like a death in the family, divorce or job loss),
- an environment where secrecy is permitted or encouraged,
- exposure to adult sexual terms, pornography or exchange of sex for goods or services,
- alcohol or drug abuse or misuse,
- being a child of domestic violence.
- not having access to accurate information about healthy sexual behaviour,
- being expected to fill emotional or intimate needs of adults, and
- being a victim of physical or emotional abuse.

Measures of early intervention and prevention are, however, more difficult to implement than systems of response. In this regard, it is incredibly important to have a robust network of authorities such as health services, police forces, and child protection services, who understand and prioritise means of protecting children.

Punishment of Incest Act 1908

This piece of legislation (the 1908 Act), enacted over a century ago, is still part of Irish law today, and has seen little change. Many of its provisions have attracted controversy.

Sentencing

Originally, an offender faced a maximum of seven years. The 1908 Act was amended in relation to men in 1993, following uproar over a man who abused and fathered a child by his daughter only receiving a sentence for seven years.⁷ The maximum sentence increased to twenty years for men, and then again to life imprisonment in the 1995 Criminal Law (Incest Proceedings) Act.⁸ A man convicted of attempted incest could also face life imprisonment.⁹

The first woman ever to be found guilty of incest in Ireland was in 2009. She received the maximum sentence of seven years and was released in April of 2014

⁵UNICEF global databases <https://data.unicef.org/topic/child-protection/violence/sexual-violence/#_ftn1> accessed 4 November 2017.

⁶ Stop it Now!, 'Understanding What Makes Kids Vulnerable to Being Sexually Abused', <<http://www.stopitnow.org/ohc-content/understanding-what-makes-kids-vulnerable-to-being-sexually-abuse>> accessed 4 November 2017

⁷ James F Clarity 'Rape-Incest Case in Ireland Provokes Furore' *The New York Times* (4 March 1993)

⁸ Criminal Law (Incest Proceedings) Act 1995

⁹ Criminal Law Act 1997, s10(2)

after having a quarter of her sentence reduced for good behaviour.¹⁰ Similar to the reaction in 1993, this discrepancy received much public criticism.

In 2014 TD Denis Naughten introduced a new bill into the Dáil to ensure equality between men and women for sentencing in incest cases. It was accepted by both houses but not enacted immediately as it was planned to be incorporated into the future Criminal Law (Sexual Offences) Bill.

This ultimately did not happen, after Sinn Féin TD Jonathan O'Brien challenged the amendment.¹¹ The sentence for women who commit incest remains at a maximum of seven years, while men still face up to life imprisonment.

Age Limit

There have been questions surrounding the different age limits which apply to a charge of incest, with the law appearing to presume that the victim is female.¹²

The original act allowed a male of any age to be prosecuted, but limited it regarding females to those over the age of sixteen. Section 5 of the Criminal Law (Sexual Offences) Act 2006 provides that a female child under the age of 17 years 'shall not be guilty of an offence under the Act by reason only of her engaging in an act of sexual intercourse,' while males under the same age limit can be charged.¹³

In *D. (M.) v Ireland* the Supreme Court upheld the constitutionality of this section.¹⁴ The discrepancy was justified as pregnancy is only a risk to adolescent girls rather than boys, and therefore there are overriding policy concerns for protecting them. O'Malley provides another justification saying that teenage girls are more likely to be victims of incest than any other group and if they were liable to prosecution it may prevent them from reporting it.¹⁵ This line of thinking led Temkin to suggest daughters and granddaughters should be exempt from the crime of incest altogether.¹⁶

Media Coverage

The 1908 Act provides that neither the victim nor the accused may be named by the media, even after a conviction.

In *McG v Murphy*¹⁷ the decision of the Judge, that none of the parties could be named by the media after a man was found guilty of sexually abusing his sister,

¹⁰ John Fallon 'House of Horrors mother due for early release today' *The Independent* (22 April 2014)

¹¹ Dáil Debate, 'Criminal Law (Sexual Offences) Bill 2015 [Seanad]' 7 February 2017

<<https://www.kildarestreet.com/debates/?id=2017-02-07a.448>> accessed 10 November 2017

¹² Conor Hanly *An Introduction to Irish Criminal Law* (3rd edn, Gill & Macmillan 2015) 17.2

¹³ Criminal Law (Sexual Offences) Act 2006, s5

¹⁴ [2012] IESC 10

¹⁵ Thomas O' Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 7.10

¹⁶ Jennifer Temkin, "Do we need the crime of Incest" (1991) 44 *Current Legal Problems* 4

¹⁷ [2008] IEHC 378

was challenged. The victim had written to the Minister for Justice and the DPP seeking to have the anonymity lifted. One in Four also wrote on her behalf to the State authorities.¹⁸

However, Hanna J found that the 1908 Act completely precluded publication of the names of the victim or perpetrator. He went on to contrast this against the Criminal Law (Rape) Act 1981. This Act permits the identification of the accused after conviction, while the identity of the victim is protected.¹⁹

While there is some logic behind this distinction, given that incest occurs in a family and therefore identifying the perpetrator runs a high risk of implicitly identifying the survivor, it has still attracted criticism.

Relationships covered under the Act

Another possible issue with the act is that it does not provide for certain relationships. For example, it has no mention of same-sex incest, i.e. a father abusing his son or a mother her daughter. It is claimed that the objective of an incest law is based on child protection, with eugenic considerations-- the health risks to possible offspring-- secondary.²⁰ However, if it is truly about protecting children then this oversight is questionable.

O'Malley argues that there "is a strong, if not unanswerable, case for redefining incest in such a way as to make it applicable to sexually exploitative conduct within the family unit, regardless of whether the relationship between the parties is consanguineous or otherwise."²¹ He references the Incest and Related Offences (Scotland) Act 1986 and English Sexual Offences Act 2003 as examples of this in practice.

Some have argued that incest should be decriminalised for consenting relationships among adults. Indeed there are a number of jurisdictions where incest in this situation is not a criminal offence. O'Malley says that perhaps one of the most convincing reasons for consensual incest remaining criminalised is the taboo associated with it, suggesting that it "has perhaps a more stigmatic quality than a conviction for defilement."²²

¹⁸ 'Older brother charged with incest cannot be named' *The Irish Times* (2 March 2009)

¹⁹ Criminal Law (Rape) Act 1981, s8(1)(b)

²⁰ Thomas O' Malley, *Sexual Offences* (2nd edn, Round Hall 2013) 7.14

²¹ *idem* 7.17

²² *ibid*

Court Procedure in Historic Sexual Abuse Cases

While in historic sexual abuse trials the complainants are generally adults, there can be exceptions to the standard rules that evidence must be given in Court and that the defendant has a right to confront their accuser.

Survivors of institutional abuse,²³ incest,²⁴ and other forms of sexual violence²⁵ have increased mental health and emotional difficulties as a direct result of the crimes that have been committed against them. Court procedure in these circumstances must take account of these vulnerabilities and make according considerations when dealing with these victims as witnesses. There has been some progress over the years, but more reform is urgently needed to assist these victims in attaining justice.

In general, Courts are reluctant to allow adult survivors of sexual abuse to use the special measures allowed for other vulnerable witnesses. In the cases of childhood sexual abuse, the abusers often held 'dominion' over their victims; the victims often find it hard even with the passing of time to confront them.

Despite this, adult survivors of childhood abuse are rarely allowed to give evidence via video link or through an intermediary.²⁶ In the case of *O'D v DPP*²⁷ the court established a high threshold for the giving of evidence via video link, stating *inter alia*, the risks to a fair trial as a reason against it. Unpleasantness nor inconvenience for witnesses was not enough to qualify them for these protections. While the rights of the accused are important, certain limitations can be placed on their right to cross-examine their witnesses.²⁸

The Criminal Justice (Victims of Crime) Act 2017, which is further discussed in the Court Procedure and Vulnerable Witnesses section, seeks to aid vulnerable witnesses in giving evidence in a less daunting and traumatic manner. However, it still does not allow for the pre-recording of evidence in chief and cross examination.

Corroboration Warnings in Historical Sexual Violence Cases

Corroboration warnings are issued to juries by judges in cases with 'suspect evidence.' They are often issued in cases where there is little evidence outside of the complainant's account that the crime took place.

²³ Carr and others, 'Adult Adjustment Of Survivors Of Institutional Child Abuse In Ireland, (2010) 34 Child Abuse & Neglect 485

²⁴ Tracey L. Waldman and others, *Incest Survivors Have Different Personality Characteristics than Nonassaulted Persons*, (1997) 13 Journal of Social Behavior and Personality 437

²⁵ Jeffery E. Aspelmeier, Ann N. Elliott, Christopher H. Smith 'Childhood sexual abuse, attachment, and trauma symptoms in college females: The moderating role of attachment', (2007) 31 Child Abuse & Neglect 549

²⁶ *Guide to the Legal Process for Survivors of Sexual Violence*, Rape Crisis Network Ireland 22

²⁷ [2009] IEHC 559; [2009] 12 JIC 1707

²⁸ Oran Doyle, *Constitutional Law: Text, Cases and Materials*, 1st edn, Clarus Press, (2009) para 2-70

The issue of lack of corroboration and the corroboration warning are especially concerning in historic sexual violence cases. Despite the introduction of s 7(1) of the Criminal Law (Rape) Act 1990, which disallowed trial judges from automatically issuing corroboration warnings to juries, there is a belief that judges still tend to issue these warnings too readily.²⁹

These warnings can prejudice a jury against a victim, even if couched in language which stresses the fact that the warning is not intended to cast any doubt on the veracity of the complainant's evidence.³⁰ In standard sexual violence cases there is little corroboration, but this is even more so for crimes committed against children many years ago. There are rarely witnesses, and generally where there are witnesses they themselves are other victims.³¹ They also may have died in the intervening years, or the passage of time may have damaged their memories. It is further unlikely that any physical evidence will be salvageable.

It may not even be possible to prove basic facts of the crime, for example that both individuals were in the same place concurrently. Children often do not know that what has happened to them is wrong, they may repress the memories and not report it out of fear of their abuser.³² While the defendant has rights, they should not benefit from the fact that the children they preyed on were vulnerable.

Conclusion

This section makes the following key findings with regard to childhood sexual violence:

- Child sexual abuse, both worldwide and in Ireland, has been gaining recognition as far more common than originally understood.
- The Punishment of Incest Act 1908 reflects outdated values and leaves room for reform with regards to sentencing, age limits, anonymity of both perpetrator and survivor, and both the gender and familial profile presented of offenders and victims.
- There is need for further usage of supports such as video-links for adult survivors of sexual violence taking historical cases.
- There is an overuse of corroborating warnings in historical sexual violence cases.

²⁹ Susan Leahy 'The Corroboration Warning In Sexual Offence Trials', *The International Journal Of Evidence & Proof* 46

³⁰ *idem* p 52

³¹ Robert G. Marks, *Note, Should We Believe the People Who Believe the Children?: The Need for A New Sexual Abuse Tender Years Hearsay Exception Statute*, (1995) 32 HARV. J. LEGIS. 207, 229

³² *ibid*

Sexual Violence in the Sex Industry

Across countries and political allegiances, sexual violence in the sex industry is a contentious topic. Some believe that the violence is inherent, because consent cannot be bought and therefore all acts of prostitution are non-consensual. They also cite the reality that the majority of women in the sex industry do not wish to be in it, and are there due to economic pressures or other forms of coercion. Others oppose this view. They say that deeming all bought sexual acts as violent lessens the gravity of a woman in the sex industry determining for herself that a specific encounter was rape or assault. Furthermore, they argue that it is a denial of women's autonomy to say her profession inherently results from coercion. This disagreement extends to the law, with varied methods of legislating for or against the sex industry being put forward in different countries. While approaches may differ, the end goals are generally the same: keeping those engaged in this often dangerous profession as safe as possible, with as much support as possible.

This section shall examine:

- the three main methods of legislating sex work:
 - the Nordic or Equality model, as adopted by Ireland;
 - the German model of regulation;
 - the New Zealand model of total decriminalisation.
- the risk of sexual violence in sex work, specifically examining:
 - rape by deceit or refusal to pay,
 - non-consensual removal of condoms, and
 - non-disclosure of STIs.

The Law in Ireland

The recent Criminal Law (Sexual Offence) Act 2017 (The 2017 Act) amended many provisions of Irish law dealing with sexual offences. The provision which decriminalised the selling of sex, though kept buying sex illegal, received the most attention.

This is modelled off the system adopted in some Nordic countries, which has been proven to lower street prostitution as well as trafficking.¹ It has been criticized by some who believes it pushes women in the sex industry to carry out their jobs less publicly, and accept offers from more dangerous buyers.² There is no proven corresponding rise in other forms of prostitution as street prostitution lowers, however. According to data gathered by the Nordic Model Now!, a group

¹ Katalin Kelement and Marta C. Johansson, 'Still Neglecting the Demand that Fuels Human Trafficking: A Study Comparing the Criminal Laws and Practice of Five European States on Human Trafficking, Purchasing Sex from Trafficked Adults and from Minors' (2013) 21 *European Journal of Crime, Criminal Law and Criminal Justice*, 247

² Garreth MacNamee, 'An historic day': It is now illegal to buy sex in Ireland' *The Journal* (27 March 2017)

campaigning for the introduction of such legislation in the UK, it can also be linked to a lowered rate of women in sex work being murdered.³ For example in Spain where it is completely decriminalised, there were 31 murders of women in sex work, over a five year period. In Germany, where it is regulated, there were 97 murders in a thirteen year period. However in Sweden, there was only one murder of a woman in sex work over the sixteen years following the introduction of the nordic model. Even controlling for Sweden's lower population than the former two countries, the difference is noteworthy.

Evidence from government-funded research into sex work in Oslo shows that, since the introduction of the Nordic model in 2009, 7% more women in the industry report being targeted by violence. However, the increases were seen in less serious violent acts such as 'hair-pulling' and 'verbal abuse.' Being struck by a fist had gone down by 38%, and rape by 48%.⁴

In Ireland, while engaging in sexual activity for pay is not illegal, other parts of sex work may still be criminalised. The 2017 Act in fact increased the sentences for both brothel keeping or 'organising' prostitution, and for 'loitering for the purposes of prostitution.'⁵

Given the relatively new nature of this legislation, which came into effect on the 27th of March 2017, there are not yet any verifiable trends resulting from the changes it made. This section of the Act is scheduled for review three years after its commencement date, in 2020.

The Law in Germany

Introduced in 2002 in Germany,⁶ the regulation model was intended to allow women in sex work to obtain regular work contracts, bringing sex work under the scope of health and safety rules, employment law, and otherwise exist with the same monitoring as other businesses. In practice, the model has come under much criticism. It has been linked with higher numbers of women in sex work, increased sex trafficking and violence against those in sex work,⁷ increased difficulty in charging and convicting sex traffickers,⁸ and an explosion in both the size and number of brothels.⁹ In 2007, a government review found that very few women in sex work actually became party to a work contract, and that there was no improvement in

³ Nordic Model Now! 'Fact: Prostitution is inherently violent'

<https://nordicmodelnow.org/facts-about-prostitution/fact-prostitution-is-inherently-violent/> accessed 27 Dec 2017

⁴ Ulla Bjorndahl Oslo, 'Dangerous Liaisons: a report on the violence women in prostitution in Oslo are exposed to,' 2012

⁵ Criminal Law (Sexual Offences) Act 2017, s 27

⁶ Prostitution Act 2002, Germany

⁷ 'Amnesty is the mark on its sex worker proposal' *The Observer* (18 Aug 2015)

⁸ Charlotte Alter, 'Sex Buyers: Why Cops Across the US Target Men Who Buy Prostitutes,' *Time*

⁹ Catherine Shanahan, 'Amnesty prostitution vote rebuked' *The Irish Examiner* (20 Aug 2015)

their welfare or quality of life as hoped.¹⁰ Today, very few still believe this to be the preferable method of legislation.

The Law in New Zealand

Based on a harm reduction approach, the Prostitution Reform Act 2003 completely decriminalised both the buying and selling of sex in New Zealand. It also decriminalised soliciting and brothel keeping.

In 2008, an evaluation of the decriminalisation was conducted, as required by the 2003 Act.¹¹ This showed no decrease or increase in the number of women participating in sex work. While some distrust of authorities remained, women were found to be more likely to report acts of violence. The main complaints were of stigma surrounding the work, and local governments not falling in line with the national legislation. Most felt positive about the results of this research.

However, some have hesitations over the reliability of this research. In conducting it, the State did not employ any interpreters, and therefore only women who spoke fluent English were consulted. Given that migrant women are often the most at risk in sex work, a very important demographic was overlooked. Also, it did not count Maori women in its sex trafficking statistics.

Violence in the Sex Industry

There is limited research on sex work in Ireland, given that up until last year those in the profession could face criminal charges for their work, and they are in general transient and hard to reach. However, international research shows that women in this work are highly susceptible to both physical and sexual violence, and have high rates of post-traumatic stress disorder.¹² The majority of sex work in Ireland is organised by criminal gangs.¹³ Women in sex work are more likely to be victims of repeated attacks, as the perpetrators generally know they can be isolated, have low reporting rates, and are often carrying cash. As many if not most women in sex work are migrant women, they also face the challenges outlined in the section on sexual violence in the migrant community.

In Ireland, the website 'uglymugs.ie' can give some indication of the situation in Ireland. As this website serves the purpose of helping women in the sex industry stay vigilant against dangerous buyers and behaviours by creating a platform for them to share abusive experiences with each other, it could not be seen as providing

¹⁰ 'Federal Government Report on the impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act - Prostitution Act)' 2007

¹¹ Report of the Prostitution Law Review Committee on the Operation of the Prostitution Law Reform Act 2003. May 2008

¹² Melissa Farley and others, 'Prostitution in Nine Countries: an Update on Violence and Post-Traumatic Stress Disorder' (2003) 2 *Journal of Trauma Practice* 33

¹³ Sinead Baker, 'Most prostituion here is run by organised crime gangs': Irish service helped 92 victims of sex trafficking in 2016' *The Journal* (28 Aug 2017)

empirical data. There is no mechanism preventing multiple reportings of the same abusive act, no differentiation between legal and illegal abusive acts, and no control for the increase of reporting corresponding to the increase of the website's use by women in the sex industry. Nevertheless, it can provide some useful indications. For example, in the statistics for January 2018, while 162 incidents of abuse were reported, only two of these incidents were reported to the police.¹⁴ This demonstrates the incredibly low reporting rate among women in sex work.

Rape by Deception and Refusal to Pay

Rape by deception occurs when in order to obtain consent, one party deceives the other with regards to an important consideration to such an extent that it vitiates the falsely obtained consent. Many believe that a man telling a woman in sex work that he will pay and then refusing to do so is an example of rape by deception. In the 2017 Act, consent has not been given if one is mistaken as to the nature and purpose of the act¹⁵ or as to the identity of any other person involved in the act.¹⁶

As this is newly enacted there has been little litigation on the subject, so it is unclear how expansive or restrictive these subsections will be interpreted by the judiciary. The 2017 Act states that “[t]his section does not limit the circumstances in which it may be established that a person did not consent to a sexual act,” so the definition of consent could be even further expanded in the courts.

In a 1995 case taken by a woman in sex work who had not received the pay the accused had promised, the UK courts adopted a narrow interpretation of ‘consent.’ Though consent had only been given with the expectation of pay, the refusal to pay did not negate the consent, and the court rejected the idea of rape by deception.¹⁷ However under the Sexual Offences Act 2003, there is a conclusive presumption against the presence of consent if one party is deceived to the nature or purpose of the act. This could be interpreted in favour of women in sex work.

The introduction of punishment for refusal to pay in Ireland is potentially made less likely given that doing so would by implication require the accused to pay for the sex, an act which is illegal in itself. However, given that the 2017 Act treats promising to pay in the same way as paying for sex, this could end up not causing problems.

Non-Consensual Removal of Condoms

In Canada the courts have found that non-consensual removal of condom or poking holes in a condom is rape.¹⁸ There is currently no law covering the situation in

¹⁴ Ugly Mugs, January 2018 Ireland Crime Statistics, <<https://uglymugs.ie/2018/02/01/january-2018-ireland-crime-statistics/>> accessed 3rd Feb 2018

¹⁵ Criminal Law (Sexual Offences) Act 2017, s 48 (2) (e)

¹⁶ Criminal Law (Sexual Offences) Act 2017, s 48 (2) (f)

¹⁷ R v Linekar [1995] 3 All ER 69 73

¹⁸ R. v. Hutchinson [2014] 1 SCR 346

Ireland. It is understandable that removal of condom can be considered rape, following the reasoning of the Canadian courts, as there are “different risks inherent to sex with a condom and sex without a condom.”¹⁹ These differences are so pronounced that consent to sex with the understanding that a condom will be used cannot be read as the same or similar to consenting to sex without a condom.

Introduction of rape by non-consensual removal of condoms would offer further protections to sex-workers. A recent investigation has revealed that not using condoms is the most common request made of women in the sex industry.²⁰ While there is no specific provision in Irish law criminalising such a behaviour, the 2017 Act could be interpreted by the judiciary as doing so, given that they are allowed discretion in defining which situations breach consent.

Non-Disclosure of STIs by Buyers

Exposure to STIs can put women already in precarious lifestyles further in danger. Given that women in sex work often know nothing about the buyers, and that, as above, sex without condoms is in high demand, they are at particular risk of this practice. In Canada non-disclosure of an STI has been considered to invalidate consent since 1998.²¹ and expanded upon in *R. v. Mabior*²² and *R. v. D.C.*²³ which required disclosure of an STI even with a relatively low risk of transmission.

In the UK non-disclosure of an STI has been held to be reckless grievous bodily harm under section 20 of the Offences against the Person Act 1861.²⁴ While this does not elevate the non-disclosure of an STI to that of rape it recognises the harm that it inflicts on an individual and paves the law in the right direction.

Through following Canada, Ireland would be able to offer further protection to those in the sex industry who are more at risk of STI's from non-disclosure. For example, on average, sex workers are 10 times more likely to become infected with HIV than adults in the general population.²⁵ If Ireland were to take a more moderate approach by following the laws in the UK it would still offer more protection than is currently offered, as currently there is no legal protections for non-disclosures of STI's.

¹⁹Alexandra Brodsky, “Rape-Adjacent’: Imagining Legal Responses to Non-consensual Condom Removal” (2017) 32 (2) Columbia Journal of Gender and Law 183

²⁰ Sorcha Pollack, ‘Video reveals how sex buyers view women trafficked into Ireland’ *The Irish Times* (19 Jan 2018)

²¹ *R. v. Cuerrier* [1998] S.C.J. No. 64,

²² *R. v. Mabior* [2012] S.C.J. No. 47

²³ *R. v. D.C.* [2012] S.C.J No. 48

²⁴ *R v Golding* [2014] EWCA Crim 889

²⁵ UNAIDS (2016) 'Prevention Gap Report'

Conclusion

Sexual violence is a significant risk in the sex industry, and some would argue an inherent one. The following key issues with regards to the Irish situation have been identified:

- it is too early to note whether the new Irish legislation is having positive effects, but the model as seen in other countries have been linked to some improvements for women in sex work,
- the German model of regulation is rife with problems and has been rejected by most experts and bodies working for the protection of women in sex work,
- the New Zealand model appears to have produced some good results, though the research has been called into question,
- The likelihood of general sexual violence and more specific acts such as non-disclosure of STIs, non-consensual removal of condoms, and rape by deception, is particularly high for women in sex work, and Irish legislation has failed to specifically deal with these risks.

Sex Education and Sexual Violence

Ireland has historically offered a very limited sex education to its children. As the school is often the first place where people learn about sex from an authoritative source, its importance cannot be understated. With regards to sexual violence, many believe that adequate sex education curricula can be the most effective preventative measure. This section shall examine:

- how sex education is taught in Irish primary schools,
- the advent of consent classes in third level institutions,
- systems of sex education in the Netherlands and in Spain,
- young people's understanding of sexual violence,
- sex education as a preventative measure against sexual violence, and
- lessons to be learnt from the effect of sex education on teen pregnancy.

Sex Education in Primary Schools

Under the European Social Charter, students have a right to objective sexual and reproductive health education which does not involve censoring, or withholding or intentionally misrepresenting information. Despite this, Ireland has had a historical lack of sex education. To date, there is little to no set curriculum for sex education, and instead schools may educate students on sex as they see fit.¹ Additionally, there is virtually no discussion of sexual consent in Irish schools. The RCNI has urged the government in recent years to make it a priority within the system. This was following European research into Standards for Sexuality Education. Little has been done by the government in response to this.²

Consent classes in colleges

Consent classes in colleges are a recent phenomenon in Ireland. All of the largest universities have begun setting up comprehensive programmes for consent in universities. In UCD, mandatory consent workshops were introduced in 2016, with sanctions up to expulsion for those who do not attend.³ UCDSU have been calling on management to come completely on board and increase funding for courses, counselling etc. These calls have reportedly increased since the scandal in which male UCD students were sharing explicit images of women with whom they had had

¹ Peter McGuire, 'Sex ed in Ireland: "it's all disease, risk and crisis pregnancy' *The Irish Times* (Dublin, 18 May 2015)

² "RCNI urges government to make Sexual Consent Education a priority within our Secondary Schools" (*Rape Crisis Network Ireland*) <<http://www.rcni.ie/rcni-urges-government-to-make-sexual-consent-education-a-priority-within-our-secondary-schools/>> accessed November 2017

³ Sorcha Pollak, "UCD Students' Union plans mandatory consent classes" *The Irish Times* (Dublin, 9 February 2016)

sex.⁴

NUIG has set up a 'Smart Consent Programme,'⁵ which does research into the statistics around consent and the developing culture of consent classes in universities.

Trinity had established consent workshops which are mandatory for first year halls students, and has plans to extend these to the entire university.⁶ UCC has also set a module on consent, which may be rolled out to all students on campus.⁷

The Union of Students in Ireland (USI) have carried out research programmes in order to establish the need for mandatory consent workshops in all colleges. They also voted recently to research and design national student-focused workshops on consent. It seems likely that the consent programme in universities will continue to expand in years to come as a result.⁸

The Netherlands

The Netherlands has a particularly robust sexual education system, so much so that it has been the subject of multiple comparative studies, for example with the American system⁹ and the English system.¹⁰ Sex education begins at primary level and continues throughout a child's teenage years.¹¹ The country has a more liberal attitude to sex as opposed to Ireland and other English-speaking Western countries. The country has an extremely low rate of teen pregnancy.¹² In spite of this liberalism, or perhaps because of the sex education system, there were very few benefits for single underage mothers up until 2000.¹³

Spain

Spain's sexual education system is organised on a region-by-region basis, to the extent that some regions could be said to have liberal systems, and others

⁴ "UCD Consent Campaign" (*UCD Students' Union*) <<https://www.ucdsu.ie/getinvolved/campaigns/consent/>> accessed November 2017

⁵ "Smart Consent" (*NUI Galway*) <<http://www.nuigalway.ie/smartconsent/>> accessed November 2017

⁶ Kathleen McNamee, "Trinity Consent Workshops return in September Improved and Refocused, After Year of Review" *The University Times* (Dublin, 5 August 2017)

⁷ "Sexual Consent Classes" (*Campus.ie* 30 January 2017) <<http://campus.ie/surviving-college/sex-files/sexual-consent-classes>> accessed November 2017

⁸ Dominic McGrath, "USI Votes to Develop National Model for Consent Workshop" *The University Times* (Dublin, 28 March 2017)

⁹ Amy Schalet, *Not Under My Roof: Parents, Teens and the Culture of Sex* (The University of Chicago Press 2011)

¹⁰ Jane Lewis and Trudie Knijn, "A Comparison of English and Dutch Sex Education in the Classroom" [2001] 19(4) *Education and Health* 59

¹¹ Arjun Walia, "In The Netherlands Sex Education Starts In Kindergarten: Here's What They Tell Them & Why" *Collective Evolution* (22 June 2015)

¹² Saskia de Melker, "The case for starting sex education in kindergarten" *PBS News Hour* (USA, 27 May 2015)

¹³ Sue Lloyd-Roberts, "Netherlands: Let's talk about sex" *BBC News* (The Netherlands, 1 March 2000)

conservative ones. One region has a specific programme in place to teach children how to masturbate, while others have programmes which encourage teenagers to engage in sexual activity.¹⁴ It seems to be a political issue in the country, unlike in Ireland, where the systems in place generate rich public discussion. However, as regards to the teaching of sex education, there seem to be a wide number of obstacles preventing accurate and effective teaching as recognised by teachers themselves.¹⁵

Youth Understanding of Sexual Violence

In 2014 the University Of Minnesota, admittedly working from a very small sample, published a study finding that 32% of the ordinary college men surveyed admit they might rape someone if it's not called rape.¹⁶ While 13.6% of respondents said they would act on 'intentions to rape a woman' if they knew they could get away with it, almost a third said they would act on 'intentions to force a woman to sexual intercourse.'¹⁷ This shows that there is a genuine misunderstanding among young men of what constitutes rape, and highlights how ignorance has the potential to create both victims and perpetrators. Similarly, in a 2015 focus group using NUIG students, many participants believed that someone having sex with someone who was 'blackout drunk' did not qualify as rape.¹⁸ Again, this shows how young people not having a clear understanding of what rape encapsulates can be potentially dangerous.

The proliferation of porn among adolescents, which many believe to be the primary or initial sex education for teens, has led to some worrying physiological consequences. Teresa Bergin, a therapist specialising in sex-addiction, has noted the increase of patients in their late teens and early twenties suffering from erectile dysfunction traceable to hyper exposure to pornography.¹⁹ If early and prolonged exposure to pornography in the formative sexual years-- when, as Bergin notes, the brains neuroplasticity is at its peak-- can have such a profound physical reaction one may speculate how such exposure informs adolescents understanding of how sexual encounters are to be conducted and communicated.

In 2013, RCNI reported that 21% of perpetrators of sexual violence were under 20 years old and 14% were under 18.²⁰ Furthermore 16% of sexual abuse perpetrated

¹⁴ Lisa Abend, "Spanish Outraged by Teen Masturbation Workshops" *Time* (Spain, 16 November 2009)

¹⁵ José L Martínez, "Sex education in Spain: Teachers' views of obstacles" [2012] 12(4) *Sexual Education*

¹⁶ Sarah Edwards, Kathryn Bradshaw and Verlin Hinsz, 'Denying Rape but Endorsing Forceful Intercourse: Exploring Differences Among Responders' [2014] 1(4) *Violence and Gender* 188

¹⁷ *ibid* 191

¹⁸ Pádraig Macneela and Thomas Conway, 'Young People, Alcohol and Sex: What's Consent Got to Do With it?' [2015] Commissioned by Rape Crisis Network Ireland 18

¹⁹ Kate Holmquist, "When porn becomes a problem" *The Irish Times* (Dublin August 8 2015)

²⁰ Rape Crisis Network Ireland, *National Rape Crisis Statistics* (RCNI 2013) 19

against those aged 13-17 was perpetrated by other minors.²¹ This emphasises the importance of young people being given healthy and accurate information on sex.

Sex Education as a Preventative Measure

As sexual violence is a social phenomenon influenced by a range of factors in an infinite number of ways, it is virtually impossible to conduct a qualitative study of the effectiveness of preventative measures. Early education and its value in preventing sexual violence could only be perceived after long term observance likely to outlast any legislator's career, and so politicians have little incentive to advocate for a program whose benefits they will never be able to claim. However, a potential connection may be drawn with the effect of sex education on teenage pregnancies.

Lessons from Education Aimed at Reducing Teenage Pregnancy

In 2015, the HSE reported a 60% decrease in births to teenagers since 2001.²² This, it was argued, was influenced by the success of the Relationships and Sexuality Education (RSE) programme.²³ In 2010, the Crisis Pregnancy Programme found that 86% of adults in the 18-25 age group had received some form of sex education, while only 57% of 36-45 year olds reported the same.²⁴ Furthermore 'Sex and Sexual Intercourse' and 'Contraception' were the most commonly covered topics. Those who had received sex education at home and/or in school were found to be 1.5 times more likely to use contraception upon engaging in heterosexual intercourse for the first time and those who thought that their sex education was helpful were twice as likely to use contraception when having sex for the first time.²⁵ Thus, current findings indicate that educating minors on safe sex and contraception correlates with reducing teen pregnancy and increasing use of contraceptive measures.

Meanwhile, between the first quarters of 2015 and 2016, an Garda Síochána recorded an 8.6% increase in reports of sexual offences.²⁶ It is possible we could expect a similar drop in rates of sexual violence were we to invest in an education programme like that to deter teen pregnancy. Alongside our focus on reducing the potential physical harms of sex (unwanted pregnancy, STIs etc.), we have failed to educate on the communicative aspects of sexual activity.

²¹ *ibid*

²² 'HSE welcomes a 60% decline in the number of births to teenagers since 2001' (Health Service Executive Ireland 29 May 2015)

<www.hse.ie/eng/services/news/media/pressrel/newsarchive/archive15/may15/teenpregnancy.html> accessed 10 November 2017.

²³ *ibid*

²⁴ Crisis Pregnancy Programme, *Irish Contraception and Crisis Pregnancy Study 2010* (CCP 2010) 111.

²⁵ *ibid*

²⁶ Central Statistics Office, *Recorded Crime Quarter 1 2016* (CSO 2016) 1

Conclusions

Where much time, money, and research has been invested in modernising the Irish approach to contraception, little has been devoted to the education of sexual misconduct and violence. This section makes the following key observations:

- Irish schools continue to fail following a formalised sex education curriculum which gives due attention to consent, communication, and preventing sexual violence,
- other jurisdictions such as the Netherlands and some regions in Spain have taken much more progressive approaches to sex education, with positive results,
- as it stands today, young people have limited understanding of consent or sexual violence, and this can have dire real world consequences, and
- while it can be very difficult to draw a conclusive link between thorough sex education schemes and lowered rates of sexual violence, the case of lowered teen pregnancies shows that sex education can work..