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Dear Sir/Madam

Re: Evidence in Sexual Offences Prosecutions Consultation Report

The Commissioner Designate for Victims of Crime in Northern Ireland welcomes the comprehensive review undertaken by the Law Commission in their 'Evidence in Sexual Offences Prosecutions' report. Whilst she is aware that the geographical scope of this consultation applies to the law of England and Wales, she is confident the proposals within this report could be used as a blueprint for changes to law in Northern Ireland as well.

The Commissioner Designate commends the comprehensive examination of the law and practice in this area and whilst not responding in detail to each consultation question has outlined her general opinion on some of the key areas highlighted. These opinions have been informed by her engagement and experience of working with victims in Northern Ireland.

Context

The Commissioner Designate has met with many rape and serious sexual offences (RASSO) victims since taking up office and often they will describe the criminal justice process as harrowing and distressing, describing the trial as '*another assault*' or '*worse than the incident itself*'¹.

¹ Martin, P.Y. Powell, R.M (1994) *Accounting for the 'Second Assault: Legal Organizations' Framing of Rape*

The Gillen Review of the law and procedures in serious sexual offences in Northern Ireland in 2019 highlighted how RASSO cases '*defy the normal trial process.*²' The review identified a range of weaknesses including delays, rape myths, social media, disclosure issues, consent, training, education and resources which informed a staggering 253 recommendations for improvements.

Despite several significant improvements such as the introduction of victim legal advocates and remote evidence centres, work is on-going to implement all recommendations amidst a pace of change that is both slow and incremental. This delay in implementation has been fuelled by both the pandemic and funding constraints. The Commissioner Designate believes however that the biggest barrier to implementing change in this area is the need for cultural change across this system.

The Commissioner Designate recognises that within the criminal justice system victims are considered to be complainants. Given the remit and title of her office, we have used the terms victims throughout, this is no way in meant to infer guilt of any party involved.

Chapter 2 – Rape myths

The report highlights the negative impact that rape myths can have on victims which echoes the feedback received from victims in Northern Ireland. Whilst researcher opinion may vary as to the impact of such myths on jury decision-making, the Commissioner Designate remains of the opinion that such debate detracts from the reality that these myths continue to pervade each step of the process most often cited by victims to be propagated by defence practitioners in particular as a means to undermine the credibility of the victim. The Commissioner Designate draws the Law Commission's attention to the Victim Support NI 'Bearing Witness' report, published in 2021³ which draws upon the observations of lay members of the public tasked with observing sexual violence trials in Northern Ireland. This report highlighted the use of rape myths at trial and the perceived failure by either judges or prosecutors to address or intervene in a timely fashion. Victims engaging with the Commissioner Designate's office has highlighted this issue and report feeling attacked and let down by the system's failure to address this.

This issue also arose in the Gillen Review leading to numerous recommendations regarding juror training and instructions to jurors as well as training for the Judiciary. The Commissioner Designate believes that this is an issue which not only requires criminal justice system changes but also more holistic change across wider society. Through improving public understanding of rape myths and stereotypes and the impact of the impact of trauma, we will increase the understanding of juries which will in turn reduce any reliance of such myths by legal professionals in sexual violence cases.

² Gillen Review Report into the law and procedures in serious sexual offences in NI - [gillen-report-may-2019.pdf \(justice-ni.gov.uk\)](#)

³ [VSNI-Report BearingWitness Final.pdf \(victimsupportni.com\)](#)

Chapter 3: Personal records held by third parties

The issue of third party material and disclosure has been an area of concern for the Commissioner Designate since she took up her post in June 2022. She is currently working with the Police Service for Northern Ireland (PSNI), the Information Commissioners Office (ICO) and the Public Prosecution Service (PPS) in relation to police and/or prosecution using consent as the most appropriate means of accessing and sharing third party material (TPM).

The Commissioner Designate's concern relate to two specific areas; the failure to comply with existing guidance governing the issue of third party material, and the need for additional legislative safeguards to protect the victim's right to privacy surrounding their personal information and in particular access to therapy notes.

The Commissioner Designate believes that current disclosure law and practices and the subsequent pressures that this places on the victim serves only to compound the trauma experienced by victims and can be linked to victim attrition.⁴

The Commissioner Designate is **supportive of bespoke provisions within a unified regime** that governs access, production, disclosure and admissibility of personal records held by third parties. Whilst she is not against having a bespoke system for sexual violence cases only, she believes that a unified approach for all cases may be more easily implemented across the relevant bodies. Any such regime must clearly outline the specific role and responsibilities of all parties and be established in such a way to aid effective monitoring and accountability. Our office currently relies on the feedback of victims and practitioners to understand current practice in this area which would be more greatly enhanced if there was a robust data set which could also be drawn upon to monitor practice as well as inform the evaluation of any new initiatives.

The Commissioner Designate also wishes the apparent **disparity in understanding surrounding the issue of victim consent when seeking access to third party material**. The consultation document draws on existing legal guidance outlining the ability of police and prosecutors to obtain access to third party material where there is consent. The ICO report 'Who's Under Investigation 2022'⁵ however raises concern about the use of consent as a lawful basis for acquiring and processing third party material and recommends the discontinuation of forms indicating general consent to obtain third party materials. The Commissioner Designate hopes that any new regime would clearly align all relevant advice in this area to ensure clarity and consistency for practitioners as well as victims and their advocates.

⁴ [Review into the Criminal Justice System response to adult rape and serious sexual offences across England and Wales \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

⁵ [ICO opinion-whos-under-investigation-20220531.pdf](#)

Any new system must also strive to ensure that processes are not over-burdensome on third parties. Whilst statutory bodies will have access to data protection and legal advisers, many organisations, particularly within the voluntary and community sector will not have similar levels of resourcing so any new regime must be easily understood and manageable.

The Commissioner Designate supports the proposal that **any regime regulating third party material should apply to all records in which a victim has a reasonable expectation of privacy.** She recognises that there may be some material which police would seek as a reasonable line of inquiry which is time sensitive and may need to fall outside any new bespoke provisions. In such cases, she believes that victims should be informed as appropriate and any onward sharing of such material should fall within the scope of the new regime and be open to victim's to make representations. Any personal information obtained about the victim should also be shared with the victim unless there is a strong legal reason prohibiting this.

Access to therapy notes was the key issue which brought the issue of third party disclosure into sharp focus for the Commissioner Designate. Her examination of the impact of this on victims led to her to conclude that victims were effectively choosing between healthcare and justice. The Commissioner Designate's preferred position was a prohibition on the disclosure of therapy records alongside the introduction of a short questionnaire that Judges could issue to therapy providers to satisfy themselves that any Article 6 concerns had been addressed e.g. had any retractions occurred. Legal opinion on this proposal was sought by the Commissioner Designate and the opinion received indicated that any such legislation may be compatible with a defendant's convention rights and unlikely to withstand appeal. The legislation in place in Canada was highlighted as a potential alternative and the analysis undertaken by the Law Commission in their review has further sold the merits of this option to the Commissioner Designate.

Notwithstanding this, the Commissioner Designate believes that the only way to give victims absolute confidence that their personal thoughts and feelings will not somehow be shared with the defendant is to have a complete prohibition on the disclosure of the actual records and any concerns regarding the defendant's fair trial rights to be addressed via a questionnaire for the therapist. **In the absence of such an outright ban, the Commissioner Designate favours legislation which draw upon the safeguards embedded in the Canadian and Western Australian models.** Such a model should govern access to all victim personal information, not solely therapeutic records and increase the scrutiny role of the Judiciary regarding access to the material. **Any determinations to be made post a decision to prosecute would most helpfully be undertaken by the trial judge who would be in the best position to determine relevance.**

The Commissioner Designate is mindful of the impact of delay on victims and the potential for increased judicial involvement to add to this. She suggests that greater consideration is given to the potential use of independent legal advisers for victims whose involvement in the case may help ensure greater protection and support when they are asked for their views on access to their personal information. A legal adviser's involvement may negate the need for a judicial scrutiny if the victim has made an informed choice to grant access.

The Commissioner Designate agrees that ultimately the court needs to be satisfied in any third party disclosure application that there is 'good reason to think' that exculpatory evidence exists. She would want to see clarity around what defines 'good reason to think' and that this is embedded in legislation rather than guidance in order to ensure transparency, consistency and accountability.

Chapter 4 – Sexual behaviour evidence

The Law Commission will be aware that the Gillen Review in Northern Ireland highlighted conflicting opinions about how frequently this issue arises in Northern Ireland courts. Gillen recommended a range of measures including greater consideration as part of the case management process, increased judicial training and notification of the victim in cases where an application has been made. Gillen's recommendation for the introduction of Sexual Offence Legal Advisers (SOLAs) to provide advice to victims in such applications has subsequently been introduced however to date no applications have been made which has involved a SOLA.

The Victim Support NI Bearing Witness Report⁶ recorded the use of previous sexual history evidence in some of the trials observed, however the author was unable to determine whether any prior application had been made. The complexity of this issue was evident in the observer's reports with confusion arising amongst observers as to what constituted previous sexual history. Northern Ireland continues to see challenges in recording the number of applications made and the outcomes.

The Commissioner Designate recognises the complexity of this issue, the need to ensure effective fair trial rights and the important role that judges play. She welcomes the introduction of a more structured model which provides greater clarity regarding the threshold that needs to be met before it is permitted and works to actively reduce any potential further traumatising of the victim. In order to help ensure transparency and increase public and victim confidence in this area, she would like to see the Judiciary issuing the reasons behind their determinations and the provision of free independent legal advice to victims to represent the victim's interests regardless of which party is trying to adduce SBE.

⁶ [VSNI-Report BearingWitness_Final.pdf \(victimsupportni.com\)](#)

Chapter 5 – Character evidence

The ability of a defendant to introduce good character evidence in sexual violence cases causes significant distress to victims of crime. This often feels particularly unfair when the good character of the victim of the case is actively questioned throughout the trial and no character witnesses called to give evidence to their credibility or integrity. The use of character witnesses' post-conviction (as part of mitigating statements) is often particularly galling for victims of sexual and or domestic violence where guilt has been determined.

The Commissioner Designate is concerned that current practice around good character evidence does overly weigh in favour of the defendant in a trial which quite often comes down to one party's word against another's. She believes that any reform in this area should be approached cautiously however to help avoid any unforeseen consequences to delay and negative impact on vulnerable or marginalised victims of crime.

Chapter 6 – Compensation for criminal injuries

Northern Ireland operates a similar scheme for criminal injury compensation as that in place in England and Wales and has a similar two year time deadline to submit applications. The Commissioner Designate, in her previous role within Victim Support NI has shared her concerns about how this scheme is being used to discredit and undermine the credibility of sexual violence victims and these views have been referred to in the Law Commission's report.

The Commissioner Designate, in her new role, continues to raise concerns about practice in this area and has included this issue in her examination of the disclosure of third party material. She believes that access to information about whether an individual has applied to the scheme and if so, the details included in any application, should be subject to strict third party disclosure tests which must first determine potential relevance and where retrieved have clear evidence of probative value before it is introduced.

The Judiciary should be particularly alert to this issue and seek submissions as to any potential use as part of early case management or ground rule hearings so that no victim finds themselves being questioned about such an application with clear judicial agreement. Where a judge determines that evidence from a compensation claim may be introduced, they should also issue direction regarding the scheme to help avoid the jury drawing negative inference based on myths or misconceptions.

Chapter 7 – Special measures

Northern Ireland has yet to see full roll out of the special measures provided for via the Criminal Evidence (Northern Ireland) Order 1999⁷ with pre-recorded cross-examination yet to be introduced. The Commissioner Designate believes that special measures provide a valuable tool to help reduce the additional trauma experienced by victims encountering an

⁷ [The Criminal Evidence \(Northern Ireland\) Order 1999 \(legislation.gov.uk\)](https://legislation.gov.uk)

adversarial legal system. Victims' experience of such measures vary and many can be adversely impacted by failures in technology and the resulting consequences on victims' ability to watch the remainder of the trial. Victims also report varying opinions from prosecutors in such cases with some still advocating the benefits of the jury seeing the victim 'in person'.

The Commissioner Designate is supportive of efforts to address concerns regarding the terminology and rather than viewing these as 'special' advocates for the introduction of these measures as a choice for victims of any crime to avail of in a modern day justice system. She believes that the key issue in such usage is the directions given to the jury by the judge when someone is availing of such measures. A simple introduction to the jury as a tool which is common practice in such cases can help to explain the use of the measure to the jury and mitigate against any undue inference from such usage.

The Commissioner Designate supports all efforts to remove any barriers to the use of such measures by sexual violence victims and stresses the need to ensure that victims are actively engaged with in determining their needs and views about the use of these measures. This assessment should be statutory and form part of an ongoing comprehensive needs assessment process from the time of report to post trial.

The Commissioner Designate would also draw the Commission's attention to the introduction of remote evidence centres (RECs) in Northern Ireland as recommended by the Gillen Review. Whilst greater promotion and co-ordination is needed to fully realise the benefits of such facilities for sexual violence victims, the RECs provide a safe and comfortable option for victims to give their evidence from a more relaxed environment outside the court environment avoiding the possibility of the victim encountering the accused or their family and helping to overcome the physical barriers which impact on the ability to renovate aging court buildings.

Chapter 8 – Independent legal advice & Chapter 11 – Right of appeal

The Commissioner Designate believes that the introduction of Sexual Offence Legal Advisers (SOLAs) in Northern Ireland has been a game changer for victims of crime. Feedback received from victims engaging with the Commissioner Designate's office has been overwhelmingly positive in particular from those victims whose cases began before the introduction of the service so have experience of 'the before and after effect' of their creation. Victims report an increased understanding of the system and a reassurance that there is '*someone in their corner*'. One victim who used the SOLA service commented "*Thank you so much for your help. As you know, I have lost faith in the system but it great to have someone to explain why this is all happening... your support and advice has been so helpful. I am so frustrated with how long everything is taking but at least now I understand why.*"

Unfortunately the lack of an Executive or Assembly in Northern Ireland has prevented the proposed introduction of legislation which would provide the SOLAs with the right of audience in the court which means that the full potential of this role has yet to be realised.

Experience gained in the introduction of this service has also highlighted the need to ensure that victims are alerted to its availability at an early stage in their reporting journey. The link between this role and the need to ensure a robust third party disclosure process is essential. The SOLA service is primarily concerned with representing the victim's article 8 rights at a pre-trial stage. The Commissioner Designate believes that the victim should be afforded the same right of appeal in relation to decisions regarding the admissibility of such evidence as that which is afforded to prosecution and defence in such cases.

Chapter 9, 10, & 12 – How trials are conducted

The Commissioner Designate **fully supports the introduction of mandatory special training and relevant guidance** for all practitioners working in this area and the ongoing refresher of such training as part of an individual's continued professional development. She **is fully supportive of all steps that can be taken to help encourage practitioners to comply** with codes of conduct and regulate performance.

She **is fully supportive of efforts to address the impact of myths and stereotypes in the trial process and the need to increase jury understanding of trauma responses** – where expert opinion can be drawn upon to assist, this should be explored. She sees merit in the use of expert evidence on occasion however is cautious about the potential negative impact of the routine introduction of expert witnesses both in terms of delay and value if both parties were calling on different expert opinions.

The Commissioner Designate believes firmly in **the need to be ambitious and holistic in our approach to reform** of this issue. She is frustrated that the lack of an Assembly in Northern Ireland has stalled legislative reform needed to complement the non-legislative recommendations required if we are to achieve the level of change anticipated by the Gillen Review. She would encourage the Law Commission to develop an indicative implementation plan to address all agreed proposals as a suite that if implemented collectively can make the most meaningful positive impact on how the system handles sexual violence cases. Any such plan should be clear from the outset about the indicative costs involved and the evaluation metrics against which success will be measured.

Chapter 13 – Radical reform


The Commissioner Designate is **supportive of the introduction of specialist sexual violence courts** and believes it may be the most expedient way to achieve the cultural and systemic changes needed to address the issues of attrition, further trauma and delay which impact negatively on the victim's experience and their access to justice. Any such court should be carefully constructed to mitigate against concerns such as practitioner burn-out. Such initiatives should also be cognisant of other developments and how they can complement each other e.g. the development of a Barnahus model.

The Commissioner Designate is acutely aware of the concerns regarding the removal of juries in these trials and was part of the Sir John Gillen's advisory panel which examined this issue amongst others. She remains convinced however that **the most expedient and**

effective way of addressing issues such as the use of rape myths, victim blaming, jury stereotypes, excessive requests for disclosure etc. is through the replacement of juries with a judge-led panel (judges and lay assessors) in sexual offence cases. Such a panel would be chaired by a Judge however could also include experts in trauma or healthcare. The panel could be required to provide detailed reasons for their determinations which whilst of course could be used as grounds for appeal for the defendant would also serve as explanation for victims which may be particularly helpful in cases where the panel were not convinced beyond reasonable doubt.

The Commissioner Designate is grateful for the work that has been carried out in producing this consultation report and is hopeful that the proposals will be implemented not just in England and Wales but in other jurisdictions, including Northern Ireland. She is also happy to meet to discuss any of the points raised in this letter.

Yours sincerely,



Geraldine Hanna
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