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**A response to**

**Gillen Review of the Law and Procedures in Serious Sexual Offences in Northern Ireland**

**January 2019**

**Women’s Aid Federation Northern Ireland**

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**General comments**

Women’s Aid commends Sir John Gillen and the review team for this thorough exploration of the criminal justice process in sexual violence cases and the culture in which it operates. We are extremely encouraged by many of the recommendations, and by the considered manner in which these recommendations have been made, with reference to rape culture and patriarchal norms that underpin this issue.

We would also like to acknowledge the work of the review team in listening to the views and experiences of victims and survivors of sexual violence. Women’s Aid facilitated a number of meetings between Sir John Gillen and survivors of sexual violence as part of the process. Many participants reported to us that taking part in the review had been an empowering experience for them, and that they felt listened to and their evidence valued.

**Recommendation 1: Better recognition & understanding of the reasons for under-reporting and high drop-out of complainants**

Women’s Aid agrees that this work is necessary.

We would point out that support organisations for victims and survivors like ourselves are well-versed in the reasons why victims either don’t report or withdraw, which are usually complex and inter-connected. In our experience, women do not report sexual violence for a number of reasons, including:

* They fear not being believed, especially as most cases of rape and sexual assault are perpetrated in private and may come down to a ‘he-said-she-said’ scenario where the victim rarely wins.
* They fear lines of questioning that dissect their entire sexual history or cast negative aspersions on their character. They have already suffered a sexual assault and are not prepared to suffer the further indignity of being treated this way. This is particularly the case for female victims, who are impacted by disproportionate judgment from society for being sexually active in a way that men are not.
* They have feelings of shame or guilt tied in with what has happened to them. For women this may include the unfair belief that they contributed to their own rape because of how they acted, what they were wearing etc. For men, this may be influenced by toxic, patriarchal and often latently homophobic stereotypes, which demand that ‘real men’ are strong, heterosexual and not capable of being raped.
* They are aware of the low chances of conviction and are not willing to endure a lengthy, re-traumatising and gruelling court process only to be denied justice.
* They find the process of giving evidence, being interviewed by police, only being a witness in court to their own crime, and not having sufficient support and explanation of the process throughout, gruelling and retraumatising.
* There is an associated fear of being regarded as a ‘liar’ by their families and communities if they report and there is a decision not to prosecute or an acquittal. Societal understanding of the legal system and the ramifications of requiring a ‘beyond reasonable doubt’ conviction is low – this is compounded by the disproportionate media focus on the very small number of cases of false accusations of rape.
* They know the perpetrator, and are faced with the prospect of ‘ruining a man’s life’ if they report. This victim-blaming cultural way of thinking is so ingrained as to extend to victims, even though it is the victim whose life has been turned upside down by the sexual assault.
* In cases of sexual violence within a relationship, many women we support cannot even say out loud to their support worker that they have been sexually assaulted. There is such deep shame connected with the man you love raping you that victims find it too difficult to process or disclose.

**Recommendation 2: Access to trials limited to close family & defendant and press**

Women’s Aid welcomes this recommendation. We believe that the current public access of public to sexual violence trials is ultimately not in the interests of justice as it is preventing victims from coming forward and going through the trial process. Ultimately we believe that this recommendation, allowing family and press to remain, balances the needs of open justice and accessible justice.

We support the recommendation to take further steps to protect the identity of the complainant, including the use of ciphers, a ban on displaying the image of the complainant and anonymity to be retained even after death.

We would also recommend that new guidelines are introduced to ensure responsible press reportage of sexual violence cases. During the Ulster Rugby rape trial, many of us were extremely vexed by the salacious nature of reportage and propensity of the media to reinforce rape myths.

At present, the South-Eastern Domestic Violence Partnership is leading on work to develop new guidance on press reportage around cases of sexual violence. We would recommend that this work is supported and given more resourcing, and that further work is done to see whether and how reporters and media outlets can be compelled to comply with such guidance.

**Recommendation 3: Provision of early, pre-recorded cross-examination of complainant**

Women’s Aid supports the adoption of the Scottish definition of vulnerable complainants to include all complainants of sexual and domestic violence crimes, as per the Victims and Witnesses Act (Scotland) 2014. We support the extension of such a definition to the Northern Irish courts, along with the automatic entitlements that go with it. We suggest that by implementing a ‘presumption of vulnerability’, this might help better protect victims going through the criminal justice process in sexual violence cases. We also support the move away from the court setting for vulnerable victims.

**Recommendation 4: Publicly-funded legal representation for complainants**

The case for a legal advocate

We support the recommendation for publicly-funded representation for complainants. One of the most shocking realisations for victims of sexual violence is when they embark on the criminal justice journey to find that they are not treated as victims but as mere witnesses in ‘their own’ case. The process is long, daunting, and as we have seen from the statistics and testimonies, many victims withdraw from the process and feel that they are being violated all over again. We believe that having representation may be a means of lowering the attrition rate, and making the process less traumatic and confusing for victims.

We believe the entitlement to a legal advocate, and the specific role of the advocate, should be built in to the system, so as to avoid apathy or uncertainty as to how to adapt the system. We are of the view that a representative should be able make representations in the trial process to ensure that the rights of victims are being robustly upheld at all times, particularly with regard to the use of rape myths during the course of a case. We agree that the victim advocate should not be involved in the case vis a vis the finer points of law, or be a ‘second prosecution’. They should fulfil the specific remit of being assigned to the complainant to act as a legally-knowledgeable advocate throughout the process, with the ability to specifically intervene during trial if they believe rape myths are being relied upon by either prosecution or defence. We agree that legal advice and/or advocacy should be available throughout the whole process, from reporting a crime to the conclusion of a criminal trial. We concur that there should be a formal obligation to inform complainants of their right to a legal advocate.

We would support a role for advocates regarding sexual history evidence. Having this written into the fabric of sexual violence proceedings leaves no shadow of a doubt that the rules around using such evidence are to be adhered to and taken seriously. The knowledge that a defence team can and will be challenged should they attempt to circumvent or fudge these rules would itself be a useful mechanism for encouraging continued cultural change in sexual offence trials.

Character evidence

We agree that an imbalance exists in the system regarding the exploration of the ‘character’ of accused and complainant. We would submit that this imbalance is not in the interest of justice, as in sexual violence cases where it is ‘one person’s word against another’s, the weight given to a person’s word may rest on their perceived character. That a defendant is able to call character witnesses, while a complainant cannot, yet is often subjected to an assassination of their character using the ever-prevalent rape myths and sexist prejudices in our society, is in our view unjust and may unfairly skew the balance between rights of the defendant and right to fairness and the pursuit of truth in criminal cases.

Non-legal advocacy

We regard non-legal advocacy and support as being another important element of support for complainants. However we would stress that non-legal advocacy provides an entirely different role and function to legal advocacy. In our view, non-legal advocacy and support, such as a rape crisis support worker, would provide emotional and practical support for a victim throughout the process. While such a worker would provide vital and soothing support, however, they are not legal experts and are not a substitute for legal advocacy and representation. Women’s Aid believes that both legal and non-legal advocates should be a standard component of the legal system in sexual violence cases. We are very encouraged by the Scottish example of the 24 Hour advocacy support service and would recommend that a similar system is worked towards here in Northern Ireland, notwithstanding current ongoing work to set up a Rape Crisis service in the first instance for victims of sexual crime.

**Recommendation 5: Measures in trial to combat rape myths**

Combatting rape myths in juries

Women’s Aid is greatly encouraged that the review has recognised the pervasiveness of rape myths in our society and consequently in our courtrooms. We agree that this recommendation is absolutely vital for there to be meaningful change in how victims of sexual violence get justice.

We agree that this recommendation needs to go further than just combating rape myths in the trial setting, and extend to campaigns to dismantle rape myths in all of society.

In terms of the proposed changes to educate juries on rape myths, we agree that changes such as giving directions at the beginning of a trial as well as at the end would be an improvement, and generic educational videos may go some way to help.

Written directions would provide a concrete, unambiguous direction that rape myths should not be used to influence deliberations on verdict. We also agree that directions to prevent false assumptions would be useful, as this is where unconscious bias can creep in. A jury member might make a false assumption based on a commonly and personally-held rape myth. But if he/she is disabused of that notion by written judicial direction, he or she will be able to dispense jury duty with integrity having overcome that unconscious bias.

For judicial directions to have maximum impact, it would be crucial that they are delivered in plain English, using words and examples that the average person understands. This applies to both oral and written judicial direction. The template from the Court Compendium, exemplified at 6.5, would do little to help banish biased thinking in the courtroom. Juries may have difficulty understanding what it means, let alone be able to take what has been said and apply it to their everyday lives and thinking and to their duties in the case.

***However, although these recommendations are good steps to improve jury understanding of rape myths, we are ultimately unconvinced that they will be able to successfully disrupt and dismantle a lifetime of biased thinking and societally-held misconceptions about rape, views of women, and pervasive victim-blaming culture. Rape myths and victim-blaming attitudes are not merely fringe beliefs held by some, they are ingrained and interwoven into our society and endorsed every day by media, public figures and in our local communities. These biases may be unconscious and a jury member may not realise they are using logic derived from rape myths of victim-blaming patterns of thinking to reach a verdict.***

***Therefore, Women’s Aid urges that the review team reconsider the possibility of introducing specialist sexual violence trials, run by specially-trained judges and without juries.***

Reliance on rape myths by counsel

Women’s Aid notes that the review concedes that rape myths often pervade in rape cases even after judicial direction being given (6.38) and that defence teams were able to undermine any rape myth-busting that may have been attempted (6.41). This is clearly and unequivocally unacceptable. If rape myths are to be dispelled from our courts, they must not be able to be relied upon by defence counsel to win cases.

Women’s Aid therefore calls for strong judicial management in sexual violence cases, more powers for judges to bar such comments and the practice of immediately challenging rape myths as inadmissible when raised to be installed as standard practice in sexual violence cases.

Challenging rape myths within our society

Women’s Aid enthusiastically supports the call for a public awareness campaign, in line with obligations under Article 14 of the Istanbul Convention. This should include comprehensive, mandatory RSE education in all schools, that necessarily explores the topics of consent and healthy relationships.

Our Helping Hands programme, which is delivered by teachers to Key Stage 2 pupils, currently teaches children about the right to be safe, the right for others to feel safe around them, an that there is nothing so big or so small that a child can’t talk about it. This is age-appropriate for those in Key Stage 2. However, there is an urgent need for programmes for older children, throughout all ages at secondary level, to explore issues of consent and healthy relationships.

Judicial training

Women’s Aid would point out the need for further training of judges to enable them to confidently manage new efforts to purge rape myths from our justice system. Judges, although learned and experts of our legal system, are nonetheless not born experts in uncovering and identifying rape myths. The fact that these views are so widely held in society means that everyone, including judges, has the capacity to unconsciously hold views that may unknowingly incorporate such myths. Women’s Aid believes that training for the judiciary, and all others involved in sexual violence trials, would only benefit and enhance their ability to dispense their duties.

We would hold that training of judges by independent experts would not impinge upon the independence of judges, it will merely equip them with an extra strand of expertise that they may draw upon in the dispensation of their duties.

**Recommendation 6: New legislation to manage the dangers posed by social media**

We agree that our current laws do not sufficiently deal with the realities of social media and how they impact upon criminal trials, particularly sexual violence trials and trials that garner a large amount of public interest.

While we are uncertain as to the realistic potential for a particular jurisdiction to be able to compel multinational social media companies like Twitter or Facebook to remove or block any materials relating to a trial, we do agree that there are other jurisdictions that we can look to in updating our contempt of court laws.

As stated in the review at 7.31, systems that do not operate a full jury are not so acutely affected by this problem. We would submit that this is another reason why specialist sexual violence courts without juries may be a better solution, rather than to tinker round the edges of the mammoth problem of limiting the unlimited and convincing ordinary people who live their lives on smart phones not to look at them for the long duration of a trial.

**Recommendation 7: A more robust judicial attitude and case management approach to prevent improper cross-examination**

Women’s Aid believes that such changes are vital to making the justice system a less hostile place for victims of sexual crime, and that the changes should be implemented as a matter of urgency.

We can attest to the assertions of victims and survivors that all too often there is inappropriate admission of previous sexual history in cases, and that a fear of this happening actively discourages victims from reporting sexual crimes or engaging in a trial process.

We are concerned that admission of sexual history evidence undermines the fact that consent is person and situation specific, and opens the door to relying on victim-blaming myths about female ‘promiscuity’ meaning that a rape couldn’t have taken place in cases where victims are female.

We are also concerned that if these changes aren’t proactively and robustly managed by judges in the court setting, they won’t be implemented properly. As guardians of justice, we rely on judges to lead the way in ensuring that rape myths cannot be relied on in cases. To that end, it might be helpful to take supplementary action to give judges broader scope and mechanisms to ensure that improper cross-examination is not allowed to take place.

We would also comment that due to the vulnerability of victims of sexual violence, a different style of advocacy altogether would be more appropriate and lead to better justice outcomes. We address this under Recommendation 12.

**Recommendation 8: Combat excessive delay in the system**

Women’s Aid broadly supports the proposals outlined. Over the last number of years, we have engaged with consultations with DOJ and other bodies on this very issue, seeking to find solutions to reduce delay. Those attempts to manage and reduce delay seem to have unfortunately proven futile. In our view, the issue of delay is too important to take half measures or be complacent about, especially in sexual violence cases.

**Recommendation 10: Anonymise identity of accused until the point of being charged, except in rare circumstances in the interest of justice**

Women’s Aid strongly supports this recommendation.

While we appreciate the reasoning behind calls for accused anonymity, we are firmly of the view that these arguments are outweighed by the need for justice. In cases of serial perpetrators, it is the disclosure of their name and charge against them that can encourage others to come forward and provide evidence of their own experiences. It may establish a pattern of offending or escalating behaviour and aid convictions of dangerous perpetrators. In short, given that sexual violence crimes are one of the most under-reported and difficult to secure a conviction, granting anonymity is the last thing that would overcome these problems.

We also agree that anonymity for the accused in sexual violence cases would endorse the false but widely-held impression that false accusations of rape and sexual assault are more prevalent than false accusations for other crimes, which is demonstrably not the case.

**Recommendation 11: DOJ commission research into prevalence, extent, nature and experiences of sexual offences against BAME, LGBTQ, Travellers, sex workers, older people and those with disabilities**

Women’s Aid welcomes this proposal, and the recognition that these groups of people suffer multiple barriers in reporting sexual crime and seeking justice.

**Recommendation 12: Introduction of a different style of advocacy for child victims and vulnerable adults**

We strongly support the proposal to introduce a different, less adversarial, style of advocacy for children and vulnerable adults. We endorse NICCY’s response in this regard.

We echo the words of the Northern Ireland Commissioner for Children and Young People, who said in her submission to the review that:

“While current processes may be further developed to, for example, improve Achieving Best Evidence and use of video recorded interviews and to properly implement special measures10, we note that this will not fully address fundamental concerns about avoiding the re-traumatisation of victims and improving the fairness and the quality of justice for all involved.”

We would also echo NICCY’s highlighting of “the value of the Review

considering non-adversarial arrangements for all sexual offences cases not only those

involving children.”

We would go further to say that ALL victims of sexual violence have a transitory vulnerability imposed on them by the trauma they have experienced, and therefore that all sexual violence cases should employ a less adversarial style of advocacy and look to alternative approaches.

**Recommendation 13: Training and awareness raising from outside agencies on trauma suffered by victims, rape mythology, jury misconceptions and jury guidance.**

We welcome the proposals for the JSB prioritising training from outside agencies who are experts on trauma, rape myths and so forth. As we stated under Recommendation 5, no one is inherently an expert on such topics, nor can they be expected to be. Therefore it can only be beneficial to the administration of justice in sexual violence cases that judges and other parties and agencies involved receive training on these specialist but central issues.

We echo the views of McDonald & Tinnsley in saying that

*“Judicial training should include not only information about the dynamics of sexual violence, and the impact of offending, but also knowledge and experience in applying evidential rules that are particular in sexual cases.”[[1]](#footnote-1)*

**Recommendation 14: All serious sexual offences tried at Crown Court with a jury, without the need for a gender quota.**

We are not satisfied that this recommendation will sufficiently lead to the substantial and fundamental change that is required to truly make our system fit for purpose in trying sexual violence cases.

We are of the same mind as Elizabeth McDonald, who is currently conducting the evaluation of specialist courts in New Zealand and contributed extensively to New Zealand’s own review of sexual crime and criminal justice, that:

*“…in sexual cases there is, on balance, greater likelihood that the cognitive illusions causing biased judgments can be attended to where a judge, rather than a jury, is the decision maker. The process of collective deliberation is less effective where the majority act under the same bias, and where the case is not clear cut in favour of conviction or acquittal. As myths and misconceptions about sexual offending are widespread, education of juries and jurors will be more difficult to achieve than targeted training of judges. There is evidence that, for some forms of bias, judicial experience assists in preventing the operation of bias on the decision made, and we consider that judges can (and should) be required to give reasons for their verdict, opening up the reasoning to scrutiny.”[[2]](#footnote-2)*

We also echo McDonald’s recommendation that a specialist court need not be a specific building or listing, rather a specific set of rules for operation, with specially-trained judges and counsel (both prosecution and defence) who are required to undertake accredited and mandatory training to practice in this area, and alternative ways to give evidence as outlined in the Review’s recommendations. Benefits of such an approach include *“the development of expertise, continuity of personnel, a consistent approach to the prosecution and the reduction of secondary victimisation to the complainant”.*

**Recommendation 15: Alternative mechanisms, including victim-led restorative practice, to be introduced both within and as an alternative to the criminal justice process**

We are not convinced by the merits of these proposals.

Regarding the option for restorative justice upon sentencing, we appreciate the reasoning as being similar to that in the current Foyle pilot, whereby those domestic abusers who plead guilty may opt to undergo a perpetrator programme as an alternative to sentencing. In theory we see the merit as to how this may help some victims feel that they have achieved justice.

However, it should be noted that Judge McElholm has already raised concerns that the court-mandated perpetrator programme is not as effective as it should be, because perpetrators are ‘taking their chances’ in court and pleading Not Guilty (presumably under advisement of their defence counsel), knowing that they have a good chance of acquittal. This perhaps once again highlights the underlying problem with our current system, and how more fundamental change must first take place before alternative processes like this are put in place.

Regarding the second proposal, Women’s Aid is unconvinced that restorative justice as an alternative to trial processes is appropriate at this time. In absence of all other recommendations being put in place, and the criminal justice process itself being made fit for purpose for sexual violence victims, this recommendation may be deemed to be an ‘easy fix’. If implemented in place of a complete transformation of the criminal justice process, it will not provide victims with the justice they deserve.

Although the recommendation states that restorative justice should be entirely voluntary, we are aware through our work supporting victims of domestic violence that other supposedly voluntary practices like mediation can be thrust upon victims, who feel like it is the only option being offered to them and worry that they will lose the support of the legal profession/ statutory agencies involved in their case if they don’t consent to it. It would be a travesty if victims of sexual violence were put in this position.

We are also unconvinced that Northern Irish models of restorative justice would be at all appropriate for sexual violence cases. Although much restorative justice work is carried out using a community-based model, this would be unsuitable for sexual violence cases – these cases require expert-led practice that we do not have in place in Northern Ireland. Implementing such an approach in the wrong way would do more harm than good, and ultimately do a disservice to victims and survivors of sexual crime.

**Recommendation 16: Comprehensive resource impact assessment into the recommendations, including the cost arising out of delivering the changes.**

We agree that this should be carried out, and that it is vital that a realistic scoping should take place so that this review and it’s many important recommendations are not ‘left on the shelf’ in the years that follow. Women’s Aid concurs with Sir John when he has stated that it would be a travesty to all those who took part in this process, particularly victims and survivors, if it did not lead to meaningful outcomes for future victims.

**Further Comments**

We agree that sexual offences “seem to defy the ordinary trial process”. Therefore we believe that nothing short of full adoption of the report’s recommendations as a whole will truly lead to substantial change. Cherry-picking those recommendations that are easy and cost-effective to deliver will not deliver justice in our view.

Women’s Aid would also point out that if these recommendations do not lead to improvements in justice for sexual violence victims whose abuser was their partner, then we will be continuing to fail a substantial number of sexual violence victims. Sexual violence cases where the accused is the complainant’s partner or ex-partner will, we believe, be a bellweather for the health of the system in addressing sexual crime. If a new, more responsive system can overcome the challenges posed in successfully prosecuting cases where a complainant has consented to sex in the past and is in a relationship with the accused, it will have successfully broached many of the pitfalls of the existing system that renders justice elusive in such cases.

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1. McDonald E & Tinnsley Y, *From ‘Real Rape’ to Real Justice* [↑](#footnote-ref-1)
2. McDonald E & Tinnsley Y, *From ‘Real Rape’ to Real Justice* [↑](#footnote-ref-2)