RAPE CRISIS NETWORK IRELAND

RCNI Commentary on the

Criminal Procedure Bill 2021

As initiated

February 2021

1.0 Introduction - Rape Crisis Network Ireland clg (RCNI)

Rape Crisis Network Ireland (RCNI) is a specialist information and resource centre on rape and all forms of sexual violence. The RCNI role includes the development and coordination of national projects such as using our expertise to influence national policy and social change, and supporting and facilitating multi-agency partnerships. We are owned and governed by our member Rape Crisis Centres who provide free advice, counselling and other support services to survivors of sexual violence in Ireland.

1.1 Introduction - Criminal Procedure Bill 2021 as initiated[1]

RCNI welcomes very much both the publication of this Bill and the determination of the current Minister for Justice to ensure that it passes through the Oireachtas as soon as possible, as part of the Implementation Plan through which the recommendations made in the O'Malley Report will be put into effect. We are particularly glad to see the new provisions on Preliminary Trial Hearings. This Commentary will focus on this aspect of the Bill for the most part. It will be updated as the Bill itself is amended at each relevant stage of its passage through the Oireachtas.

Preliminary Trial Hearings: Part 2 Criminal Procedure Bill 2021

Since 2008, RCNI has advocated consistently for statutory preliminary (pre-trial) hearings to be introduced into the criminal justice process[2], and also for a more structured and formal approach to efficient and timely case management in our criminal courts, most recently in our submission to the O'Malley Review in November 2018[3] and in the Report which was compiled by RCNI on vulnerable witnesses, earlier in 2018[4]. Our view is that as many issues as possible should be addressed in advance of the trial itself, in order to:-

- reduce the number of late, and sometimes repeated, adjournments of trials (often lasting many months);
- shorten the trial itself by enabling it to run in a more streamlined way with a minimum of interruptions, thereby
- reducing overall waiting time and attendant uncertainties for victims, and
- making it easier for the victim to maintain his or her complaint till trial, by

[1] https://data.oireachtas.ie/ie/oireachtas/bill/2021/8/eng/initiated/b0821d.pdf - full text of Bill as initiated

[2] See Appendix for checklist of all major RCNI submissions on Pre-Trial Hearings and Case Management

[3] https://www.rcni.ie/wp-content/uploads/RCNI-Review-of-investigation-and-prosecution-of-sexual-offences-autumn-2018-Submission-Final.pdf

[4] https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf

- reducing his or her understandable and sometimes overwhelming feelings of anxiety about how the trial itself will work.

- It is important to understand that the current lengthy delays before a case can be heard are very stressful for the victim not only because the case hangs over him or her for a long time, making it hard to recover from the violence and move on with their lives, but also because so many issues about how the trial will run remain unresolved until the trial itself or until it is imminent.

- This uncertainty about for example, whether a particular special measure will be allowed or whether a trial involving several accused persons will be heard as a single trial or as several separate trials, how long it is likely to take (and so on) – is extremely stressful for any victim, especially when accompanied by lengthy delays before final hearing.

- Preliminary trial hearings also provide a forum in which there is an opportunity to raise and discuss any special measures or other practical steps to be taken in order to ensure that the victim and other witnesses are facilitated as far as possible to give evidence at trial. In our view, the Court should be obliged to consider at every preliminary trial hearing whether there are any specific needs of trial witnesses which should be the subject of submissions and in respect of which it may be appropriate to give directions.

- RCNI's view is that from the point of view of vulnerable witnesses including victims of sexual violence, it is time to explore how the whole of these victims' evidence might be given as early as possible in the proceedings, so that these witnesses do not have to wait months or even years to have their evidence heard at trial. Over time, it should become the norm for them to have the opportunity to have all their evidence heard at a preliminary trial hearing.

Rights of victims, witnesses and accused persons in the criminal justice process

Our consistent view has been, and remains, that no statute-based system of Preliminary Trial Hearings can survive legal challenge to reduce delays and ensure trials are run as efficiently as possible, unless it takes full account of the primacy of the rights of the accused person to a fair trial under both Irish and European law and also respects the rights of victims and witnesses as far as it is appropriate to do so. RCNI considers that this Criminal Procedure Bill sets out an appropriate framework through which the rights of both victim and accused person may be vindicated.

Limitations of Preliminary Trial Hearings

Preliminary Trial Hearings are not a panacea to remove all unnecessary delays and to ensure that case management is as tight as possible for all relevant trials on indictment. While the procedural improvements proposed in this Bill can do much to reduce delays and uncertainties, thereby reducing stress for survivors waiting to give evidence, they do need to be underpinned by measures to ensure that there are enough judges to hear all relevant cases and also, to ensure that disclosure issues are addressed so that they too are resolved as early as possible in advance of any trial.

1.2 Structure of this Commentary

This Commentary will examine several Sections in Part 2 (Preliminary Trial Hearings) and a number of other Sections in the Bill, in the order in which they appear. Any recommendations for change to the Bill as initiated are included under each Section discussed. For ease of reference, the text of each Section discussed appears just under the heading, in contrasting typeface.

Part 2 Preliminary Trial Hearings

Section 5: Relevant offence for purposes of Part [2 – Preliminary Trial Hearings]:

5. (1) In this Part, a relevant offence means—

(a) an offence specified in an order made under subsection (2),

(b) an offence for which a person of full capacity and not previously convicted may, under, or by virtue of, any enactment or the common law, be sentenced to—

(i) imprisonment for life, or

(ii) a maximum term of imprisonment of 10 years or more,

(c) an offence consisting of aiding, abetting, counselling or procuring the commission of an offence specified in an order made under subsection (2) or an offence to which paragraph (b) applies, or

(d) an offence consisting of conspiring to commit, or inciting the commission of, an offence specified in an order made under subsection (2) or an offence to which paragraph (b) applies.

(2) Subject to subsection (3), the Minister may by order specify as a relevant offence an indictable offence under a provision of any enactment or at common law, other than an offence to which subsection (1)(b) applies, if the Minister considers that it is proper to do so for the purposes of—

(a) facilitating the just, expeditious and efficient conduct of the prosecution of such indictable offence and, in particular, for the avoidance of delays in such prosecution,

(b) preventing the disruption to juries and witnesses that could arise in the trial of such indictable offence where no preliminary trial hearing was held in respect of such trial, or

(c) reducing the impact on victims of such indictable offence of orders to which section 6(8) applies being made during the course of the trial of the offence, where such orders could appropriately have been made at a preliminary trial hearing.

(3) In making an order under subsection (2), the Minister shall take into account the following: (a) the nature of the offence concerned; (b) any relevant complexities that generally arise in the prosecution of such an offence.

(4) An order made under subsection (2) shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order is passed by either such House within the next 21 days on which that House sits after the order is laid before it, the order shall be annulled accordingly, but without prejudice to the validity of anything previously done thereunder.

RCNI Commentary: Section 5 defines the "relevant offences" for which a preliminary trial hearing will have to be held (on application of either prosecution or defence, and if there has not already been at least one preliminary trial hearing) as either

- Those which have a maximum penalty of at least 10 years (Section 5 (1) (b)), or
- Those which are designated later by the Minister for Justice as "relevant offences" following the criteria for designation laid down in the Bill (Section 5 (2).
- These include not only the avoidance of delay, inefficiency and injustice, as well as the prevention of disruption to juries and witnesses, but also the reduction of the impact on victims of these offences of any one of the orders listed under Section 6(8) which could have been made at a preliminary trial hearing, being made instead during the trial itself.
- The Minister must also take into account the nature of the offence and "any relevant complexities" that generally arise when such an offence is prosecuted (Section 5(3).

RCNI notes that almost all of the sexual offences commonly prosecuted are included under Section 5(1) – most have a maximum penalty of 10 years or more. We are also very glad to see that the impact on victims of having to wait till trial to know the outcome of any application for an order listed Section 6(8) – is part of the criteria for inclusion of any further offences on this list.

RCNI Recommendations: With regard to offences which might be included in the list, either by way of amendment to Section 5(1) or by Ministerial order, RCNI recommends that:

- Offences of **indecent assault** should be included on this list in order to capture offences committed before 1980 which carry a maximum penalty of two years for a first offence. Because of the age of the offences, it is important that delays before trial are minimised so that ageing and often elderly complainants can benefit from the criminal justice process.

- These are offences which by their nature cause very serious harm, often lasting most of a lifetime, from which recovery may be slow and difficult;

- Most offences under Part 2 of the Criminal Law (Sexual Offences) Act 2017 [sexual exploitation of children] will come under Section 5 (1) of the Criminal Procedure Bill as they have a maximum penalty of 10 years or more. **Section 17 (sexual act with a child under 17**), however, has a statutory maximum of 7 years, rising to 15 if the act is committed by a person in authority over the child.

- Speed and careful attention to the specific protection needs of child victims should be central to the prosecution of any sexual offence against a child. Indeed, the Criminal Justice (Victims of Crime) Act 2017 itself recognizes this, as it presumes that child victims have protection needs (Section 15(7)). Section 30 CVJCA 2017 which amends Part III of the Criminal Evidence Act 1992, contains an expanded list of special measures which benefit from various presumptions in favour of their being granted to child victims (and on occasion, other child witnesses who are not accused in the case).

- It follows that careful attention should be given before the trial to decisions about which special measure(s) should be granted to a child victim or witness, and to the practicalities which must be considered to ensure that the appropriate facilities are indeed available to the child victim or witness, on the day of the trial; further,

- No child or young person should have to live with a criminal trial hanging over their heads for a lengthy period, nor should they have to endure the anxiety and distress caused by one or more long adjournments of their case;

- Trials of these offences are often held after the child victim has "aged out", ie reached the age of 18, and where the offence and the Garda interview happened some years previously. This means that the child victim cannot benefit from any presumption in the legislation in favour of granting special measures, such as the ability to give evidence by video-link. This is not the fault of the young person who must lose the benefit of such a presumption and ought to be avoided as far as possible;

- For all these reasons, RCNI recommends that Section 17 CLSOA 2017 should be regarded as a "relevant offence", and either be the subject of a statutory amendment to Section 5(1) or an early Ministerial order designating it as a "relevant offence" under Section 5(2).

- The new offences of **distributing, publishing or threatening to distribute or publish intimate images without consent** with intent to cause harm or being reckless as to whether harm is caused (Section 2 of the Harassment, Harmful Communications and Related Offences Act 2020), which have a maximum penalty of 7 years, should be considered for inclusion under any Ministerial order designating any offence as a relevant one under Section 5(2), once the Act is commenced and has been in force for a period long enough to discern whether these offences are generally complex to prosecute.

- These offences may also have very serious impacts on their victims, regardless of the exact form they take (for example, "sextortion", circulating "deep-faked" images, circulating images which record sexual assault or rape of the victim).

Section 6 – Preliminary trial hearing

6. (1) Where an accused has been sent forward for trial in respect of an indictable offence, the court before which the accused is to stand trial (in this Part referred to as the "trial court") may, of its own motion or upon the application of the prosecution or the accused, hold one, or more than one, hearing pursuant to this section (in this Part referred to as a "preliminary trial hearing") where the court is satisfied that—

(a) it would be conducive to the expeditious and efficient conduct of the proceedings, and (b) it is not contrary to the interests of justice, for the hearing to be held.

(2) Without prejudice to the generality of subsection (1), the trial court shall, where—

(a) an accused is charged with a relevant offence,

(b) the prosecution or the accused makes an application to the court for a preliminary trial hearing to be held, and

(c) no preliminary trial hearing has previously been held in respect of the trial of such offence, hold such a preliminary trial hearing.

(3) Subject to subsections (4) and (5), where the trial court directs pursuant to subsection (1) or (2) that a preliminary trial hearing shall be held in respect of the trial of an offence, the hearing may be held at any time before—

(a) the jury is sworn in, where the accused is before the Circuit Court or the Central Criminal Court, or

(b) the trial commences, where the accused is before a Special Criminal Court.

(4) The trial court shall, in determining when a preliminary trial hearing shall be held in respect of the trial of an offence, ensure in so far as is possible that the timing of the hearing is likely to achieve the purposes of this Act in a manner that is consistent with the interests of justice and, in particular, is likely to—

(a) facilitate the expeditious and efficient conduct of the proceedings,

(b) result in the least disruption to the jury and witnesses in the trial of the offence, and

(c) best protect the interests of any victim of the offence.

(5) The trial court may, on the application of the prosecution or the accused, where it considers it appropriate having regard to the orders the making of which are to be considered at a preliminary trial hearing and, in particular, where the making of a relevant order is sought, direct that the preliminary trial hearing concerned be held as close in time to the date for which the trial is set down for hearing as the court considers appropriate and just in the circumstances.

(6) Where an accused has not been arraigned prior to a preliminary trial hearing in the proceedings concerned, the trial court may, where it considers it appropriate, direct that he or she shall be arraigned at the commencement of such a hearing.

(7) The trial court may, at a preliminary trial hearing, assess the following matters and make such orders or rulings as it considers appropriate in the interests of justice and to ensure the just, expeditious and efficient conduct of the trial of the offence concerned:

(a) the availability of witnesses for the trial;

(b) whether any particular practical measures or technological equipment may be required for the conduct of the trial;

(c) the extent to which the trial is ready to proceed (including whether there are any outstanding issues relating to disclosure);

(d) the likely length of the trial.

(8) Without prejudice to the generality of subsection (7), the trial court may, at a preliminary trial hearing, make any one or more of the following orders:

(a) where two or more persons are charged in the same proceedings, an order that the persons be tried separately;

(b) any order that may be made under or pursuant to:

(i) section 6 of the Criminal Justice (Administration) Act 1924;

(ii) section 15A of the Juries Act 1976;

(iii) section 21 or 22 of the Act of 1984;

(iv) section 3 of the Criminal Law (Rape) Act 1981;

(v) section 13, 14, 14A, 14C, 19A or 29 of the Act of 1992;

(vi) section 39 of the Criminal Justice Act 1999;

(vii) section 181 of the Criminal Justice Act 2006;

(viii) section 67 of the Criminal Justice (Mutual Assistance) Act 2008;

(ix) section 34 of the Act of 2010;

(x) section 21 of the Criminal Justice (Victims of Crime) Act 2017;

(xi) section 25 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020;

(c) a relevant order;

(d) in the case of proceedings before the Circuit Court or the Central Criminal Court, any other order that could be made by the court in the absence of the jury;

(e) in the case of proceedings before a Special Criminal Court, any other order that could be made by the court during the course of the trial;

(f) any other order relating to the conduct of the trial of the offence concerned as appears necessary to the court to ensure that due process and the interests of justice are observed.

(9) The trial court, in holding a preliminary trial hearing, may make such orders with regard to the conduct of the preliminary trial hearing as it considers appropriate and in accordance with the interests of justice, including with regard to the making of submissions in writing.

(10) Subject to subsections (11) and (12), where a preliminary trial hearing has been held in respect of the trial of an offence, it shall not be necessary for the same judge or judges, as the case may be, who presided over the preliminary trial hearing concerned to preside over—

(a) any further preliminary trial hearings in respect of the trial of the offence, or

(b) the trial of the offence.

(11) Where a preliminary trial hearing has been held in respect of the trial of an offence, the trial court may direct, where it is satisfied that it is in the interests of justice to do so, that any subsequent preliminary trial hearings or the trial of the offence, or both, shall be presided over by the same judge or judges, as the case may be, who presided over the preliminary trial hearing concerned.

(12) Where a relevant order is made at a preliminary trial hearing, the same judge or judges, as the case may be, who presided over such hearing (in this section referred to as "the presiding judge or judges") shall, subject to subsection (13), preside over—

(a) any further preliminary trial hearings in respect of the trial of the offence, and

(b) the trial of the offence.

(13) Subsection (12) shall not apply where—

(a) the presiding judge or judges is or are unavailable to preside over further preliminary trial hearings in respect of the trial of the offence or over the trial of the offence, or

(b) there is other good reason for which that subsection should not apply.

(14) Subject to subsection (15) and section 7, where the trial court makes an order at a preliminary trial hearing or under subsection (11)—

(a) the order shall—

(i) have binding effect, and

(ii) where the court considers it appropriate and so directs, have effect as though it had been made in the course of the trial of the offence, and

(b) without prejudice to the generality of paragraph (a)(ii), no appeal shall lie against the order, pending the conclusion of the trial of the offence.

(15) The trial court may—

(a) of its own motion, or

(b) subject to subsection (16), upon the application of the prosecution or the accused, vary or discharge an order made at a preliminary trial hearing or an order made under subsection (11) where the court is satisfied that it is in the interests of justice to do so.

(16) An application may not be made under subsection (15)(b) unless there has been, since the making of the order the subject of the application, a material change in circumstances relevant to that order.

(17) Where an order referred to in paragraph (a), (b) or (c) of subsection (8) shall be required to be sought by the prosecution or the accused during the course of proceedings for an offence to which this Part applies, the party concerned shall so inform the trial court at the first available opportunity, in order to facilitate the court in making a decision as to whether or not to direct that a preliminary trial hearing in respect of the trial of the offence shall be held.

(18) Nothing in this section shall affect the right of the accused to appeal against conviction in respect of an offence, including insofar as any ground of such appeal relates to matters arising from a preliminary trial hearing in respect of the trial of the offence concerned.

(19) This section is without prejudice to the power of the trial court to deal with the matters referred to in subsection (7) or to make an order to which subsection (8) applies otherwise than at a preliminary trial hearing.

(20) The trial court shall, in holding a preliminary trial hearing in relation to the trial of an offence, have all the powers it would have in conducting the trial, including the power to receive evidence.

(21) Where a legal aid (trial on indictment) certificate within the meaning of section 3 of the Act of 1962 is granted under that section in respect of an accused, the certificate shall extend to any preliminary trial hearing held in respect of the offence to which the certificate relates.

RCNI Commentary:

I "Prior Issues Hearings?"

- **Sections 6(1) through 6(6)** refer to decisions to be made by the Trial Court **before** any such hearing is held, as to whether a Preliminary Trial Hearing should be held at all (SS 6(1), (2)), the timing of any such hearing (SS 6(3), (4) and (5)), and whether there should be an arraignment at the preliminary trial hearing (S6(6)). Under SS 6(1), (2) and (5), either prosecution or defence may make application to the court for certain orders.

- **Section 6(17)** confers a duty on both prosecution and defence to inform the "Trial Court" as early as possible of any intention to make an application for certain orders at the Preliminary Trial Hearing.

- Clearly, the expression "Trial Court" in this group of subsections does not refer to a court convened for the purpose of trying a not guilty plea on indictment. The word "Court" and the references to orders which may be made of the Court's own motion, as well as the powers which both prosecution and defence have to apply for certain orders, all suggest that an **oral hearing** is envisaged which would take place **before** any preliminary trial hearing, at which judge, prosecution and defence would all be present and at which the **prior issues** of whether to hold a preliminary trial hearing and if so, what the timing of it should be, would all be determined;

- However, the purpose of this Bill is to streamline and shorten the criminal justice process. Therefore, the expression "Trial Court" is more likely to refer instead not to a "prior" oral hearing but to a decision process conducted by a judge and based entirely on written submissions. Section 11 on Rules of Court supports this

interpretation, as it clarifies that these rules may cover among other things, the manner and form of an application for a preliminary trial hearing and the notice(s) which must be given when an application is made. However, it does not give specific guidance on any rules to be made setting out the procedure through which these **prior issues** will be determined;

- RCNI respectfully submits that as a general principle, the number of pre-trial oral hearings of any kind should be kept to a minimum: if they are allowed to proliferate beyond what is strictly necessary and useful, there is a grave risk that their purpose will be defeated;

- Accordingly, RCNI submits that the issues to be decided under this group of subsections should be simplified as far as possible and also, that any **prior issues** should be determined out of court and solely through written submissions, so that it is not necessary to co-ordinate a convenient date, venue, judge and registrar to hold an oral "prior issues" hearing **in advance of** any preliminary trial hearing; and

- The normal procedure to be followed to determine these **prior issues**, together with any exceptions to it, should be made absolutely clear and unambiguous in this part of the Bill:

- Section 6(1) gives the trial court a general power, either on his or her own motion or on the application or the prosecution or the defence, to direct a preliminary trial hearing for an indictable offence whenever in the court's view, it is "conducive to the expeditious and efficient conduct of the proceedings" and "not contrary to the interests of justice" to do so, subject to the issues which must be considered under Section 6(4) as to the timing of that preliminary hearing, and may fall to be considered under Section 6(5). However,

- Section 6(2) obliges the trial court to hold a preliminary trial hearing in respect of any relevant offence(s) if either the prosecution or the defence applies for one, without fulfilling more conditions except those in relation to the timing of the preliminary trial hearing at Sections 6(4) and 6(5). This means that there is an onus on both prosecution and defence to consider whether a preliminary trial hearing should be sought in every case involving relevant offences, but the court itself has no power to direct one under this subsection.

- It seems to RCNI that the effect of these two subsections taken together is that every single indictable offence returned for trial will undergo scrutiny by the trial court, in order to determine whether a preliminary trial hearing should be directed or not under Section 6(1) where the offences concerned are indictable but not relevant, in order to verify that either prosecution or defence has applied for a preliminary trial hearing under Section 6(2) in the case of any relevant offences, and in order to

consider the timing of the preliminary trial hearing under Sections 6 (4) and 6(5) for all offences, regardless of whether they are relevant offences or not.

- This process of universal scrutiny is likely to have the following effects:
- It will take up the time of a judge or County Registrar and will add to overall waiting time for the case to go to trial, it is hoped not to any great extent;
- It will also take up the time of Courts Service staff who must process written submissions in due form received from both prosecution and defence and ensure that they are placed in the Court files;
- The more serious cases (10 years maximum penalty and upwards) automatically go to a preliminary trial hearing, provided only that either prosecution or defence applies for one, so they will tend to be decided faster;
- It will take more time to make a decision in respect of any indictable but non-relevant offence. These cases will be more dependent on good preparation and good advocacy (likely in written form only) and outcomes will be harder to predict;
- Indictable but non-relevant offences may attract a preliminary trial hearing for reasons which are not related directly to ensuring that every possible arrangement is made to facilitate vulnerable witnesses to give their best evidence, through special measures in particular;
- In our respectful submission, **the provision of all possible supports for vulnerable witnesses should be central to any decision whether to hold a preliminary trial hearing** under Section 6(1). If this is not done, there is a real risk of injustice to those vulnerable witnesses, among whom we would count any survivor of sexual violence;
- Fewer cases will go to preliminary trial hearing, perhaps significantly fewer, than the total number of cases sent forward for trial, which makes it harder to evaluate accurately over time:
- The positive effect of holding preliminary trial hearings on the criminal justice system, as far as reducing delays, narrowing the issues, ensuring special measures and other protections are in place, and running trials in a more streamlined and coherent manner, are concerned;
- RCNI also fears that for Section 6(1) indictable but non relevant offences at least, there is a real risk that there would be more delay for the victims at the heart of them and at the same time, no statutory obligation on the person making the decision whether to hold a preliminary trial hearing to consider the needs of any vulnerable witness for special measures (and other measures) to help them give

their evidence as well as they can and with the minimum risk of being re-traumatised by the process itself.

RCNI Recommendations:

- Consider making preliminary trial hearings universal for all indictable offences and introduce time limits by which such a hearing would have to be held;
- If that suggestion is not acceptable, impose strict time limits by which the relevant paperwork would have to be submitted by prosecution and defence which is relevant to the determination of any **prior issue**, to the trial court;
- Impose strict time limits by which the trial court would have to determine whether a preliminary trial hearing should be held, absent good reason to delay making a decision;
- Mandate that a preliminary trial hearing must be held, in any case in which there has been a failure to comply with procedural requirements without good reason;
- Hold the preliminary trial hearing within a fixed period after the determination to hold one;
- Give the court the powers to charge the offending party (prosecution or defence) whose written submissions were not forwarded to the court in time, with the costs of that initial preliminary trial hearing, in any case in which their lateness causes further delay on account of the need to hold a second preliminary trial hearing absent any reasonable excuse for that delay;
- Consider including a general power to have an accused person arraigned at any stage of a preliminary trial hearing (ie without the trial court having to make a direction to that effect) – this would ensure that an accused person would have an opportunity to enter an early guilty plea immediately if a "relevant order" on the admissibility of evidence had been decided against him, earlier in the preliminary trial hearing;
- Take steps to ensure that the Courts Service records the time that each case, including any in which there is no preliminary trial hearings, takes to complete each stage of the whole pre-trial procedure, so that it can detect and compare any differences between the overall time taken from return for trial to first effective full hearing for each one of the following groups of indictable offences: Section 6(1) cases in which at least preliminary hearing is held, Section 6(2) cases in which at least one such hearing is held, and any indictable offence in which no preliminary hearing is held; and

- Consider researching the qualitative effects on victims (and other court users) of having a system of trial on indictment in which preliminary trial hearings play a significant role.

II Powers of the trial court at preliminary trial hearings – Sections 6(7), (8), (9), (12), (13), (14), and (20)

- RCNI's view is that there should be an obligation on any trial court holding a preliminary trial hearing to consider whether any special measures or other supports are needed to facilitate any vulnerable victim or other witness, regardless of whether there is an application from the prosecution to grant any special measure or other support;

- Where oral evidence is heard from any vulnerable victim or other witness as part of a preliminary trial hearing in which the admissibility of evidence is raised as an issue under Sections 6(8) and (12), and the court decides that this evidence is admissible, an audio visual recording of it should be allowed to stand as that person's evidence at trial, so that no vulnerable witness has to give live oral evidence twice;

III **Powers of the trial court after any preliminary trial hearing – Sections 6(11), 6(15), (16) and (19)**

- Section 6(11): RCNI suggests that the wording which gives the court the power to order at preliminary trial hearing that the same judge will hear any subsequent preliminary hearing and the trial itself, should be more restrictive and perhaps more specific than the court being satisfied that it is in the interests of justice to make such order. Whichever wording is chosen, its effect should be that if there is a real risk of injustice to the accused if such an order is not made, it should be made. We submit respectfully that if there is no such risk, an order should not be made under this subsection because **every** such order means more delay and attendant anxiety and uncertainty for any vulnerable victim or other witness;

- Sections 6(15) and (16): Similar considerations apply to this power given to the court to vary or discharge any order already made at a preliminary trial hearing. On Section 6 (15), RCNI's view is that the wording "is satisfied that it is in the interests of justice to do so" should be replaced with a more restrictive formulation as suggested in the preceding paragraph, and for the same reasons**.**

- RCNI submits that it should not be an easy or straightforward matter to vary or discharge a binding ruling made already at a preliminary trial hearing, otherwise there is a risk that these rulings will become the subject of routine, near universal applications to vary or discharge, thereby defeating the purpose of preliminary trial hearings.

- There should not be any need to change the phrase "material change in circumstances" in Section 6(16) if the wording of Section 6(15) is tightened up;
- Section 6(19): RCNI respectfully suggests that this wording could be amended to make it clearer that this subsection does not apply in any case in which an issue has already been determined by an order made at a preliminary trial hearing – those orders are governed by Sections 6(11)-(16) – and Section 7.

Section 7: Appeal of certain orders made at preliminary trial hearing

7. (1) Where the trial court makes a relevant order at a preliminary trial hearing to the effect that evidence shall not be admitted at the trial of the offence, the prosecution may, subject to subsection (2), appeal the order on a question of law to—

(a) the Court of Appeal, or

(b) in the case of an order made by the Central Criminal Court, the Court of Appeal or the Supreme Court under Article 34.5.4° of the Constitution.

(2) An appeal referred to in this section shall lie only where the relevant order concerned made by the trial court erroneously excluded evidence which is—

(a) reliable,

(b) of significant probative value, and

(c) such that when taken together with the relevant evidence proposed to be adduced in the proceedings a jury, or in the case of an offence being tried before a Special Criminal Court, that court, might reasonably be satisfied beyond a reasonable doubt of the accused's guilt in respect of the offence concerned.

(3) An appeal referred to in this section shall be made on notice to the accused to whom the appeal relates within 28 days or such longer period not exceeding 56 days as the Supreme Court or the Court of Appeal, as the case may be, may, on application to it in that behalf, determine, from the day on which the ruling was made.

(4) Where the accused fails to appear before the Supreme Court or the Court of Appeal, as the case may be, in respect of an appeal referred to in this section, the court, if it is satisfied that it is, in all the circumstances, in the interests of justice to do so, may proceed to hear and determine the appeal in the absence of the accused concerned.

(5) For the purposes of considering an appeal referred to in this section the Supreme Court or the Court of Appeal, as the case may be, shall hear argument—

(a) by, or by counsel on behalf of, the prosecution,

(b) by, or by counsel on behalf of, the accused, and

(c) if counsel are assigned under subsection (6), by such counsel.

(6) The Supreme Court or the Court of Appeal, as the case may be, shall assign counsel to argue in support of the exclusion of the evidence referred to in subsection (1) if—

(a) the accused does not wish to be represented or heard under subsection (5)(b), or (b) notwithstanding the fact that the accused concerned exercises his or her right to be represented or heard under subsection (5)(b), the court considers it desirable in the public interest to do so.

(7) Where an appeal referred to in this section has been made to the Supreme Court or the Court of Appeal and a legal aid (Supreme Court) certificate or a legal aid (appeal) certificate, as the case may be, is granted under subsection (8), or deemed to have been granted under subsection (9), in respect of the accused, he or she shall be entitled to free legal aid in the preparation and conduct of any argument that he or she wishes to make to the Supreme Court or the Court of Appeal, as the case may be, and to have a solicitor and counsel assigned to him or her for that purpose in the manner prescribed by regulations under section 10 of the Act of 1962.

(8) The accused may, in relation to an appeal referred to in this section, apply for a legal aid (Supreme Court) certificate to the Supreme Court or a legal aid (appeal) certificate to the Court of Appeal, as the case may be, either—

(a) by letter to the registrar of the Supreme Court or the registrar of the Court of Appeal, as the case may be, setting out the facts of the case and the grounds of the application, or

(b) to the Supreme Court, or the Court of Appeal, itself, as the case may be, and the court concerned shall grant the certificate if (but only if) it appears to the court that the means of the accused are insufficient to enable him or her to obtain legal aid.

(9) If a legal aid (trial on indictment) certificate was granted under the Act of 1962 in respect of the accused concerned in relation to the proceedings in respect of the offence concerned, a legal aid (Supreme Court) certificate or a legal aid (appeal) certificate, as the case may be, shall be deemed to have been granted in respect of him or her in relation to an appeal referred to in this section.

(10) On an appeal referred to in this section the Supreme Court or the Court of Appeal, as the case may be, may affirm or quash the order under appeal.

(11) In this section— "legal aid (appeal) certificate" has the same meaning as it has in the Act of 1962; "legal aid (Supreme Court) certificate" has the same meaning as it has in the Act of 1962; "legal aid (trial on indictment) certificate" has the same meaning as it has in the Act of 1962; "relevant evidence", in relation to an accused, means the proposed evidence contained

in such of the following as have been served on the accused or his or her solicitor pursuant to section 4B or 4C of the Act of 1967:

(a) the documents specified in section 4B(1)(b) of that Act;

(b) the exhibits listed in the list of exhibits referred to in section 4B(1)(b)(vii) of that Act;

(c) the documents specified in section 4C(1) of that Act;

(d) the exhibits listed in the list of exhibits referred to in section 4C(1)(g) of that Act.

RCNI Commentary:

- This power to appeal "relevant orders" excluding evidence which are made at a preliminary trial hearing is given only to the prosecution, not the defence, and there is no other power of appeal to a higher court against a preliminary trial court order in this Bill. In this sense it is an outlier;

- There is no doubt that this power may be very useful to the prosecution to the extent that it may lead ultimately to convictions for offences which might not have been obtainable otherwise. The test for the grant of such an order should be, and is, stringent.

- RCNI's main concern in relation to Section 7 is that its inclusion might lead to a direct challenge from the defence in a particular case, on the basis that a fair trial is not possible because it represents an unfair advantage for the prosecution because this is an "arm" which has no exact counterpart for the defence. If this happens, and the result is that a higher court makes an order to the effect that this Section should be excised from the legislation, no vulnerable victim or other witness will benefit;

- If this Section is allowed to stand un-amended by any form of reciprocal provision allowing the defence to appeal against any ruling in favour of admitting evidence at a preliminary trial hearing, RCNI's view is that Sections 6(15) and (16) will likely be tested to the limit by defence lawyers as a means through which "relevant orders" unfavourable to their interests can be set aside, so that there will likely be additional delay (and anxiety and uncertainty) for any vulnerable victim or other witness in any event.

- In our view, this possibility strengthens the case for making the test for the grant of orders to vary or discharge any order already made in a preliminary trial hearing, stricter;

- Any process through which a "relevant order" can be appealed to a higher court should be very much the exception, and should be subject to short and rigid

timetables, so that the negative effects of any additional delay and attendant anxiety and uncertainty are minimised for vulnerable victims and other witnesses.

Section 9: Power to exclude public

9. (1) Subject to this section and any other enactment, a preliminary trial hearing or the hearing of an appeal under section 7 shall be conducted in open court.

(2) Where a court conducting a preliminary trial hearing or the hearing of an appeal under section 7, as the case may be, is satisfied, because of the nature or circumstances of the case or otherwise in the interests of justice, that it is desirable to do so, it may exclude from the court during the hearing—

(a) the public or any portion of the public, or

(b) any particular person or persons, except bona fide representatives of the Press.

(3) Subsection (2) is without prejudice to the right of—

(a) a parent, relative or friend of the accused or of an injured party, or

(b) a support worker chosen by an injured party, to remain in court in any case to which section 20(4) of the Criminal Justice Act 1951, section 6 of the Criminal Law (Rape) Act 1981, section 8 of the Criminal Justice (Female Genital Mutilation) Act 2012 or section 20 of the Criminal Justice (Victims of Crime) Act 2017 applies.

(4) In this section, "support worker" means a volunteer of, or an individual employed under a contract of service or under a contract for services by, an organisation which provides support to victims of crime.

RCNI Commentary: It is not clear from the wording of this Section whether it is open to prosecution and defence to apply for an order restricting access to the public, or a portion of it, during a preliminary trial hearing. In our respectful submission, this should be clear and explicit.

Section 11: Rules of court

11. Without prejudice to the power of the court to make such provision in the absence of such rules, rules of court may make provision to give further and better effect to this Part, including for any one or more of the following matters:

(a) the manner and form in which an application for a preliminary trial hearing is to be made;

(b) the manner and form in which notice of the making of such an application is to be given;
(c) the manner and form in which evidence is to be heard at a preliminary trial hearing;

(d) the timing of the holding of a preliminary trial hearing;

(e) other matters ancillary to the holding of a preliminary trial hearing;

(f) matters ancillary to the hearing of an appeal under section 7.

RCNI Commentary:

- RCNI's view is that the list of matters which may be covered by Rules of Court should also include explicit reference to those **prior issues** which must be decided **in advance of** any preliminary trial hearing, such as whether any such hearing should be held, under either Section 6(1) or Section 6(2), the timing of any preliminary trial hearing (see Sections 6 (3), (4) and (5), and whether there should be an arraignment at the preliminary trial hearing (Section 6(6)). It must be clear that these Rules extend to this early stage of the process also;

- These Rules of Court should set out a clear and detailed procedure to be followed in relation to disclosure issues, as these issues are among those most likely to delay the progress of a case towards final hearing if they are allowed to remain unresolved.

Part 3: Provision of Information to Juries

Section 12: Provision of information to juries

12. (1) This section shall apply to any offence being tried on indictment other than an offence to which any of the following provisions apply:

(a) section 1078C of the Taxes Consolidation Act 1997;

(b) section 57 of the Criminal Justice (Theft and Fraud Offences) Act 2001;

(c) section 10 of the Competition Act 2002;

(d) section 56 of the Central Bank (Supervision and Enforcement) Act 2013;

(e) section 882 of the Companies Act 2014.

(2) In a trial of an offence to which this section applies, the trial judge may order that copies of any or all of the following documents or materials shall be given to the jury in any form that the judge considers appropriate:

(a) any document admitted in evidence at the trial;

(b) where such transcripts or audio recordings are available:

(i) the transcript of the opening speeches of counsel or an audio recording of such speeches;

(ii) the transcript of the whole or any part of the evidence given at the trial or an audio recording of such evidence;

(iii) the transcript of the closing speeches of counsel or an audio recording of such speeches;

(iv) the transcript of the trial judge's charge to the jury or an audio recording of such charge;

(c) any charts, diagrams, graphics, schedules or summaries of evidence produced at the trial;

(d) any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations including, where appropriate, an affidavit by an accountant or other suitably qualified person summarising, in a form which is likely to be comprehended by the jury, any transactions by the accused or other persons which are relevant to the offence.

(3) If the prosecution or the accused proposes to apply to the trial judge for an order that a document referred to in subsection (2)(d) shall be given to the jury, the prosecution or the accused, as the case may be, shall give a copy of the document to the other party in advance of the application and, on the hearing of the application, the trial judge shall take into account any representations made by or on behalf of either party in relation to it.

(4) Where the trial judge has made an order that an affidavit referred to in subsection (2) (d) shall be given to the jury, the accountant or other suitably qualified person concerned—

(a) shall be summoned by the prosecution or the accused, as the case may be, to attend at the trial as an expert witness, and

(b) may be required by the trial judge, in an appropriate case, to give evidence in regard to the report and any relevant accounting procedures or principles.

RCNI Commentary:

- Under Section 12(2) which refers to the power of the court to direct that certain documents be made available to the jury, Section 12(2)(b) says that transcripts and audio recordings of various speeches, charges and oral examinations of witnesses may be given to the jury if they are "available";

- While RCNI supports the inclusion of this Section because it will make it much easier for the jury to absorb and retain information during often lengthy and complex trial proceedings, it seems to us that the word "available" may need to be qualified by for example, "immediately" or "readily" available, because

- It would not make sense for the trial itself, or for jury deliberations themselves, to be held up for days or even longer while transcripts or audio recordings were generated, perhaps also edited or redacted, and generally made accessible to jury members;

- On a separate point, our view is that Section 12(2) should state explicitly that it applies not only during the trial, but also during the jury deliberations after the trial itself has concluded.

RCNI/LPD/1

Carmichael Centre

North Brunswick Street

Dublin 7 D07 RHA8

February 2021

Website: **www.rcni.ie**

Email: **legal@rcni.ie**

Tel: **087 963 5201**

Appendix

List of main RCNI submissions on Pre-Trial Hearings and Case Management

1. RCNI Position Paper on Case Management and Pre-Trial Hearings (2011 – shorter version), accessible online via this web-link: https://www.rcni.ie/wp-content/uploads/RCNIPositionPaperOnCaseManagementandPreTrialHearings.pdf

2. Reducing Delays in Court: RCNI Policy Paper on Case Management and Pre-Trial Hearings in the Criminal Courts (2012 – expanded version), accessible online via this web-link: https://www.rcni.ie/wp-content/uploads/RCNICaseManagementandPreTrialHearingspositionpaperMay12.pdf

3. RCNI Submission on Sexual Violence to the Joint Oireachtas Committee on Justice, Defence and Equality, (2013), accessible online via this web-link: https://www.rcni.ie/wp-content/uploads/RCNISubmissiononSexualViolencetoJointOireachtasCommitteeonJusticeEqualityandDefenceJune2013FINAL.pdf

4. RCNI Submission on the General Scheme of the Criminal Procedures Bill (2014), accessible online via this web-link: https://www.rcni.ie/wp-content/uploads/RCNI-Submission-on-Criminal-Procedures-Bill-GS-to-JOCJDE-A%E2%80%A6.pdf

5. RCNI Submission to the Review of the Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences (2018), accessible online via this web-link: https://www.rcni.ie/wp-content/uploads/RCNI-Review-of-investigation-and-prosecution-of-sexual-offences-autumn-2018-Submission-Final.pdf

6. Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings (RCNI, 2018) – accessible online via this web-link: https://www.rcni.ie/wp-content/uploads/210807-Rape-Crisis-Network-Ireland-Hearing-Every-Voice-Report-3.pdf