

DÁIL ÉIREANN

AN COMHCHOISTE UM DHLÍ AGUS CEART AGUS COMHIONANNAS

JOINT COMMITTEE ON JUSTICE AND EQUALITY

Dé Céadaoin, 13 Samhain 2019

Wednesday, 13 November 2019

The Joint Committee met at 9 a.m.

Comhaltaí a bhí i láthair/Members present:

Jack Chambers,	Frances Black,
Catherine Connolly,	Martin Conway.
Jim O'Callaghan,	
Thomas Pringle.	

I láthair/In attendance: Deputy Martin Kenny.

Teachta/Deputy Caoimhghín Ó Caoláin sa Chathaoir/in the Chair.

Business of Joint Committee

Chairman: I remind members to switch off their mobile phones as they interfere with the recording equipment. Apologies have been received from Deputy Peter Fitzpatrick. I propose that the joint committee goes into private session to deal with housekeeping matters. Is that agreed? Agreed.

The joint committee went into private session at 9.01 a.m. and resumed in public session at 9.22 a.m.

General Scheme of the Criminal Justice (Victims of Crime) (Amendment) Bill 2018: Discussion

Chairman: The purpose of this morning's engagement is to conduct detailed scrutiny of the Criminal Justice (Victims of Crime) (Amendment) Bill 2018, a Private Member's Bill sponsored by our colleague on the Joint Committee on Justice and Equality, Deputy Jim O'Callaghan. We are joined by Ms Caroline Counihan, legal policy director at the Rape Crisis Network Ireland, RCNI. She is very welcome. From the Law Society, we are joined by Mr. Robert Purcell and Ms Áine Breathnach. They are both very welcome. I note some of their colleagues are present in the Visitors Gallery, including Mr. Ken Murphy. I do not recognise everyone but they are all very welcome. I ask our visitors to put mobile phones on silent. I will shortly invite each of our guests to address us, starting with Deputy O'Callaghan.

I draw the attention of witnesses to the fact that by virtue of section 17(2)(1) of the Defamation Act 2009, witnesses are protected by absolute privilege in respect of their evidence to the committee. However, if they are directed by the committee to cease giving evidence on a particular matter and they continue to do so, they are entitled thereafter only to a qualified privilege in respect of their evidence. They are directed that only evidence connected with the subject matter of these proceedings is to be given and they are asked to respect the parliamentary practice to the effect that, where possible, they should not criticise or make charges against any person, persons or entity by name or in such a way as to make him, her or it identifiable.

Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the House or an official either by name or in such a way as to make him or her identifiable.

Deputy Jim O'Callaghan: I thank the witnesses for attending this morning. As the Chairman mentioned, the purpose of this meeting is for the committee to scrutinise legislation I introduced last year. It is a small Bill titled the Criminal Justice (Victims of Crime) (Amendment) Bill 2018. In order for legislation to progress further through the Houses of the Oireachtas, we apply scrutiny through today's process. Neither I nor anyone on the committee is particularly sensitive, so the witnesses should feel free to be very critical of the legislation and to outline how it could be improved. This is a very important part of the process of ensuring that any legislation introduced is effective and works. I thank the Rape Crisis Network Ireland and the Law Society for their opening statements, which we have received and I have read closely. They are very helpful contributions to the debate.

I will give an overview of the reasons for the legislation and its effect, if introduced. The reasons for the legislation derive from the fact that in Ireland we have low levels of reporting of

sexual offences. In recent years, the recorded crime figures have shown that reporting of sexual offences has increased but that is probably partly because we have had such low levels of reporting in the past and much of the increase is accounted for by historical reporting of previous offences. Many people who are victims of sexual offences and rape find it a very intimidating process and they do not report those offences to the same extent as somebody who is a victim of an assault on the street or a burglary. I know it is difficult to accumulate accurate statistics in this respect, but the One in Four organisation has estimated that only 15% of victims of sexual abuse make complaints to An Garda Síochána. Irrespective of the true figures in that respect, we as legislators have a responsibility to take legislative steps to improve those statistics and make it more comfortable for people who are victims of sexual assault to come forward and make complaints to An Garda Síochána.

As I said, part of the reason for this is that many victims of these offences find the criminal justice system quite intimidating. It is an intimidating system for many persons involved in it. Its primary function is to determine whether a person accused of a particular offence is guilty or not guilty. It is unfortunately also true in cases involving rape or sexual assault that the complainant very much becomes a party heavily involved in those proceedings. The process by which the complainant comes before the court can have a very negative effect on him or her, and can also have a very negative effect on other persons reading about the experience complainants have had.

The purpose of the Bill we are discussing is to amend progressive and important legislation enacted by the Houses two years ago, the Criminal Justice (Victims of Crime) Act 2017. Specifically, this Bill seeks to amend section 17, which deals with special measures during investigations. At present, the section contains provisions outlining the special measures which may be implemented in respect of a victim during the course of the investigation of an alleged offence. One of the special measures available to the victim is that where the alleged offence involves sexual violence, gender-based violence or violence in a close relationship, the victim may be informed of his or her right to request that interviews are carried out by a person of the same sex as him or her. That is a welcome addition to the protections available to a complainant, but the purpose of this legislation is to go further and provide greater protection and support to individuals who come forward and make complaints.

One often hears when speaking to persons who have been through the criminal justice process as a complainant, particularly in cases involving sexual assault and rape, that they did not realise at the outset the extent and nature of the process in which they were getting involved.

For instance, they were not aware that statements they provide to the Garda and the statements of other people supporting them would be provided to the accused, as they must be. They are unaware that when it gets to court for the hearing of the prosecution that the complainant will be required to give evidence in respect of their statement. They are unaware that the complainant will require to be cross-examined by the accused in the case or by counsel representing the accused. They may be unaware of the extent to which their case can become an issue of public notoriety in the newspapers, notwithstanding that their identity will be protected.

The purpose of this short amending legislation is to provide that in such cases of sexual violence, gender-based violence or violence in a close relationship, where complainants go to make a complaint at the outset, they will be provided with relevant information and legal advice by a solicitor, funded by the Minister, advising the victim of the process involved and actions required for criminal proceedings in respect of the alleged offence to be brought and heard.

Currently, in many instances this protection and resource is provided by rape crisis centres, which have their expertise. Individuals can be given advice by a solicitor as to what will be involved in the process. However, it would be beneficial if we could enact that and ingrain it in legislation.

The Bill seeks to provide levels of support that I believe will not be costly for the State. We propose that legal advice under the criminal legal aid scheme be provided to complainants. It will not involve them being represented at the hearing of the process because laws exist for that to apply. However, it will mean that at the outset, formal legal advice will be given to a complainant, telling her - as the case generally is - of what is involved in the criminal process and being present for the complainant as she goes through that process of the complaint leading up to the prosecution.

I am conscious that in practice this will require the State to fund legal aid solicitors who will be able to provide this scheme. I will be interested to hear from the Law Society regarding the extent to which it believes this would be a burdensome process on any solicitor. It would be beneficial if complainants knew before going to An Garda Síochána that if they go down the process of making a complaint, they will have the support of a solicitor funded by the State, who will be able to advise them in respect of what is involved in this process. Provision of such information would be beneficial because it would give individuals an overview of what is involved. In a way it is a hand-holding exercise to make them feel more comfortable when it comes to the process of making the complaint.

That is the purpose behind the Bill. We are starting off in the legislative process and amendments will be tabled in respect of it. I am happy to hear any amendments that might be recommended by RCNI, the Law Society or any colleagues. It would be a valuable addition to provide that level of support for complainants in what are very difficult criminal acts perpetrated against them and where they need the support of the State to bring the complaint.

Chairman: I congratulate the Deputy on his work in preparing and introducing the legislation. I invite Ms Coughlan to make her opening statement.

Ms Caroline Coughlan: RCNI welcomes this opportunity to contribute to the pre-legislative scrutiny process on the Bill, which introduces a new section 17(1)(c) into the Criminal Justice (Victims of Crime) Act 2017, providing a new right to access legal advice for victims of sexual violence, gender-based violence, and violence in a close relationship. I will make four main points.

There is a need for legal advice for victims of sexual violence in criminal proceedings. The criminal justice system, though it has improved, remains daunting for these victims. The intimate nature of these offences, their association with still powerful rape myths and the fear of being victimised in cross-examination all combine to make many victims reluctant to make and sustain a criminal complaint. Having access to independent legal advice from early on can and does empower victims to make and sustain a complaint. In our view, such access should be the right of victims of sexual offences and arguably other serious offences.

While RCNI can provide some legal support to individual survivors on an *ad hoc* basis because, thankfully, it is funded to do so by the Department of Justice, unfortunately this additional assistance is not adequate to meet the needs of all victims for legal advice from offence to conclusion of criminal proceedings and beyond.

As members will be aware, victims of sexual and other offences now have the right to have their legal representative present whenever they report an offence to An Garda Síochána or make a formal complaint to An Garda Síochána, in addition to a person of their choice, subject to certain restrictions. In our view, victims should be able to exercise this right without worrying about the cost.

My second point follows on from the first. The current provision is not adequate to meet the needs of victims. I stress that I mean no criticism of the Legal Aid Board when I say this. In principle, RCNI welcomes any expansion of victims' rights to legal advice as they negotiate the criminal justice process. At present, victims of sexual violence are entitled to free legal advice from the Legal Aid Board regardless of means, provided that a prosecution is in being and that the accused person is charged with rape, aggravated sexual assault, defilement, incest or one of a short list of trafficking and prostitution-related offences. They are also entitled to free legal advice and representation from the Legal Aid Board, again regardless of means, in two limited situations: when there is a defence application for leave to introduce evidence into the trial of their other sexual experiences or when they wish to object to disclosure of their counselling records.

However, victims of sexual violence are not entitled to any free legal advice from the Legal Aid Board before anyone is charged with an offence. Neither are they entitled to that advice if the accused person is charged with sexual assault, by far the most common offence reported and charged. My experience is that the greatest demand for this advice is at two distinct stages: before the victim decides to make a formal complaint to An Garda Síochána; and later on, if the DPP decides not to prosecute in his or her case, and the victim must decide whether to look for the reasons for that decision and-or to seek a review of the decision. That said, of course, victims also look for advice and support at any stage throughout the investigation and prosecutorial stages, and beyond.

It will be seen that the existing provisions are not adequate to meet victims' needs for legal information and advice. While An Garda Síochána is obliged to, and does, provide information about the criminal justice process itself and about protective measures, special measures and other rights specific to victims of crime, it is not its role to provide independent legal advice to victims of sexual violence, for instance, as to whether they should object to disclosure of counselling or other personal records, or whether they should request a review of the decision not to prosecute in their case.

Our third point is that while the Bill is welcome, it could go even further to improve legal support to victims. It represents a good start, but it could be improved further. For instance, RCNI would remove the qualification at the start of the section 17(1) of the Criminal Justice (Victims of Crime) Act 2017, "during the course of an investigation", as far as the right to legal advice is concerned, because so many victims in my 11 years' experience need detailed information and legal advice - perhaps more than once - before they decide to report the offence. The RCNI suggests that, instead of using the word "provided", the section should read "be informed of his or her right to be provided with legal advice from a solicitor [whether funded by the Legal Aid Board or directly by the Minister for Justice and Equality] about the criminal justice process to be followed so that criminal proceedings in respect of the alleged offence may be brought and heard", or include something very similar in order that it would be clear that not only did the Legal Aid Board or another entity have responsibility for funding the provision of any advice requested but also that unwanted or unnecessary advice would not be provided.

RCNI also suggests considering amendments to section 26(3A) of the Civil Legal Aid Act

1995 to the effect that legal advice could be provided by the Legal Aid Board free of charge, regardless of the sexual offence involved, from the moment the offence took place until the conclusion of criminal proceedings at least, subject, of course, to the overriding control of the case staying with the prosecuting lawyer. It would also provide for attendance at the Garda station or other venue when the victim reported the offence or made a formal complaint, if the victim so wished. It would provide for legal advice and support to be made available to a victim whenever a negative decision on prosecution was received from the Director of Public Prosecutions.

Victims of sexual violence need advocacy support, as well as legal advice and information. The response of State agencies to victims of sexual violence has improved significantly in recent times. However, when that response is inappropriate, altogether lacking or downright wrong, many victims find it hard to address the issue, even if they know what their rights are. Rape crisis centres will do their best to provide advocacy support for their clients as far as they can within the limits of their training and expertise. Garda and court accompaniment volunteers are given some general training in the law and procedures relevant to victims of sexual offences, thanks to the Department of Justice and Equality which funds the programme, while they also have access to some legal support from RCNI. However, we would prefer to see a system in place under which each rape crisis centre would have continuous access to advocacy services for their clients from a dedicated and appropriately trained professional advocacy and support worker. To that end, we are applying for funding for a pilot scheme to employ such a worker at one or, possibly, two rape crisis centres. A scheme such as this is already working very well in Scotland and has been evaluated positively.

In our view, advocacy and support workers would complement the work of solicitors in providing legal advice and information for victims of sexual offences. It would be the role of these workers to make themselves available to listen to victims' fears and concerns, provide for accompaniment to Garda interviews, court appearances and, elsewhere as necessary, to ensure victims would understand what their rights were and to liaise with legal advisers and gardaí and others, as necessary, to ensure the concerns of victims were heard and addressed. There is no question of their giving legal advice. Instead, they would refer victims to the appropriate sources to receive that advice.

We note that in his report on the law and procedure for serious sexual offences in Northern Ireland published in May Sir John Gillen recommended that general legal advice and information on the relevant law and procedure be made available to victims of sexual offences up to the commencement of a trial and that the Northern Ireland Department of Justice sensure the advocacy and support scheme, proposed to start there in 2020, be similar to the one already established in Scotland.

I am happy to answer questions about any aspect of this statement and on the issue of legal advice for victims of sexual violence more generally.

Chairman: I thank Ms Counihan and Rape Crisis Network Ireland for their participation in the committee's consideration of the Bill.

Mr. Robert Purcell: The society welcomes the opportunity to contribute to the consideration by the committee of the Bill. The Bill comes at an important time for Ireland, having just ratified the Istanbul Convention, that is, the Council of Europe convention on preventing and combating violence against women and domestic violence. Our obligations under the convention must be matched by clear actions, structural changes and necessary resourcing. It also arises on the eve of publication of Professor Tom O'Malley's review of the conduct of inves-

tigations and prosecutions of sexual offences. The society, practitioners and others await the recommendations to be made in that review which we anticipate will further support the victim in these circumstances, while not compromising the rights of the accused. I am joined by my colleague Áine Breathnach. Both of us practise in this area and are members of the society's human rights and equality and criminal law committees, respectively

As of today, the right to legal aid and representation for victims of sexual and gender based violence is *ad hoc* and piecemeal. The Bill provides an opportunity for the State to develop a comprehensive legal advice and aid service for victims of sexual and gender based violence in a way that will support them throughout the criminal justice process. The prosecution and successful conviction of sexual offences are necessary in a society that wants to protect and vindicate the rights of all victims of sexual and gender based violence, including women, girls, boys and men. It is in the public interest for victims to be supported through the legal process as the victim is the primary and often only witness of these crimes which, by their very nature, strike at the core of their dignity. It is also important that victims be aware of their rights to privacy on issues of disclosure of counselling, phone records, medical records and other personal information. The witness, complainant or victim, depending on circumstances, is key to a successful prosecution and, as such, should be afforded comprehensive and continuous representation. Currently, victims have no right to legal representation before making a complaint to An Garda Síochána.

I support the remarks made in the previous submission on this matter. The provision of information on what could be coming down the line for a person embarking on this process is extremely important and forewarned is forearmed in this situation. It would also attempt to avert the experiences relayed to Deputy O'Callaghan by somebody who had been through the process. There is also no right to legal representation where the Director of Public Prosecutions decides not to prosecute, while there is limited funding to provide for a right to legal representation in the disclosing of counselling and medical notes.

The Bill represents a lifeline and important public service for those affected and Deputy O'Callaghan is to be commended for advancing it. Some of things to which I have referred are happening for practitioners, but they are being done without payment, generally because of the means of the individual concerned. The Government's support for the Bill is welcome. Its endorsement of the Istanbul Convention and the Domestic Violence Act in recent years provides practitioners with hope its interest in criminal justice issues is genuine and sincere.

I will address a number of issues dealt with in the Bill. On the subject of providing clarity on the type of legal advice to be provided, there are many stages in dealing with a criminal complaint and prosecution. The Bill will provide an opportunity for victims to make informed decisions throughout the process, provided that the right to funding for a solicitor and legal advice begins prior to making the complaint. Use of a solicitor who is qualified and proficient in court procedures and criminal law is vital in navigating these boundaries. The process involve a pre-complaint to An Garda Síochána, an investigation stage, a prosecution stage, the decision of a jury or judge and the sentencing stage, as well as a consequential appeal stage.

The Bill is an important step in supporting victims of sexual violence through the very complex and gruelling process of a criminal justice trial. It is submitted that a Bill such as this provides very necessary legal and technical support for victims of sexual and gender based violence. Wider reform is, undoubtedly, needed in this area, particularly in the disclosure of sensitive details predating or unrelated to the prosecution, as well as concerning the rights of the victim. The work and advocacy of supports services, such as RCNI, Rape Crisis Centre, and

One in Four, as well as the genuine interest taken by An Garda Síochána and other agencies, in the victims of sexual and gender-based violence must be commended and is vital.

There will always be a need for comprehensive, timely and appropriately communicated information services. The Criminal Justice (Victims of Crime) Act has been helpful in that regard. However, legal aid and representation is distinct and particular to aiding a victim of sexual and gender-based violence through the complexity of the criminal justice process. These cases are highly sensitive, legally complex, unique to the parties and with so much at stake that they demand a specific and bespoke representational role, that generalised information, however helpful, will not compare to.

In the life cycle of a case, from reporting to sentencing, a range of issues arise that demand a legal and qualified perspective, to protect the interests of the victim, and the credibility of the legal process. On the delivery and management of this advice, there are a number of avenues the State could adopt to provide this service. To date, the Legal Aid Board manages a number of *ad hoc* and specialised schemes in areas such as the Garda station legal advice scheme, and the international protection applicant legal aid scheme, as well as the limited schemes available for witnesses in rape trials. It is likely that the provision of legal advice and aid as proposed under this Bill will require a blending of approaches in other schemes, however models exist and are operational that provide immediate and effective services in other areas that could be adapted for this service. Most important, when designing this scheme continuity of service should be of primary concern to ensure that the victim does not have to repeat her account on a number of occasions to different lawyers and thus increase the risk of retraumatization.

The question has been asked as to whether providing advice might delay criminal proceedings. We do not believe that it would. Criminal proceedings are likely to be more secure where the victim has representation and support and has an understanding of the process what is involved in the process and what they may have to go through in the future. A well-considered scheme, such as those in place by the Legal Aid Board, and that safeguard continuous legal representation, are likely to speed up rather than delay proceedings. Our vision of an appropriate scheme for the victim is one that runs in tandem with the case rather than part of the proceedings. It is important to acknowledge that the accused's rights are no way diminished by improving the victims understanding of the process. A fair trial is crucial. We also wish to assist and aid any victim within legal parameters in respect of the trial process. Our submission to the O'Malley review identified a number of reforms that, hopefully, will be reflected in the final report. These reforms are more likely to reduce delays, and include the introduction of pretrial hearings; specialist training for the Judiciary, An Garda Síochána and other agencies; supports and information to victims throughout the process; the adequate resourcing of the aid and the courts; and case management by the courts.

The Government expressed concern that the scope of the Bill and the challenge of defining the offences. However, current sexual offences legislation, in particular the 2017 Act, as well as the Domestic Violence Act 2018, provide assistance in identifying classes or categories of victims that would benefit from this Bill. Broadly, legal aid is limited to those who are victims of aggravated sexual assault, rape, incest and child defilement. A question that arises, which relates to our values as a society, is whether all people who claim that their personal dignity and privacy and safety has been violated should be afforded legal aid and representation.

We urge the committee to appreciate Ireland's obligations under EU and international law and how this Bill plays an important part in it. We urge it to fully engage with the O'Malley report that is due to be published, hopefully by the end of the year or perhaps by early next year.

Resourcing and specialisation are vital building blocks. State agencies, including An Garda Síochána, the Society, Bar Council and NGOs such as the Rape Crises Network all have a part to play. A collaborative approach will be doing the State some service.

To conclude, the victim must be put front and centre, and how their interests are best protected, forms part of that obligation. Ms Breathnach and I look forward to engaging with the committee on any questions it may have.

Chairman: I thank Mr. Purcell and the Law Society for its attendance. I will begin with Senator Black and Deputy Connolly to be followed by Deputies Jack Chambers and Pringle. Deputy O’Callaghan is welcome to contribute in his dual capacity but I will take the other members first.

Senator Frances Black: I thank Deputy O’Callaghan and the witnesses. Sexual, domestic and gender-based violence are important issues and I am glad the committee is taking them so seriously. I wish to note some points and then I will ask a question. I welcome the Bill and offer it my strong support. It is a short, concise Bill, which does not seek to move mountains. It would secure greater information and support for people in difficult and vulnerable situations. Given that we are dealing with highly sensitive complex cases, often involving a great deal of trauma and shame, it is only right that we make extra efforts to provide support.

Context is important. Mr. Purcell mentioned how Ireland has just ratified the Istanbul convention on violence against women. We need to ensure that it is not only aspiration but that we match the commitment with action and material support. I have seen this with the Convention on the Rights of Persons with Disabilities, where words are not always followed by action. Providing better and more inclusive legal aid and advice is an important step in this.

On improvements, the point made by Ms Counihan and the RCNI on when legal advice is needed is crucial. I fully agree that people need this information and support before they contact An Garda Síochána or they might not make that call at all. This is something we should consider for the Bill.

The Law Society presentation also sets out just how *ad hoc* and piecemeal the current system is. That is the Bill’s value as it would provide a framework for the State to put a clearer, simpler system together in one place. If we did that, it would bring us closer to Deputy O’Callaghan’s goal of increasing the number of people coming forward and would send a signal to women that if something awful does happen, there is a service that will support them comprehensively from day one. That would be brilliant. Currently, women can feel as though they are being passed around from service to service, which makes the entire process more daunting.

I wish to ask Deputy O’Callaghan whether the money message issue might impact the Bill. He will be aware that this is something on which I have worked closely over the past year. I firmly believe the Government has been acting outside the bounds of the Constitution and abusing its power. It seems possible if we finish this review and the Bill moves forward that the Government will argue that this will cost money and seek to veto it. Is the hope that a money message will be provided?

Deputy Jim O’Callaghan: I think that the Senator is correct. Expenditure will be incurred under the legislation as the State will have to pay for solicitors providing the legal aid. In contradistinction to other legislation with which the Senator will be familiar, the incurred expenditure is clear and it will require a money message but I would like to work collaboratively with

the Government on this. It has indicated a level of support for the Bill so I would not like to see it progress in an antagonistic way and just work with it with the Government.

Chairman: The guests have escaped in this round but they might not be as lucky as we move on.

Deputy Catherine Connolly: I thank everyone for their presentations and Deputy O’Callaghan for putting the spotlight on this important area. Senator Black mentioned context. I have read the Oireachtas Library and Research Service paper on this. I always take the opportunity to thank them for their detailed work, which is tremendous. In 2018, there were 16,994 disclosures of domestic violence alone. The Bill seeks to cover more than domestic violence. Reference is made to 19,089 contacts with Women’s Aid. The purpose of the Bill which I welcome is to bring about an increase in the number of people reporting sexual abuse, leading to successful prosecutions. On page 10 of the Oireachtas Library and Research Service paper statistics are provided for a survey which are both fascinating and frightening. The survey found that 22% of victims wanted to keep the abuse private, 18% feared reprisal and 16% cited shame. If we add the three figures for An Garda Síochána, we get a total of 19%. A total of 8% believed the police would do nothing about it, 6% felt it could not do anything about it, while 5% thought they would not be believed. The legislation is welcome, but I hope amendments will be made to it. It is being discussed in the context of dealing with an enormous problem. In economic terms, we are talking about a figure of €2.2 billion, which is a conservative estimate. As a woman, I do not even want to use the economic argument, but it is really important for any Government that is serious about dealing with violence.

I have a number of questions for the delegates. Has Mr. Purcell received information on the O’Malley report that the committee does not have? He has said we are on the “eve” of its publication. I have notes that indicate that it was to have been published at the end of 2018. Then it was to be published in the first quarter of 2019. Does Mr. Purcell know something we do not know?

Mr. Robert Purcell: I understand it will be ready by the end of the year or early in the new year.

Deputy Catherine Connolly: Where is it? Perhaps we might come back to that issue in due course as a committee as it is a vital piece of the jigsaw and was supposed to have been published by the end of 2018. It has been quoted by the Government on numerous occasions. We have been told that we should await the O’Malley review. That is a very sensible suggestion, but for how long do we wait?

There is an existing Legal Aid Board scheme that covers a limited number of sexual offences, including rape. The Bill seeks to extend the range of offences covered. What concerns me is that there has been little uptake of the existing scheme, something on which I ask the delegates to comment. Again, I thank the Library and Research Service for its paper on this issue which shows that the take up of legal advice is very low, with only one application being made in 2018 and four in 2017. That begs the question as to what was the take-up prior to 2017 and 2018. Why is it so low and what, if anything, has been done about it?

Ms Caroline Counihan: I refer back to my earlier answers. In my role in the past 11 years or so I have most commonly found that people want to receive advice prior to the point at which the Legal Aid Board provides assistance by way of legal advice, that is, before any prosecution is in being. A lot of our work takes place before victims report to An Garda Síochána and also

when victims receive a decision from the Office of the Director of Public Prosecutions that it does not believe it is appropriate to prosecute. Victims have to decide what to do about it, but, as members know, it is time-limited. They have to make up their minds quickly. So much of what we are talking about is sexual assault which is not covered by the scheme. By far, that is the most relevant point. By a factor of three or four, the sexual offence reported most frequently is charged as sexual assault which the Legal Aid Board's limited scheme does not cover.

Deputy Catherine Connolly: Is Ms Counihan saying the low uptake is due to the fact that advice is not provided when it is needed before the complainant-----

Ms Caroline Counihan: We have never studied or surveyed the issue, but from what people have told me, that is part of the issue. Reports have also reached me that people in distress have needed advice, but were not able to access it quickly. Again, I stress I mean no criticism of the Legal Aid Board or any solicitor. Sometimes these things happen. Sometimes victims are able to get hold of somebody like me much more quickly.

Deputy Catherine Connolly: I understand that. Ms Counihan is saying the existing scheme does not cover the range of offences on which there is the biggest demand for advice - sexual assault offences. Second, advice is not provided before a complaint is made-----

Ms Caroline Counihan: No, before a prosecution is in being.

Deputy Catherine Connolly: Before a prosecution is initiated.

Ms Caroline Counihan: It does not kick in at the stage when people are thinking about what happened to them and wondering if they should make a complaint. In our network just over 60% of clients with whom we deal in any given year tell us about historical child sexual abuse. It is an enormous decision for them to even report it to An Garda Síochána.

Mr. Robert Purcell: I agree with Ms Counihan in what she has just said. The provisions are only triggered when a case is before the court and only apply to specific offences. The scheme is limited by the number of the cases tried in a particular year.

Deputy Catherine Connolly: I understand that. What I want to know is what has happened in the Department of Justice and Equality since 1995 in researching the uptake. Are the delegates aware of any research to ascertain the reasons for the low uptake of the scheme? It seems to be a very basic piece of research.

Mr. Robert Purcell: I am not aware of anything that is available from the Department.

Deputy Catherine Connolly: It would be very helpful, would it not as it would identify the reasons? Unfortunately, Deputy O'Callaghan's Bill does not catch the prior to prosecution stage either, which is a limitation that deserves further consideration. The delegates are saying the legislation does not capture the obvious defect or the obvious-----

Ms Caroline Counihan: Unfortunately, it does not. That early stage is so vital.

Deputy Catherine Connolly: Does Mr. Purcell agree?

Mr. Robert Purcell: Yes, I agree. Of course, it is why we are here. We are here to give our input on this and other matters and I hope improve the legislation which can be amended, if necessary.

Deputy Catherine Connolly: Absolutely. That is what we are here for, but it takes a little while to gain a proper understanding. On paper, there seems to be a very good scheme in place under the Legal Aid Board, but it is limited. The uptake is limited. We have some data for 2017 and 2018, but we do not have figures for earlier years as there has been no review of the scheme by the Department.

Ms Caroline Counihan: I am certainly not aware of one, although there may have been a review.

Deputy Catherine Connolly: What do the delegates suggest with reference to this amendment? Do they suggest we broaden it? Have they thought about a wording for it?

Ms Caroline Counihan: I am not sure exactly how it should be done. The issue is with the wording of the existing section and the phrase “during the course of an investigation”. It covers not only paragraph (c) but also paragraphs (a) and (b)

Deputy Catherine Connolly: Deputy O’Callaghan might look at the issue again. What does the existing scheme cover? Reference was made to hand-holding. Is it a hand-holding exercise or a one-off consultation?

Mr. Robert Purcell: I will use an example to illustrate the point. Let us say, for example, that a person’s sexual history is to be brought up during the course of a trial. The defence will notify the prosecution which will then notify the Legal Aid Board which will brief a solicitor and a counsel who will attend with the victim or complainant and advise him or her in that regard. If the court allows the cross-examination to take place, the counsel and the solicitor will remain in court and be part of the proceedings at that time.

Deputy Catherine Connolly: Is it an ongoing process of hand holding? Perhaps I should stop using that term. Is it an ongoing or limited process?

Mr. Robert Purcell: It would be limited to the particular application involved, that is, the cross-examination on sexual history.

Deputy Catherine Connolly: That is a particular example. Let us look the general picture. When there is a prosecution, are there a number of consultations with the victim during the process?

Mr. Robert Purcell: Yes, I believe so.

Deputy Catherine Connolly: Does anybody know?

Mr. Robert Purcell: Those are consultations with prosecution lawyers who are primarily concerned with the prosecution. The Criminal Justice (Victims of Crime) Act 2017 has assisted in the provision of information, but those lawyers do not give people specific legal advice tailored to them and their individual situations, as it is not within their remit to do so. These people are victims, as stated in the legislation but, as Deputy O’Callaghan said, they are also witnesses in the State’s case against the accused.

Deputy Catherine Connolly: I am a bit lost. I thought that there was a system in place, under the legal aid scheme, to assist victims and provide them with independent legal advice in a limited number of cases. What is the nature of that independent legal advice, as a model for what Deputy O’Callaghan is proposing? Is it a good model? Is it a hand-holding exercise or is it limited to one consultation?

Ms Caroline Counihan: I do not have the relevant section in front of me but from memory, section 26(3)(a) of the Civil Legal Aid Act 1995 refers to legal advice, and does not cite any particular limitation. It does not stipulate that someone can only have one, two, three, or four hours of counsel, for example.

Deputy Catherine Connolly: It is potentially a very good system, but we do not know how it is operating in those limited cases.

Ms Caroline Counihan: Exactly.

Ms Áine Breathnach: It is only available to a limited number of victims and, as Ms Counihan said, it is only available post complaint. We are anxious to have a much wider scheme in place. The difficulty at the moment is that it is *ad hoc* and piecemeal. Even as an expert, when I researched this issue prior to coming before the committee, it was difficult to find information on what was available, how to access it, who to ring, when the services were open and so on. It was difficult to access information and find out what one was entitled to, even from a professional point of view. A victim of an assault may not know what type of assault they have been subjected to, according to the legal definitions, and so they will not know where to look for assistance. We would like a much more comprehensive service that would start with the victim at the beginning and continue all the way through. That would limit any kind of retraumatization of the victim through having to retell their account to different solicitors or lawyers throughout the process. Unfortunately, the service is currently very narrow and piecemeal and thus it is very difficult to assess what impact it has had.

Deputy Catherine Connolly: I agree with Ms Breathnach. This Bill does not capture what the Law Society wants.

Ms Áine Breathnach: No, but as Mr. Purcell said, we are here to encourage Deputy O’Callaghan to broaden it.

Deputy Catherine Connolly: That brings us back to the cost implications, which the Deputy might address. I feel that is absolutely necessary. I welcome the Bill but it must be broadened. Unfortunately, we are doing that in the absence of data, which should be at our fingertips. Similarly, there has been no review of or update on the 2017 Act and how it is operating.

Ms Áine Breathnach: There are some statistics available on cases that have proceeded to court. My understanding is that, in 2017, approximately 127 sexual assault cases and 116 rape cases went to court. Those figures provide a general picture of the cases proceeding to court. We consider that a low number of cases but that is what is there at the moment.

Mr. Purcell talked about the uptake of legal representation when sexual history comes into play. The number of people who have accessed legal representation has increased from 26 to 48. Where services-----

Deputy Catherine Connolly: From where did Ms Breathnach get those figures?

Ms Áine Breathnach: Those figures are available from a Legal Aid Board report.

Deputy Catherine Connolly: I ask Ms Breathnach to repeat them.

Ms Áine Breathnach: In 2014, applications were made for 26 legal representatives. That representation related to a very particular section of a trial where sexual history is introduced. That figure increased to 47 in 2018. Where services are available-----

Mr. Robert Purcell: That would probably be out of a total of 100 or 120 cases coming before the court that year.

Deputy Catherine Connolly: Other figures being cited are much lower than that. We will come back to those numbers later.

Ms Áine Breathnach: That relates to a particular part of the trial process.

Deputy Catherine Connolly: Those figures should be readily available in order that we can form policy around them. I refer to the way forward. I am not sure which-----

Mr. Robert Purcell: I will make one more comment on this issue. The Legal Aid Board is generally willing to provide as many statistics as it can to people on specific request.

Deputy Catherine Connolly: That is true, but the Department must also have an approach to the low uptake of this scheme, given the prevalence of violence against women, and to a lesser extent against men. There is an onus on the Government and the Department to conduct a review of that scheme and identify the issues in order that we can introduce proper legislation based on policy.

I fully support amending this area. Could we amend the existing legislation, such as the 1995 Act, to broaden the scope? Is that appropriate? If we bring in a new Act, it would unfortunately be confined. Should we instead amend the existing legislation in a broader way? Would that help?

Ms Caroline Counihan: I am no parliamentary counsel, but I think it would be safest to also amend section 26(3)(a) of the Civil Legal Aid Act 1995 within this legislation to avoid having two Bills that might contradict each other. To put it in concrete terms, while I have no issue with including all sexual offences in Deputy O’Callaghan’s legislation, if section 26(3)(a) of the 1995 Act was left unamended, there would be a contradiction there. If one is amending the Criminal Justice (Victims of Crime) Act, perhaps one should also consider making an amendment to the Civil Legal Aid Act. As I said, I am no parliamentary counsel.

Deputy Catherine Connolly: Ms Counihan is doing well.

Ms Caroline Counihan: I thank the Deputy.

Mr. Robert Purcell: The only difficulty with using the 1995 Act is that one would then be limited to dealing with solicitors working within the Legal Aid Board, which is overstretched and only has phone lines open between 10 a.m. and 4 p.m. There might be an issue with the board’s ability to provide the service when it is already overstretched.

Deputy Catherine Connolly: That is a very good point but it is an operational issue.

Mr. Robert Purcell: Yes, I suppose.

Deputy Catherine Connolly: It was suggested that RCNI might provide this service, though it currently has even fewer resources than the Legal Aid Board. Which organisation should provide this service, assuming it was granted sufficient resources to do so?

Ms Caroline Counihan: We could certainly look at it if we had the resources. I have not considered the position of a solicitor in detail, as I am a barrister. I have not thought about how solicitors should be contained, whether they should work in-house, what supports they would

need, whether we would need professional indemnity insurance to cover them, how much space they would need, and so on. We could look at somehow taking on that role if we had the resources and if it were appropriate within the solicitors' own professional conduct rules. I do not know whether that is the case. I do not know whether that is appropriate from their point of view. Perhaps solicitors might be able to assist the Deputy a bit better on that question

Chairman: It is an answer nevertheless.

Deputy Jack Chambers: I will be brief. I thank the witnesses for attending the committee meeting. Ms Counihan's recommendation to provide the information prior to an investigation is wise and positive. It would enhance the level of provision.

In the absence of the O'Malley review, it is regrettable the Department has missed another deadline in such an important area, particularly with regard to the politics of this. The Dáil is inching towards its end, as we all know, and I fear this legislation, now that it is in pre-legislative scrutiny, will, unfortunately, lapse with the Dáil and have to be re-examined by a future Dáil. There would have been an opportunity if the O'Malley review had been accelerated, prioritised and published so that at least we could have a fusion of what it recommends, what is here and what the witnesses are stating as experts. Officials from the Department came before us last week. The committee should urgently write to the Department about missed opportunities with timelines.

Chairman: I suggest we support Deputy Chambers in that.

Deputy Jack Chambers: The Minister's speech said little. The Department stated it does not fit with Government policy and that it will not propose changes in advance of the O'Malley review. It is good to have this conversation and we can focus on future rights, provision and support. This is my suggestion. I do not have questions for the witnesses and I thank them from their expert opinion.

Chairman: With the agreement of the committee, I will write on its behalf to the Minister and we will get that done today. That is how important and urgent it is.

Deputy Jack Chambers: I thank my colleague for his work in this area.

Chairman: That is deserved.

Deputy Thomas Pringle: I thank the witnesses for their contribution and Deputy O'Callaghan for the legislation. While it is welcome, it has limitations with regard to who can access the advice and when it will be made available. I am not sure about the mechanics of how it would work, particularly prior to charges being brought. It would be interesting and worthwhile to work it out and go through it. An individual having to make even a small contribution could be a barrier because what might be a small contribution to us would be a large contribution to those who need the advice. On the civil law side, victims of domestic violence must make a once-off payment of €130 to access legal aid. That would be prohibitive.

Ms Áine Breathnach: That has been removed.

Deputy Thomas Pringle: Everything I wanted to raise has been asked. Will the witnesses elaborate on how this could work? Who would be the best person to give advice prior to charges being brought? How would it be accessed? At what stage would it be accessed? I imagine it would probably have to be a rape crisis centre. Charges might never be brought. How would

that work? Have the witnesses thought about it?

Mr. Robert Purcell: There are a number of ways it could work. There are approximately 400 solicitors who are experienced in criminal justice work throughout the country. We have a certified list of solicitors who attend Garda stations. They have front-line experience in these types of cases. I also believe that some advanced specialist training may be necessary for people to be approved to give this advice. If the NGOs were the first port of call and this list was available to them, they could refer to us individuals who require more specialist advice. Most of the 400 solicitors to whom I referred also operate a 24-7, 365 day service so it is not limited.

The certification would have to involve a State agency, perhaps the Legal Aid Board, with an appropriate form and certification of means or something similar which could be verified before a particular claim is processed on behalf of an individual. Would Ms Counihan say these generally involve emergencies?

Ms Caroline Counihan: It depends. Quite often when victims of historical sexual violence think they might report, there is no particular urgency because it happened so long ago but, at the other extreme, there are situations where people have been the victims of a recent and traumatic rape and they are absolutely at sea and do not know what to do but they must make decisions fast.

Mr. Robert Purcell: I am talking about those situations where any type of barrier to the advice, such as a means test or something like that, only serves to obstruct the situation.

Deputy Thomas Pringle: I imagine it is a difficult time for a victim to decide to report. The act of reporting itself is significant. Would a person be asked to report twice? Doing it once is very difficult.

Ms Caroline Counihan: I do not think so. The way people usually come to me is they approach a rape crisis centre because all of a sudden it has come to the surface in their lives. I am thinking in particular of people who have been victims of historic child sexual violence or, at the other extreme, where there is a very acute need. Generally, they do not find it very difficult to tell people in rape crisis centres who have specialist training in dealing with trauma. By and large survivors do not find it an ordeal to talk to people at rape crisis centres. The people who work in all our centres throughout the country and other rape crisis centres are good at working out what is a legal query they cannot answer or should not try to answer. At that point they get in touch with me and I respond to the client. Perhaps we might have a meeting, they might ring me or I might ring them. We might email each other, whatever suits, and that is how it happens.

I hope and pray it is not a traumatic encounter for them. The aim of what I say is to explain the system to them to address their particular concerns where I can, and to reassure them if they decide to report that somebody from a rape crisis centre can go with them at the earlier informal stage when they report what has happened. They can also go with them to the Garda station or, more commonly nowadays, to the rape crisis centre itself, for their formal statement to be taken. It is the idea of working with An Garda Síochána at local level to provide, as far as possible, wraparound support that addresses all of the concerns of the client. I am the legal element of this. I hope it is not traumatic for them to talk to me.

I have had some very upsetting conversations. Sometimes I have had to tell people things that I know are legal facts and they do not particularly want to hear that, unfortunately, this is how far they can go in this direction and there is no further avenue of appeal. That can be

very difficult. To move on to the formal interview with An Garda Síochána in which a person's statement is taken, there is more and more awareness of how to deal with traumatised witnesses among gardaí. As members will be aware, we now have a certain number of divisional protective services units. These units cover approximately one third of the country and I understand they will shortly cover a bit more. The officers in these units have received intensive extra training in how to deal with particularly sensitive cases, which may involve sexual or domestic violence. In any event, reporting to An Garda Síochána is less of an ordeal than it was but it is, of course, still difficult. No matter how sympathetic the garda is, this is a formal stage of the proceedings and what one says will be recorded and included in one's statement, which will form the basis of the prosecution case. If the case goes to court, one will be cross-examined on that statement. It is still very heavy and very serious and people need legal support. It is no harm to have a lawyer present, particularly to deal with issues of privacy and disclosure. If a lawyer is present, he or she can address those.

Ms Áine Breathnach: As Deputy O'Callaghan said, much of this role involves explaining to the victim what will happen, where his or her statement will go and the legal process that will be kick-started once a complaint is made. It may also involve advising clients as to whether they have to sign a consent form for the release of medical information or whether they have to hand over their phone. What about their privacy and family rights? It is about talking them through the legal process, including what their rights are and how to vindicate them at the earliest possible stage, rather than talking them through the trauma, which is the role of a specialised counsellor.

Deputy Thomas Pringle: One has to take into account that a person has to explain this stuff to someone who is very traumatised.

Ms Áine Breathnach: That is true.

Chairman: I will bring in Deputy Martin Kenny and then I will invite Deputy O'Callaghan to make his closing remarks. Is that okay? I just wish to give Deputy O'Callaghan notice of that.

Deputy Martin Kenny: First, I commend Deputy O'Callaghan on the work he is doing in this area. Any expansion of the rights of people in these circumstances has to be welcome. It is the way forward. The many of us who have had experience of dealing with people who have gone through the traumatic experiences of either sexual or domestic violence will understand what a huge trauma it represents to those people and those near to them. This legislation is a start. It moves us in a direction that will allow people to have more courage, which is what they need. Any support we can give that would enhance that courage is important. From that point of view, I commend Deputy O'Callaghan on introducing this legislation and moving us in the right direction.

I was out of the room for a few minutes but I was listening to the meeting on the monitor. I know that many questions were answered and dealt with in that time. One issue I have come across on a couple of occasions relates particularly to young people and teenagers. I refer to sexual encounters or experimentation crossing the boundaries that most of us would set and becoming assault. That can often happen a number of times before a young woman understands what has happened to her. These women find it very difficult to report such cases or to find the courage to do something because it was not a case of being attacked; it was consensual up to the point at which it crossed over into something which was no longer consensual. In the context of what we are doing here, how will support be given to people in such circumstances? I have

young teenagers myself and I listen and hear. We have a very good relationship in the house and can talk about these things and I know that this is an issue for many people. They feel they cannot report stuff which they really should. They will not do so. Do the witnesses feel this legislation goes far enough in supporting people in those circumstances?

Ms Caroline Counihan: What I have observed is that, when such situations arise, the first port of call is very often a rape crisis centre and a number of sessions with a counsellor to tease things out. That is where, at a certain point, the light bulb goes on and people realise that they did not just think something was abuse, but that it was and that they had not seen the reality for what it was. Most of the time, what I hear is either a counsellor or the parent of a young person asking what the next steps are or asking about aspects of the legal process. They will have their list of questions but I am never really involved in discerning whether something was abuse or consensual. That is more the role of a counsellor or another wise mentor who has helped a person arrive at this realisation. Sometimes it just comes out of a conversation with a parent, an older wiser friend or even a contemporary. A person's friend may say that what happened to him or her was rape and that he or she should do something about it. Thank God, he or she then does. Our hope is that such people will then find their way to a rape crisis centre because these centres have the expertise to help and support them in teasing out what happened, in working out where the abuse began and in clarifying what happened to find the point where, as the Deputy said, it went from the consensual to something more sinister.

It is only later on, if at all, that the Garda is involved. People sometimes do not want to have anything to do with a formal report to An Garda Síochána. It should be borne in mind that if a young person is involved, a report will have to be made to Tusla. As the Deputy will know, Tusla shares information with An Garda Síochána, so the Garda will be alerted anyway. Quite often, the young person does not want to have anything more to do with it. Sometimes they do, and it is at that point that I would get involved. The person may seek legal advice or help. Sometimes, all that is needed is an informal chat with a local, experienced, sympathetic, and well-trained person, usually a garda. This is the right person to talk to and can often answer many of the person's questions.

The extra bit I can offer is the independent viewpoint. I am not aligned with the prosecution; I am myself. I am essentially independent of the whole criminal justice process. I am there to support survivors. If a survivor, of any age, tells me that he or she absolutely does not want to go through with this, I will not say he or she has to. I am survivor-led. I will tell this survivor that it is up to him or her as to whether he or she decides to make a report. In fairness, members of the Garda are not heavy-handed when it comes to persuading people to report either but sometimes people can feel that even contact with An Garda Síochána is pressure and that they will have to report and there will be no way out of it. That is not actually the case. It is my job to reassure people that agency lies with them.

Deputy Martin Kenny: At what point does a person's status change from complainant to victim? Is there a-----

Mr. Robert Purcell: Under the 2017 legislation, people become victims when they make a complaint.

Deputy Martin Kenny: They formally become victims when they make a complaint.

Deputy Jim O'Callaghan: I thank Ms Counihan, Mr. Purcell and Ms Breathnach for coming in and for their contributions and written submissions, which I found very helpful. I also

thank the Chairman and the members of the committee for their contributions. We have learned much from this morning. As Ms Caroline Counihan indicated, the fact section 17 only applies during the course of an investigation excludes many complainants. When one looks at it from the point of view of legal aid for the accused, it starts at the beginning for the accused when brought before court for the first time. For the complainant, the beginning is earlier than that. It is from the date of the offence. We will all have to put our heads together to think how we can draft it in such a way to ensure those events preceding the investigation can be the trigger point for the complainant to receive this aid.

I thank everyone and the committee will produce a report. Hopefully, we will get this enacted before the Dáil finishes, contrary to what Deputy Jack Chambers said that we are inching towards the end.

Mr. Robert Purcell: For the benefit of Deputy O’Callaghan, I must point out that when a person is arrested, they are, quite properly, entitled to legal aid at the station.

Deputy Jim O’Callaghan: They can get it before they go before the court. Is that the triggering point for them?

Mr. Robert Purcell: Yes. I wanted to ensure members are aware of that.

Chairman: On behalf of the Oireachtas Joint Committee on Justice and Equality, I thank Deputy O’Callaghan. We will of course be preparing a report. I thank our witnesses who came before us, Ms Caroline Counihan, Rape Crisis Network Ireland, Mr. Robert Purcell and Ms Áine Breathnach, the Law Society, their colleagues including Mr. Ken Murphy.

Without any further ado, the Seanad members will be glad to note they will not have a meeting next week, as we are meeting in select committee to deal with legislation which I have already signalled. Accordingly, the joint committee will not be meeting next week.

The joint committee adjourned at 10.42 a.m. until 9 a.m. on Wednesday, 27 November 2019.