



NORTHERN  
IRELAND  
HUMAN  
RIGHTS  
COMMISSION

**Response to the Gillen Review preliminary  
report into the law and procedures in  
serious sexual offences in Northern Ireland**

**January 2019**

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## Summary of Recommendations

The NIHRC notes that the next stages of the review are key. We welcome the proposal for a comprehensive resource impact assessment. We recommend enhancing this through the development of a clear action plan, including reference to short, medium and long-term actions, together with a timetable for their implementation. The NIHRC also recommends that oversight of this process is critical, particularly in the absence of the NI Assembly, and that an Oversight Group, including all key stakeholders, may assist to ensure future progress. [paragraph 7]

The NIHRC recommends that the Gillen Review may wish to specifically highlight the importance of the Istanbul and Lanzarote Conventions and their value to guiding the State on its obligations in this area. [paragraph 23]

The NIHRC welcomes the recognition of the importance of open justice and proposals to continue to allow the press to attend the hearings of serious sexual offences. [paragraph 35]

The NIHRC would raise concerns about a blanket approach being taken to the exclusion of the public from particular forms of criminal trials, rather than a case-by-case consideration of the merit of a closed hearing. The Commission, therefore, recommends that the Review look again at its current recommendations to see if an individualised approach within a structured framework, asking the judge to make a formal decision at the commencement of the trial, could be adopted. [paragraph 36]

The NIHRC welcomes the clarity that the verdict of the jury and the sentencing process will remain to be held in open court.<sup>1</sup> [paragraph 37]

The NIHRC supports the proposal for pre-recorded cross-examination to support the victim through the criminal justice system and reduce secondary victimisation. However, it advises that any proposal, for example, pre-recorded cross-examination, that would restrict the rights of the defence to adequately question the witness would undermine the right to fair trial. [paragraph 47]

The NIHRC recommends that an evaluation be carried out at the end of the phased approach in order to ensure that any concerns or issues can be resolved. This should include appropriate participation from both victims and the defence. [paragraph 48]

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<sup>1</sup> Gillen Review, para 3.80.

The NIHRC supports the proposals to provide live link technology to permit victims to give evidence from outside the court building. [paragraph 49]

The NIHRC supports proposals to provide publically funded legal assistance to complainants in serious sexual offences cases. However, it recommends that the scope is extended to cover other situations which may be required in the interests of justice in a particular case. [paragraph 55]

The NIHRC is mindful of the cost of representation and recognises that such representation may be provided in-house through a specialised unit or victim organisation. The benefits of such a specialised function may support a number of other recommendations in the review, such as the evaluation of the scheme or the provision of training. [paragraph 56]

The NIHRC supports the proposed measures to ensure that the criminal justice system operates more effectively and reduces delay in the administration of justice for both the defendant and the victim. [paragraph 61]

The NIHRC recommends that the appropriate and adequate resources are made available in order to support the proposed measures to reduce delay. [paragraph 62]

The Commission endorses the recommendations, which intend to ensure that the Criminal Justice System is based on the needs of marginalised communities, as particularly vulnerable, and that any specific requirements are catered for. [paragraph 78]

The NIHRC supports the mandatory training in dealing with marginalised communities for PSNI officers in the public protection and serious crime units but would recommend that this should be extended to all personnel who come into contact with victims and witnesses through the criminal justice process. In addition, the training proposed for the judiciary, and legal professionals should extend beyond the LGBT+ community to all marginalised groups, as recommended for the other criminal justice agencies. [paragraph 79]

The NIHRC notes the proposal that it, along with other statutory bodies, "should take steps to provide specialist sexual violence services, harnessing the assistance of local grass-roots organisations for marginalised communities to encourage engagement with the criminal justice system." The Commission would welcome further discussion with the Review team in relation to the specific nature of the recommendation. [paragraph 80]

The NIHRC welcomes the proposal for further individual research into the nature and experiences of serious sexual offences within marginalised groups. The NIHRC recommends that this research should include the meaningful participation of the relevant community and that the outcome

of this research should inform future service provision. The content of the research should be in line with the international standards. [paragraph 86]

The NIHRC supports the proposal for regular and mandatory training of legal professionals on children's rights, child protection and the dynamics of sexual abuse. This should be extended to all personnel in contact with child victims in the criminal justice process. The Review may wish to recommend that any such programme of training should include at least specific reference to the UN Convention on the Rights of the Child and the Lanzarote Convention. [paragraph 91]

The NIHRC endorses a review of facilities for children and the proposed action plan to remedy deficiencies. The NIHRC would recommend that this is carried out expeditiously, with reference to the relevant human rights standards and that appropriate resources are allocated. [paragraph 96]

The NIHRC highlights the importance of a human rights based approach to training and welcomes the proposal to ensure relevant stakeholder engagement in the development of training. [paragraph 101]

The NIHRC recommends that the international standards, in particular those specific to the issue of victims' rights and sexual crime, are incorporated into any training programme for all relevant personnel. The incorporation of human rights standards should not be a discretionary part of any training programme. [paragraph 102]

The NIHRC raises concerns about whether the case has been made for the use of non-jury trials in cases of serious sexual offences. In the event that legislation is introduced to permit non-jury trials in serious sexual offence cases, this must be used only in exceptional circumstances and the decision made prior to the commencement of any trial. [paragraph 108]

The NIHRC would welcome further clarity about the nature of any restorative justice processes related to serious sexual offences that would operate outside the criminal justice system. The State is under an obligation to carry out a full investigation in relation to human rights abuses and violations, although the NIHRC recognises that there may be scope for restorative practice to complement the criminal justice process in order to support victims of crime. [paragraph 115]

The NIHRC welcomes the partial repeal of section 5, in relation to adults. The NIHRC welcomes that the duty to report will still apply in respect of children and vulnerable adults, in line with the Lanzarote Convention. [paragraph 118]

The NIHRC recommends that the Department provide sufficient resources in order to ensure that the rights of victims and witnesses, in line with international standards, are protected. [paragraph 123]

## Introduction

1. The Northern Ireland Human Rights Commission (NIHRC), pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with this function, the following statutory advice is submitted to the Gillen Review Team in response to its preliminary report into the law and procedures in serious sexual offences in Northern Ireland (the Report).
2. The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems. The relevant regional and international treaties in this context include:
  - UN International Covenant on Civil and Political Rights, 1966 (ICCPR) [UK ratification 1976];
  - UN International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) [UK ratification 1976];
  - UN Convention on the Elimination of All forms of Discrimination against Women, 1972 (CEDAW);
  - UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1987 (UNCAT) [UK ratification 1988];
  - UN Convention on the Rights of the Child, 1989 (UNCRC) [UK ratification 1991];
  - UN Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2002 [UK ratification 2009];
  - UN Convention on the Rights of Persons with Disabilities, 2006 (UNCRPD) [UK ratification 2009]
  - Council of Europe, Convention on preventing and combating violence against women and domestic violence, 2011;<sup>2</sup>
  - Council of Europe, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 2007 [UK ratification 2018].
3. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These

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<sup>2</sup> The UK Government has signed but not ratified the Istanbul Convention. The UK Mission at Geneva has stated, "The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter." See, UK Mission at Geneva, Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008 (March 2010) on recommendation 22 (France).

declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985;<sup>3</sup>
  - UN Declaration on the Elimination of Violence against Women, 1993;<sup>4</sup>
  - Council of Europe, Committee of Ministers, Recommendation No. R (97) 13 Concerning Intimidation of Witnesses and the Rights of the Defence, 1997;
  - Council of Europe, Committee of Ministers, Recommendation No. R(2002)5 on the Protection of Women against Violence;<sup>5</sup>
  - UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 2006;<sup>6</sup>
  - Recommendation Rec(2005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, 2005;<sup>7</sup>
  - Recommendation Rec(2006)8 of the Committee of Ministers of the Council of Europe to member states on assistance to crime victims, 2006;<sup>8</sup>
  - UN Principles on the application of international human rights law in relation to sexual orientation and gender identity, 2007;
  - Council of Europe, Parliamentary Assembly Resolution 1697 (2009) on Migrant women: at particular risk from domestic violence.
4. The following European Union standards apply;
- Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.
5. The NIHRC broadly welcomes the review report from Sir John Gillen, which if implemented, would significantly improve the experiences of victims of sexual crimes; and enhance the understanding of juries and wider society of the dynamics behind sexual violence.
6. While the focus of this submission will be on measures during the trial phase of the criminal justice process, the NIHRC recognises the interconnected nature of the recommendations and that the reporting and pre-trial stages are also important and the relevant human rights

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<sup>3</sup> A/RES/40/34.

<sup>4</sup> A/Res/48/104.

<sup>5</sup> Adopted by the Committee of Ministers on 30 April 2002.

<sup>6</sup> A/RES/60/147.

<sup>7</sup> Adopted by the Committee of Ministers on 20 April 2005.

<sup>8</sup> Adopted by the Committee of Ministers on 14 June 2006.

standards cited also provide detailed guidance on the rights to receive information, appropriate support services and protection.

7. **The NIHRC notes that the next stages of the review are key. We welcome the proposal for a comprehensive resource impact assessment. We recommend enhancing this through the development of a clear action plan, including reference to short, medium and long-term actions, together with a timetable for their implementation. The NIHRC also recommends that oversight of this process is critical, particularly in the absence of the NI Assembly, and that an Oversight Group, including all key stakeholders, may assist to ensure future progress.**
8. The NIHRC will set out the application of international human rights law, both generally, and in respect of key chapters and recommendations in the Gillen review. There may be other aspects of the report that the Review Team would like advice upon, which the NIHRC would be pleased to provide.

## International human rights standards

9. International human rights law places a number of specific positive obligations on the NI Executive to safeguard the rights of individuals who have been a victim of crime and witnesses, in particular of those serious sexual offences which are the subject of this review.
10. Serious sexual offences engage a number of rights under international standards, including the prohibition on torture, inhuman and degrading treatment<sup>9</sup> and the right to private and family life (including the inherent dignity of the person)<sup>10</sup>. There is also a positive obligation on the State to ensure that an appropriate legal framework is in place to protect individuals from human rights abuses and violations.
11. Pursuant to international human rights law, the State must prevent, investigate, prosecute and punish human rights violations<sup>11</sup>. The UN Human Rights Committee has stated, "the obligation under the ICCPR is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all

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<sup>9</sup> Article 7, ICCPR; Article 3, ECHR; UNCAT.

<sup>10</sup> Article 17, ICCPR; Article 8, ECHR.

<sup>11</sup> *Rajapaske v. Sri Lanka*, Communication No. 1250/2004, CCPR/C/87/D/1250/2004 (5 September 2006) para 9.3. See also, Article 16, UNCRPD; Principles 5(d) and 29, Yogyakarta Principles.

individuals in their jurisdiction. This aspect calls for specific activities by the State parties to enable individuals to enjoy their rights.”<sup>12</sup>

12. The UN Human Rights Treaty Bodies, including but not limited to the Committee on the Elimination of Discrimination against Women (CEDAW Committee),<sup>13</sup> have regularly emphasised States Parties’ obligations in relation to domestic and sexual violence and abuse. For example, the UN Committee against Torture (CAT Committee) noted, “the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties’ failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.”<sup>14</sup>
13. The UN Committee on Economic, Social and Cultural Rights (CESCR), with respect to non-discrimination<sup>15</sup> has stated, “States parties must take appropriate measures to eliminate violence against men and women and act with due diligence to prevent, investigate, mediate, punish and redress acts of violence against them by private actors.”<sup>16</sup>
14. In 2015, the EU Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime (the EU Directive) was placed on a statutory footing in NI.<sup>17</sup> This aims to provide a practical and detailed framework for the enjoyment of the rights protected under the Directive, for all victims of crime.
15. Specifically on the issues of violence against women and the sexual abuse of children, the Council of Europe has developed two treaties of note. The Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) applies to all forms of violence against women, in particular gender-based violence.<sup>18</sup> The UK Government has signed but not ratified the Istanbul

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<sup>12</sup> UN Human Rights Committee, General Comment No. 3, Article 2 – Implementation at the national level, HRI/GEN/1/Rev.1 at 4 (1994) para. 1.

<sup>13</sup> See for example, CEDAW Committee, General Recommendation 19 on Violence against Women and General Recommendation 24 on Women and Health.

<sup>14</sup> UN Committee against Torture, General Comment 2: Implementation of article 2 by States parties, CAT/C/GC/2 (24 January 2008) para 18.

<sup>15</sup> Article 3, ICESCR.

<sup>16</sup> CESCR, General Comment 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, para 27. See also Article 5(2) Istanbul Convention.

<sup>17</sup> DOJ, Victims Charter (September 2015).

<sup>18</sup> Article 2, Istanbul Convention.

Convention.<sup>19</sup> The Review report recognises the importance of the Istanbul Convention's focus and cites it regarding the State's measures to include teaching material in the curriculum on, inter alia, gender-based violence.<sup>20</sup>

16. The Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention), ratified by the UK in 2018, requires States to adopt specific legislation and take measures to prevent sexual violence, to protect child victims and to prosecute perpetrators.<sup>21</sup>
17. Where an allegation of torture, inhuman and degrading treatment is made, there is a requirement for an official investigation, which is prompt and effective<sup>22</sup>. The jurisprudence of the European Court of Human Rights (ECt.HR) has, in the context of Article 3 ECHR, identified that such an investigation must be: prompt; impartial; have hierarchical independence from those implicated; provide sufficient involvement of next of kin; and have the ability to hold those responsible to account.<sup>23</sup>
18. In broader terms, the right to remedy is also protected for those individuals whose rights have been violated; the legal source of this will be dependent on the origin of the right violated.<sup>24</sup> The UN Human Rights Committee has stated, "such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children."<sup>25</sup>
19. The NIHRC recognises that participation in legal and administrative procedures for a victim of a serious crime or violence may lead to secondary victimisation. Human rights standards require that States take the necessary measures and special protections to avoid "re-

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<sup>19</sup> The UK Mission at Geneva has stated, "The UK's approach to signing international treaties is that we only give our signature where we are fully prepared to follow up with ratification in a short time thereafter." See, UK Mission at Geneva, Universal Periodic Review Mid-term Progress Update by the United Kingdom on its Implementation of Recommendations agreed in June 2008 (March 2010) on recommendation 22 (France).

<sup>20</sup> Gillen Review Report, para 6.146.

<sup>21</sup> Article 1, Lanzarote Convention.

<sup>22</sup> UN Human Rights Committee, General Comment no.31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13 (2004) para 15; Article 12 UNCAT; Assenov v. Bulgaria (1998) ECHR 98, para 102; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006) A/RES/60/147, para 3(a) and 3(d).

<sup>23</sup> Jordan v the United Kingdom (2001) ECHR 327, paras 106-9.

<sup>24</sup> See for example, Article 2 ICCPR; Article 13 ECHR.

<sup>25</sup> UN Human Rights Committee, General Comment No. 31 - Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, para 15.

traumatization in the course of legal and administrative procedures designed to provide justice and reparation.”<sup>26</sup>

20. The EU Directive recognises that victims of gender-based violence are particularly susceptible to secondary and repeat victimisation<sup>27</sup> and requires that Member States ensure that measures are available to protect such victims<sup>28</sup>. The Istanbul Convention also identifies that all measures to provide protection and support to victims from should be with the aim of preventing secondary victimisation.<sup>29</sup>
21. The UN Declaration on the Elimination of Violence against Women requires States to ensure that “... the re-victimization of women does not occur because of laws insensitive of gender considerations, enforcement practices or other interventions.”<sup>30</sup> Similarly, the UN Committee against Torture (CAT) requires that “judicial and non-judicial proceedings shall apply gender-sensitive procedures which avoid re-victimization and stigmatization of victims of torture or ill-treatment.”<sup>31</sup>
22. The Lanzarote Convention also requires that the State Party adopt a protective approach towards child victims, “ensuring that the investigations and criminal proceedings do not aggravate the trauma experienced by the child and that the criminal justice response is followed by assistance, where appropriate.”<sup>32</sup>
23. **The NIHRC recommends that the Gillen Review may wish to specifically highlight the importance of the Istanbul and Lanzarote Conventions and their value to guiding the State on its obligations in this area.**

## Restricting access of the public

24. Chapter three of the review looks at restricting the access of members of the public to court proceedings involving serious sexual offences. The proposed recommendation is to exclude the public from all serious

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<sup>26</sup> UN Committee against Torture, General Comment 3: Implementation of article 14 by States parties, CAT/C/GC/3 (13 December 2012) para 21. See also Article 10, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; Committee of Ministers, Recommendation Rec(2006)8, para 3.3,

<sup>27</sup> Preamble, para 57, EU Directive 2012/29/EU.

<sup>28</sup> Article 18, EU Directive 2012/29/EU.

<sup>29</sup> Article 18(3), Istanbul Convention.

<sup>30</sup> A/RES/48/104 (Article 4(f)).

<sup>31</sup> UN Committee against Torture, General Comment 3: Implementation of article 14 by States parties, CAT/C/GC/3 (13 December 2012) para 33.

<sup>32</sup> Article 30(2), Lanzarote Convention.

sexual offence hearings, save for officers of the court, persons connected with proceedings, the press, a parent, relative or friend of the complainant. Other persons may be permitted to remain at the discretion of the judge or the Court.<sup>33</sup>

25. Part of the rationale behind the recommendation appears to be the protection of the anonymity of the complainant, in particular as NI is a small jurisdiction.<sup>34</sup> The NIHRC recognises that domestic law already enables special measures for victims in sexual offences cases, in particular a judge to clear a courtroom when a witness is giving evidence.<sup>35</sup> The report suggests that the provision to clear the court is rarely invoked, suggesting it is too widely drafted in order to be effective.<sup>36</sup> The report does not consider how the discretion could be circumscribed to ensure it operates more effectively to allow for consideration on a case-by-case basis of the merits of a closed hearing.
26. The right to a fair and public hearing, as enshrined as an element of the right to fair trial<sup>37</sup>, is recognised as being one of the foundations of a democratic society<sup>38</sup> and a safeguard of the rule of law<sup>39</sup>. The ECt.HR has observed, “the public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 § 1, a fair hearing”.<sup>40</sup>
27. The right to a public hearing is not absolute. The provisions of the ICCPR and ECHR both permit the exclusion of the press or the public from all or part of a trial, “where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.<sup>41</sup>
28. However, even where there is a high expectation of publicity, the ECt.HR has recognised that it may “on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote

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<sup>33</sup> Gillen Review, recommendation 27.

<sup>34</sup> Gillen Review, para 3.76.

<sup>35</sup> Article 13, Criminal Evidence (Northern Ireland) Order 1999.

<sup>36</sup> Gillen Review, para 3.94.

<sup>37</sup> Article 6, ECHR.

<sup>38</sup> B and P v the United Kingdom, Appl. Nos. 36337/97 35974/97 (24 April 2001) para 36.

<sup>39</sup> UN Human Rights Committee, General Comment 32: Article 14 on the right to equality before the courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para 1.

<sup>40</sup> B and P v the United Kingdom, Application nos. 36337/97 35974/97 (24 April 2001) para 36.

<sup>41</sup> Article 14(1), ICCPR; Article 6(1), ECHR.

the free exchange of information and opinion in the pursuit of justice".<sup>42</sup> The ECt.HR has found a violation of Article 6(1) where the domestic authorities did not provide sufficient reasoning to demonstrate that closure of a court was necessary.<sup>43</sup>

29. Similarly, the ICCPR requires that a hearing be open to the public "apart from exceptional circumstances".<sup>44</sup>
30. Under the EU Directive, States are required to conduct an individualised assessment of the victim in order to identify any specific protection needs and to what extent special measures could be used in the course of proceedings.<sup>45</sup> Such an assessment would need to take into account the personal characteristics of the victim and the nature and circumstances of the crime, with particular attention to those suffering considerable harm or a victim of a crime committed with a discriminatory motive.<sup>46</sup> Following the identification of a specific protection need, the Directive permits a hearing to take place without the presence of the public.<sup>47</sup>
31. In respect of criminal proceedings relating to child victims and witnesses, the Lanzarote Convention provides that the State Party shall ensure "according to the rules provided by its internal law, that: (a) the judge may order the hearing to take place without the presence of the public".<sup>48</sup>
32. The Istanbul Convention does not make any similar provision, save for enabling victims to testify "without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available."<sup>49</sup>
33. The NIHRC recognises the requirement to take special measures in order to protect the rights of victims, as identified throughout this submission. For example, the UN CAT Committee consider that "complaints mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital

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<sup>42</sup> B and P v the United Kingdom, Application nos. 36337/97 35974/97 (24 April 2001) para 37.

<sup>43</sup> Chaushev and others v Russia, Application nos. 37037/03 39053/03 2469/04 (25 October 2016) para 24.

<sup>44</sup> UN Human Rights Committee, General Comment 32: Article 14 on the right to equality before the courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para 29.

<sup>45</sup> Article 22(1), EU Directive 2012/29/EU.

<sup>46</sup> Articles 22(2) and (3), EU Directive 2012/29/EU.

<sup>47</sup> Article 23(3)(d), EU Directive 2012/29/EU.

<sup>48</sup> Article 36(2), Lanzarote Convention.

<sup>49</sup> Article 56(1)(i), Istanbul Convention.

rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress.”<sup>50</sup>

34. The international standards permit criminal proceedings to be carried out in the absence of the public, in particular regarding child victims. However, this appears to be considered a special measure, which should be only be used where such a protective need is identified.
35. **The NIHRC welcomes the recognition of the importance of open justice and proposals to continue to allow the press to attend the hearings of serious sexual offences.**
36. **The NIHRC would raise concerns about a blanket approach being taken to the exclusion of the public from particular forms of criminal trials, rather than a case-by-case consideration of the merit of a closed hearing. The Commission, therefore, recommends that the Review look again at its current recommendations to see if an individualised approach within a structured framework, asking the judge to make a formal decision at the commencement of the trial, could be adopted.**
37. **The NIHRC welcomes the clarity that the verdict of the jury and the sentencing process will remain to be held in open court.**<sup>51</sup>

## Pre-recorded cross-examination

38. Chapter four of the review considers the use of pre-recorded cross-examination for the complainant in serious sexual offence cases. The proposed recommendation is for pre-recorded cross-examination of vulnerable witnesses to commence on a phased basis<sup>52</sup>, to be followed by a pilot scheme for all adult complainants if successful.<sup>53</sup>
39. In practical terms, the recommendations also propose an obligatory Ground Rules Hearing for such cases<sup>54</sup>, in which case defence counsel would be required to submit their proposed questions in advance for approval.<sup>55</sup> They further suggest consideration should be given to

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<sup>50</sup> UN Committee against Torture, General Comment 3: Implementation of article 14 by States parties, CAT/C/GC/3 (13 December 2012) para 33.

<sup>51</sup> Gillen Review, para 3.80.

<sup>52</sup> Gillen Review, recommendation 30.

<sup>53</sup> Gillen Review, recommendation 31.

<sup>54</sup> Gillen Review, recommendation 34.

<sup>55</sup> Gillen Review, recommendation 35.

centres remote from the court building with the use of live link for vulnerable witnesses.<sup>56</sup>

40. The Istanbul Convention requires the State to take measures to protect the rights and interests of victims in judicial proceedings by “enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available”.<sup>57</sup>
41. The EU Directive establishes a right to protection, in which measures should be made available to “protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying.”<sup>58</sup>
42. While the international standards highlight the need to provide for protective measures for victims, the particular measures to give effect to this right are left to the State. While the focus of this is on victims of serious sexual offences, any consideration of particular protective measures would have to consider the fair trial rights of the defendant.
43. The ECt.HR has recognised that, “[i]t is true that Article 6 (art. 6) does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 (art. 8) of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”<sup>59</sup>
44. The right of the defendant to examine, or have examined, witnesses and evidence against him/her is protected by the right to fair trial.<sup>60</sup> The Human Rights Committee also recognises that the defence must

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<sup>56</sup> Gillen Review, recommendation 38.

<sup>57</sup> Article 56(1)(i), Istanbul Convention.

<sup>58</sup> Article 18, EU Directive 201/29/EU. See also para 6(d), Basic Principles of Justice for Victims of Crime and Abuse of Power.

<sup>59</sup> *Doorson v the Netherlands*, Application no. 20524/92, 26 March 1996, para 70.

<sup>60</sup> Article 14(3)(e), ICCPR; Article 6(3)(e), ECHR.

be “given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings.”<sup>61</sup>

45. While the international standards do not make specific comment on the concept of a pre-recorded cross-examination, it has been recognised that the issue of admission of evidence is a matter for the domestic legislatures and national courts.<sup>62</sup>
46. In practical terms, the introduction of pre-recorded cross-examination would require that disclosure be completed at an earlier stage than present. Failure to provide the relevant material at the appropriate stage could undermine the fair trial rights of the defence. In addition, should (pre-recorded) cross-examination have to be repeated, due to failures or delay in disclosure, this would have a significant impact on the victim and undermine the intentions of the measure.
47. **The NIHRC supports the proposal for pre-recorded cross-examination to support the victim through the criminal justice system and reduce secondary victimisation. However, it advises that any proposal, for example, pre-recorded cross-examination, that would restrict the rights of the defence to adequately question the witness would undermine the right to fair trial.**
48. **The NIHRC recommends that an evaluation be carried out at the end of the phased approach in order to ensure that any concerns or issues can be resolved. This should include appropriate participation from both victims and the defence.**
49. **The NIHRC supports the proposals to provide live link technology to permit victims to give evidence from outside the court building.**

## Separate legal representation

50. Chapter five of the review discusses the possibility of separate legal representation for complainants in serious sexual offences cases. The proposed recommendation is for publically funded legal representation in three situations: (i) to afford relevant information and legal advice throughout the process up to the commencement of the trial; (ii)

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<sup>61</sup> UN Human Rights Committee, General Comment 32: Article 14 on the right to equality before the courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para 39.

<sup>62</sup> UN Human Rights Committee, General Comment 32: Article 14 on the right to equality before the courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para 39.

where complainants appear to object to disclosure of medical records to the defence team; (iii) where complainants appear to object to the introduction of previous sexual history.<sup>63</sup>

51. The Istanbul Convention requires that victims have the right to legal assistance and free legal aid, under conditions provided by internal law.<sup>64</sup> It further recognises that the State shall take measures to protect the rights and interests of victims in judicial proceedings by “enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered”.<sup>65</sup>
52. Both the EU Directive and the Lanzarote Convention (in respect of child victims) require that victims have access to legal assistance where warranted and where they have the status of parties to criminal proceedings.<sup>66</sup>
53. The international human rights standards provide the minimum required in respect of the provision of support to victims. States are permitted to raise the bar in terms of this protection and so an enhanced level of representation for victims is a means by which participation is supported and secondary victimisation can be reduced.
54. The proposed circumstances that would warrant support after the commencement of trial are narrow. There are other situations, identified in the scope of this report, which may give rise to necessity for the victim to have representation. For example, where there is substantive delay in a case or another issue arises, there is currently no formal mechanism for a victim to make those representations to the judge.
55. **The NIHRC supports proposals to provide publically funded legal assistance to complainants in serious sexual offences cases. However, it recommends that the scope is extended to cover other situations which may be required in the interests of justice in a particular case.**
56. **The NIHRC is mindful of the cost of representation and recognises that such representation may be provided in-house**

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<sup>63</sup> Gillen Review, recommendation 45.

<sup>64</sup> Article 57, Istanbul Convention.

<sup>65</sup> Article 56(1)(d), Istanbul Convention.

<sup>66</sup> Article 13, EU Directive 2012/29/EU; Article 31(3), Lanzarote Convention.

**through a specialised unit or existing organisation providing victim support. The benefits of creating such a specialised function may support a number of other recommendations in the review, such as research, evaluation of the implementation of the review or the provision of training.**

## Delay

57. Chapter 9 looks at the causes and impact of delay within the criminal justice process, regarding serious sexual offences, in particular the existing independent reports on this issue.
58. The proposed recommendations include a number of efficiency measures across the Department of Justice, PSNI, PPS, the Judiciary and the NICTS.<sup>67</sup> There is also a recognition of the connection with disclosure, and a number of recommendations specifically considering the application of time limits to be decided, at a later date, by the Crown Court Rules Committee.<sup>68</sup> The review also recommends that there should be priority listing and fast tracking for serious sexual offences cases involving children or vulnerable adults.<sup>69</sup>
59. The review recognises the centrality of Article 6(1) ECHR, which protects the right to a fair trial within a “reasonable time”. The reasonableness of the length of proceedings is determined by the overall assessment of an entire case, including any appeal<sup>70</sup>, and will have begun to run prior to the start of the trial.<sup>71</sup> It will consider factors such as the complexity of the case, the conduct of the defendant and the prosecuting authorities.
60. Notably, the conduct of the relevant authorities can give rise to a breach of Article 6. The ECt.HR recognises that Article 6(1) imposes a “duty to organise their judicial systems in such a way that their courts can meet each of its requirements”.<sup>72</sup>
61. **The NIHRC supports the proposed measures to ensure that the criminal justice system operates more effectively and reduces delay in the administration of justice for both the defendant and the victim.**

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<sup>67</sup> Gillen Review, recommendations 108-133.

<sup>68</sup> Gillen Review, recommendations 120-123.

<sup>69</sup> Gillen Review, recommendation 124.

<sup>70</sup> König v Germany, Application no 6232/73, 29 June 1978, para 98.

<sup>71</sup> Deweer v Belgium, Application no 6903/75, 27 February 1980, para 42; Neumeister v Austria, Application 1936/63, 27 June 1968, para 18; Kalēja v. Latvia, Application no. 22059/08, 5 January 2018, para 40.

<sup>72</sup> Dobbetin v France, Application no. 13089/87, 25 February 1993, para 44.

62. **The NIHRC recommends that the appropriate and adequate resources are made available in order to support the proposed measures to reduce delay.**

## Voice of marginalised communities

63. Chapter 13 of the review considers the voice of those from marginalised communities, including persons with a disability, Black, Asian and minority ethnic (BAME) groups, the traveller community, older people, the LGBT+ community, sex workers and men.
64. The proposed recommendations include training<sup>73</sup>, research into marginalised communities<sup>74</sup> and additional measures, such as advocates for deaf people.<sup>75</sup>
65. Victims and witnesses of certain categories of crime, such as gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities, require specific treatment.<sup>76</sup> The Committee of Ministers' Recommendation on assistance to crime victims identifies "domestic or sexual violence, terrorism, crimes motivated by racial, religious or other prejudice" as special categories of crime requiring specific recognition.<sup>77</sup>
66. Committee of Ministers' Recommendation on Intimidation of Witnesses highlights the particularly difficult situation faced by "witnesses giving evidence against family members in criminal cases" and "elderly persons subjected to ill-treatment by their family."<sup>78</sup> The Committee noted that "when a vulnerable witness first reports allegations to the police, there should be immediate access to professional help" and that "the examination of the witness should be conducted by suitably trained staff."<sup>79</sup>

### Women

67. The UN Declaration on the Elimination of Violence against Women identifies, "women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention,

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<sup>73</sup> Gillen Review, recommendations 153, 161, 162 and 165.

<sup>74</sup> Gillen Review, recommendations 156 and 159

<sup>75</sup> Gillen Review, recommendation 164.

<sup>76</sup> Article 22(1), EU Directive 2012/29/EU.

<sup>77</sup> Committee of Ministers' Recommendation on Assistance to Crime Victims, para. 12.3.

<sup>78</sup> Committee of Ministers' Recommendation on Intimidation of Witnesses, paras 17 and 21.

<sup>79</sup> Committee of Ministers' Recommendation on Intimidation of Witnesses, para. 24.

female children, women with disabilities, elderly women and women in situations of armed conflict as being especially vulnerable to violence.”<sup>80</sup> Pursuant to that Declaration, States should “adopt measures towards the elimination of violence against women who are especially vulnerable to violence.”<sup>81</sup>

68. The NIHRC recognises that migrant women are particularly vulnerable to domestic and sexual violence<sup>82</sup>, with the Special Rapporteur on violence against women noting, following her visit to the UK, that “justice system is not effectively equipped, or responsive, to address the specific needs of women and girl survivors of violence.”<sup>83</sup> The Parliamentary Assembly of the Council of Europe notes, “migrant women in Europe face twofold discrimination based both on their gender and their origin. In addition, in communities marked by a strong patriarchal culture, they may be exposed to an aggravated risk from domestic violence. Confronted with the language barrier and family pressure, they often end up isolated and unable to express their views and have only limited access to any facilities that exist to protect the victims of domestic violence. Migrant women may also have faced violence in their home country or in transit or in the host country. Irregular migrant women face a further problem in that they risk being sent back to their home country if they manifest themselves to the authorities.”<sup>84</sup>
69. Similarly, the CEDAW Committee has also noted the vulnerable position of migrant women. In *Jallow v. Bulgaria*, the Committee recognised the vulnerable position of the complainant due to being an “illiterate migrant woman without command of Bulgarian or relatives in the State party, and dependent on her husband”, and concluded that Bulgaria had failed to comply with its obligations under the Convention.<sup>85</sup>
70. In the context of women migrant workers the CEDAW Committee has highlighted, “women migrant workers are more vulnerable to sexual abuse, sexual harassment and physical violence, especially in sectors where women predominate. Domestic workers are particularly

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<sup>80</sup> Preamble, UN Declaration on the Elimination of Violence against Women.

<sup>81</sup> Article 4(I), UN Declaration on the Elimination of Violence against Women.

<sup>82</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/17/26, 2 May 2011, para 14. See also, All-Party Parliamentary Group on Domestic and Sexual Violence/Women’s Aid, Women’s Access to Justice: from reporting to sentencing (2014) paras 24-27.

<sup>83</sup> UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/29/27/Add.2 (19 May 2015) para 95.

<sup>84</sup> Council of Europe, Parliamentary Assembly Resolution 1697 (2009) Migrant Women: at particular risk from domestic violence, para 1.

<sup>85</sup> CEDAW Committee, *Jallow v Bulgaria*, Communication No. 32/2011, CEDAW/C/52/D/32/2011 (28 August 2012) para 8.5.

vulnerable to physical and sexual assault, food and sleep deprivation and cruelty by their employers. Sexual harassment of women migrant workers in other work environments, such as on farms or in the industrial sector, is a problem worldwide (see E/CN.4/1998/74/Add.1). Women migrant workers who migrate as spouses of male migrant workers or along with family members face an added risk of domestic violence from their spouses or relatives if they come from a culture that values the submissive role of the women in the family.”<sup>86</sup>

71. The Commission recalls that the Council of Europe Resolution invites member states to “adopt dedicated action plans addressing the specific needs of migrant women who are victims of violence, including domestic violence and trafficking.”<sup>87</sup>
72. In relation to older women, the CEDAW Committee has stated that “States parties should give due consideration to the situation of older women when addressing sexual violence...”<sup>88</sup>

### Disability

73. The World Health Organisation (WHO) has recognised “people with disabilities are at greater risk of violence than those without disabilities... The prevalence of sexual abuse against people with disabilities has been shown to be higher, especially for institutionalised men and women with intellectual disabilities, intimate partners, and adolescents.”<sup>89</sup>
74. The UN Committee on the Rights of the Child has noted that “children with disabilities are more vulnerable to all forms of abuse be it mental, physical or sexual in all settings, including the family, schools, private and public institutions, inter alia alternative care, work environment and community at large. It is often quoted that children with disabilities are five times more likely to be victims of abuse.”<sup>90</sup> Similarly, States Parties to the UNCRPD recognise “that women and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.”<sup>91</sup>

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<sup>86</sup> CEDAW Committee General Recommendation 26 on women migrant workers, CEDAW/C/2009/WP.1/R (5 December 2008), para 20

<sup>87</sup> Council of Europe, Parliamentary Assembly Resolution 1697 (2009) Migrant Women: at particular risk from domestic violence, para 4.2. See also, CEDAW Committee, General Recommendation 26 on women migrant workers, CEDAW/C/2009/WP.1/R (5 December 2008) para 26.

<sup>88</sup> CEDAW Committee, General Recommendation 27 on older women and protection of their human rights, CEDAW/C/GC/27 (16 December 2010) para 38.

<sup>89</sup> World Health Organisation (WHO), World Report on Disability (2011) p.59.

<sup>90</sup> CRC Committee, General Comment 9 on the rights of children with disabilities, CRC/C/GC/9 (27 February 2007) para 42.

<sup>91</sup> Para Q, Preamble, UNCRPD.

75. The NIHRC notes that the UNCRPD requires State Parties to “take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers ... States Parties shall ensure that protection services are age-, gender- and disability-sensitive”.<sup>92</sup>
76. In accordance with the UNCRPD the State is obligated to “ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.”<sup>93</sup>

Sexual orientation and gender identity

77. The Yogyakarta Principles call on States to “take all necessary legislative, administrative and other measures to prohibit and eliminate prejudicial treatment on the basis of sexual orientation or gender identity at every stage of the judicial process... and to ensure that no one’s credibility or character as a party, witness, advocate or decision-maker is impugned by reason of their sexual orientation or gender identity.”<sup>94</sup>
78. **The Commission endorses the recommendations, which intend to ensure that the Criminal Justice System is based on the needs of marginalised communities, as particularly vulnerable, and that any specific requirements are catered for.**
79. **The NIHRC supports the mandatory training in dealing with marginalised communities for PSNI officers in the public protection and serious crime units but would recommend that this should be extended to all personnel who come into contact with victims and witnesses through the criminal justice process. In addition, the training proposed for the judiciary, and legal professionals should extend beyond the LGBT+ community to all marginalised groups, as recommended for the other criminal justice agencies.**

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<sup>92</sup> Article 16.2 UNCRPD.

<sup>93</sup> Committee on the Rights of the Child, General Comment No. 12 on the right of the child to be heard, CRC/C/GC/12 (20 July 2009) para 34. See also, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, para. 16.

<sup>94</sup> Principle 5(d), Yogyakarta Principles.

80. **The NIHRC notes the proposal that it, along with other statutory bodies, “should take steps to provide specialist sexual violence services, harnessing the assistance of local grass-roots organisations for marginalised communities to encourage engagement with the criminal justice system.” The Commission would welcome further discussion with the Review team in relation to the specific nature of the recommendation.**

### Research

81. The Committee of Ministers’ recommends that research should include criminal victimisation and its impact on victims; the prevalence and risk of victimisation and factors affecting risk; the effectiveness of legislative and other measures for supporting and protecting victims of crime; and the effectiveness of interventions by criminal justice agencies and victim services.”<sup>95</sup>
82. The CEDAW Committee has stated, “States parties should encourage the compilation of statistics and research on the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence.”<sup>96</sup> Similarly the UN Declaration on the Elimination of Violence against Women requires States to, “promote research, collect data and compile statistics, especially concerning domestic violence, relating to the prevalence of different forms of violence against women and encourage research on causes, nature, seriousness and consequences of violence against women and on the effectiveness of measures implemented to prevent and redress violence against women; those statistics and findings of the research will be made public.”<sup>97</sup>
83. With specific reference to violence against women, the Committee of Ministers has recommended that research and data collection should be developed in respect of:
- “a. the preparation of statistics sorted by gender, integrated statistics and common indicators in order to better evaluate the scale of violence against women;
  - b. the medium- and long-term consequences of assaults on victims;

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<sup>95</sup> Committee of Ministers’ Recommendation on assistance to crime victims, para. 17.2

<sup>96</sup> CEDAW Committee, General Recommendation 19 on violence against women (1993) para 24(c). See also, CEDAW Committee, General Recommendation 26 on women migrant workers, CEDAW/C/2009/WP.1/R (5 December 2008) para 23 (c).

<sup>97</sup> UN General Assembly Declaration on the Elimination of Violence against Women, A/Res/48/104, 1993, Article 4(k).

- c. the consequence of violence on those who are witness to it, inter alia, within the family;
- d. the health, social and economic costs of violence against women;
- e. the assessment of the efficacy of the judiciary and legal systems in combating violence against women;
- f. the causes of violence against women, i.e. the reasons which cause men to be violent and the reasons why society condones such violence;
- g. the elaboration of criteria for benchmarking in the field of violence.”<sup>98</sup>

84. Despite these commitments the European Union Agency for Fundamental Rights (EUFRA) noted in 2014 that “one area where there is agreement – embracing the UN, the Council of Europe, the European Commission, the European Parliament and civil society – is with respect to the continued lack of comprehensive, comparable data on the phenomenon of violence against women.”<sup>99</sup> The UN Special Rapporteur on Violence against Women has also noted, “coherence and sustainability in data collection is essential for the effective development and implementation of laws, policies and programmes. It is also essential to include both quantitative data, to measure prevalence and forms, and qualitative data, to assess the efficacy of measures.”<sup>100</sup>

85. Recent research by the Economist Intelligence Unit on the response to child sexual abuse and exploitation conducted a bench marking exercise with 40 countries across Europe.<sup>101</sup> It highlights the UK as having one of the better environments for children. However, it also identifies the lack of data on the extent of child sexual exploitation in the UK.<sup>102</sup>

**86. The NIHRC welcomes the proposal for further individual research into the nature and experiences of serious sexual offences within marginalised groups. The NIHRC recommends that this research should include the meaningful participation**

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<sup>98</sup> Council of Europe, Committee of Ministers, Recommendation No. R(2002)5 on the Protection of Women against Violence, Appendix, para 5. See also, Council of Europe, Parliamentary Assembly Resolution 1697 (2009): Migrant Women: at particular risk from domestic violence, para 4.1.2; Article 11.1, Istanbul Convention.

<sup>99</sup> EUFRA, Violence against women: an EU-wide survey (March 2014,) p. 12.

<sup>100</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, A/HRC/23/49 (14 May 2013) para 61.

<sup>101</sup> The Economist Intelligence Unit, ‘Out of the shadows: Shining light on the response to child sexual abuse and exploitation’ (EIU, 2018).

<sup>102</sup> The Economist Intelligence Unit, ‘Out of the shadows: Shining light on the response to child sexual abuse and exploitation: UK country profile’ (EIU, 2018) p.1.

**of the relevant community and that the outcome of this research should inform future service provision. The content of the research should be in line with the international standards.**

## Voice of the child

87. Chapter 14 of the review looks at the voice of the child and participation in the legal process. While the other sections will also apply to children, it is important that particular consideration is given to the age of the complainant. The proposed recommendations include regular and mandatory training on children's rights, child protection and the dynamics of sexual abuse by the Judicial Studies Board, the Law Society, the Bar Council, the PPS and the PSNI.<sup>103</sup>
88. The obligation to protect children from all forms of violence, exploitation and abuse is outlined under the UNCRC.<sup>104</sup> The Committee on the Rights of the Child (CRC) has outlined the need for "children's rights to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child caregiving and protection strategies and programmes."<sup>105</sup> Further, the CRC has noted that the "right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention."<sup>106</sup>
89. The Istanbul Convention requires that the State takes "all necessary legislative or other measures to ensure that in the provision of protection and support services to victims, due account is taken of the rights and needs of child witnesses".<sup>107</sup> Furthermore, that a child victim or witness of violence against women and domestic violence "be afforded, where appropriate, special protection measures taking into account the best interests of the child."<sup>108</sup>
90. The Lanzarote Convention requires that the State "ensure that training on children's rights and sexual exploitation and sexual abuse of

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<sup>103</sup> Gillen Review, recommendation 170.

<sup>104</sup> Article 19(1), UNCRC.

<sup>105</sup> UN CRC Committee, General Comment 13 on the right of the child to be free from violence, CRC/C/GC/13 (18 April 2012) para 3(e).

<sup>106</sup> UN CRC Committee, General Comment 13 on the right of the child to be free from violence, CRC/C/GC/13 (18 April 2012) para 3(f).

<sup>107</sup> Article 26(1), Istanbul Convention.

<sup>108</sup> Article 56(2), Istanbul Convention.

children is available for the benefit of all persons involved in the proceedings, in particular judges, prosecutors and lawyers.”<sup>109</sup>

91. **The NIHRC supports the proposal for regular and mandatory training of legal professionals on children’s rights, child protection and the dynamics of sexual abuse. This should be extended to all personnel in contact with child victims in the criminal justice process. The Review may wish to recommend that any such programme of training should include at least specific reference to the UN Convention on the Rights of the Child and the Lanzarote Convention.**
92. The proposed recommendations also include a review of facilities to ensure that they are suitable for child witnesses.<sup>110</sup>
93. The Optional Protocol to the UNCRC<sup>111</sup> and the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime highlight the particular vulnerability of children at all stages of the criminal justice process.<sup>112</sup>
94. The Committee on the Rights of the Child has stressed that, “a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.”<sup>113</sup>
95. The EU Directive also requires, although not specifically for child victims, that measures to avoid contact with offenders and to ensure that the victim can be heard without being present, using communication technology where appropriate are available. <sup>114</sup>
96. **The NIHRC endorses a review of facilities for children and the proposed action plan to remedy deficiencies. The NIHRC would**

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<sup>109</sup> Article 36(1), Lanzarote Convention.

<sup>110</sup> Gillen Review, recommendation 193.

<sup>111</sup> Article 8(1)(a), Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

<sup>112</sup> The Guidelines provide a practical framework to ensure respect for the rights of child victims and witnesses of crime and to contribute to the implementation of the UNCRC. See also, Committee of Ministers’ Recommendation on Intimidation of Witnesses, paras 19 and 20.

<sup>113</sup> Committee on the Rights of the Child, General Comment No. 12 (the right of the child to be heard) CRC/C/GC/12, para. 34. See also, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, para. 16.

<sup>114</sup> Articles 23(3)((a)-(b), EU Directive 2012/29/EU.

**recommend that this is carried out expeditiously, with reference to the relevant human rights standards and that appropriate resources are allocated.**

## Training

97. Chapter 15 considers the issue of the sufficiency of training provided to participants in the criminal justice process. The proposed recommendations cover the judiciary and legal professionals<sup>115</sup>, the PSNI<sup>116</sup>, the PPS<sup>117</sup>, the IPLS<sup>118</sup> and the Department of Justice.<sup>119</sup> However, the issue of training and particular recommendations are proposed in other chapters of the Gillen review.
98. The Commission notes that the EU Directive requires, “officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.”<sup>120</sup> It also specifically details that the judiciary and lawyers should also both have access to both general and specialist training to increase awareness of the needs of victims.<sup>121</sup> In line with the nature and level of contact with victims, the “training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner.”<sup>122</sup>
99. The Committee of Ministers’ Recommendation on assistance to crime victims further specifies, “specialised training should be provided for all personnel working with child victims and victims of special categories of crime, for example, domestic or sexual violence, terrorism, crimes motivated by racial, religious or other prejudice, as well as to families of murder victims.”<sup>123</sup>
100. The content of such training should have regard to the relevant human rights standards as cited in this paper.<sup>124</sup> The Istanbul Convention

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<sup>115</sup> Gillen Review, recommendations 205-210.

<sup>116</sup> Gillen Review, recommendation 211.

<sup>117</sup> Gillen Review, recommendation 212-213.

<sup>118</sup> Gillen Review, recommendation 214.

<sup>119</sup> Gillen Review, recommendation 215.

<sup>120</sup> Article 25(1), EU Directive 2012/29/EU. See also Committee of Ministers’ Recommendation on protection of witnesses, para 7; Basic Principles, para 16. Committee of Ministers’ Recommendation on assistance to crime victims, paras 12.1 and 12.4; Article 15(1), Istanbul Convention.

<sup>121</sup> Article 25(2) and (3), EU Directive 2012/29/EU.

<sup>122</sup> Article 25(5), EU Directive 2012/29/EU. See also Committee of Ministers’ Recommendation on assistance to crime victims, para 12.2.

<sup>123</sup> Committee of Ministers’ Recommendation on assistance to crime victims, para 12.3. See also Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, para 4.

<sup>124</sup> Committee of Ministers’ Recommendation on assistance to crime victims, para 12.5.

further requires that training should include how to prevent secondary victimisation<sup>125</sup> and a coordinated multi-agency approach.<sup>126</sup> The CEDAW Committee has highlighted, “gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention.”<sup>127</sup>

**101. The NIHRC highlights the importance of a human rights based approach to training and welcomes the proposal<sup>128</sup> to ensure relevant stakeholder engagement in the development of training.**

**102. The NIHRC recommends that the international standards, in particular those specific to the issue of victims’ rights and sexual crime, are incorporated into any training programme for all relevant personnel. The incorporation of human rights standards should not be a discretionary part of any training programme.**

## The Jury System

103. Chapter 16 considers the use of jury trials within the context of the prosecution of serious sexual offences. While not recommending a change to the present procedure in the Crown Court, there is a proposal to introduce legislation to permit a trial to continue before a judge-alone on the application of the defence or the prosecution, where it is in the interests of justice to do so.<sup>129</sup> It is not clear at this point if it is intended for the victim to participate in any decision to continue a trial without a jury or if the rights of the victim will be considered.

104. The Gillen review recognises that existing domestic law provides for non-jury trials in particular cases, under the Justice and Security (NI) Act 2007<sup>130</sup> and the Criminal Justice Act 2003.<sup>131</sup> These provisions can be used in instances of terrorist related cases where there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury<sup>132</sup> or where there is a real and present danger

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<sup>125</sup> Article 15(1), Istanbul Convention.

<sup>126</sup> Article 15(2), Istanbul Convention.

<sup>127</sup> CEDAW, General Recommendation No. 19: Violence against women (1993) para 24(b). See also Committee of Ministers’ Recommendation on Intimidation of Witnesses, para. 21.

<sup>128</sup> Gillen Review, recommendation 204.

<sup>129</sup> Gillen Review, recommendation 217.

<sup>130</sup> Section 1, Justice and Security (NI) Act 2007.

<sup>131</sup> Section 44, Criminal Justice Act 2003.

<sup>132</sup> Section 1, Justice and Security (NI) Act 2007.

of jury tampering.<sup>133</sup> It is also relevant to note that the operation of non-jury trials are subject to annual review by the Independent Reviewer of the Justice and Security Act and the provisions expire after two years unless extended by order of the Secretary of State.

105. In respect of the use of non-jury trials, the UN Human Rights Committee has noted that in the context of judicial proceedings, equality before courts and tribunals “requires that similar cases are dealt with in similar proceedings”.<sup>134</sup> The Committee uses the example of non-jury trials in the United Kingdom, stating that, “objective and reasonable grounds must be provided to justify the distinction” in treatment of defendants with and without access to a jury trial.”<sup>135</sup>

106. The UN Committee against Torture has also recommended that the UK Government should, “take due consideration of the principles of necessity and proportionality when deciding the renewal of emergency powers in Northern Ireland, and particularly non-jury trial provisions. It encourages the State party to continue moving towards security normalisation in Northern Ireland and envisage alternative juror protection measures.”<sup>136</sup>

107. The NIHRC has previously recognised the continuing severe threat of terrorism as a justification for the continued provision of non-jury trials<sup>137</sup> but has advised the NIO to consider “ensuring the principles of necessity and proportionality are fully reflected within the arrangement for authorising non-jury trials.”<sup>138</sup>

**108. The NIHRC raises concerns about whether the case has been made for the use of non-jury trials in cases of serious sexual offences. In the event that legislation is introduced to permit non-jury trials in serious sexual offence cases, this must be used only in exceptional circumstances and the decision made prior to the commencement of any trial.**

## Measures complementing the CJS

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<sup>133</sup> Section 44, Criminal Justice Act 2003.

<sup>134</sup> UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para 14.

<sup>135</sup> UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 (23 August 2007) para. 14.

<sup>136</sup> UN CAT, Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, CAT/C/GBR/CO/5 (24 June 2013) para 13.

<sup>137</sup> NIHRC, The 2018 Annual Statement (10 December 2018) p.101.

<sup>138</sup> NIHRC, The 2018 Annual Statement (10 December 2018) p.101.

109. Chapter 17 considers the concept of alternative resolution or restorative justice to complement existing criminal justice processes. It also looks at the duty to report under section 5 of the Criminal Law Act (Northern Ireland) 1967.
110. The proposed recommendations are for the Department of Justice to consider funding a restorative justice scheme within the criminal justice process<sup>139</sup> and a self-referral voluntary justice mechanism as an alternative to participation in the criminal justice system.<sup>140</sup>
111. The EU Directive recognises restorative justice programmes, requiring the State to ensure that there are adequate safeguards to protect the victim from secondary and repeat victimisation, intimidation and retaliation.<sup>141</sup> However, the Directive covers all criminal offences and does not specify if the nature of the offence is relevant to the provision of restorative justice. It does establish some safeguards for the exercise of a safe and competent system, which include that the service be in the best interest of the victim, with their free and informed consent and that any agreement may be considered in future criminal proceedings.<sup>142</sup>
112. However, it must be recognised that the State is under an obligation to conduct an effective, official investigation in respect of allegations that fall under the scope of torture, inhuman and degrading treatment.<sup>143</sup> In particular, there is an onus on the State to conduct an investigation of their own motion, once aware of the allegation, and not at the request of the victim.<sup>144</sup> The serious sexual offences that fall within this review have been considered under this heading by international treaty bodies and the ECt.HR.
113. For example, the ECt.HR has confirmed that the State obligation to take action, even in circumstances where a victim of domestic violence does not make or withdraws a complaint. The Court has reiterated, "once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim."<sup>145</sup> The ECt.HR has also found it was the duty of police, when aware of allegations, to, "investigate of their own motion the need for action in

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<sup>139</sup> Gillen Review, recommendation 219.

<sup>140</sup> Gillen Review, recommendation 220.

<sup>141</sup> Article 12(1), EU Directive 2012/29/EU.

<sup>142</sup> Article 12(1)(a)-(d), EU Directive 2012/29/EU.

<sup>143</sup> See paras 11-13 of this submission.

<sup>144</sup> *Jordan v the United Kingdom* (2001) ECHR 327, para 105.

<sup>145</sup> *Opuz v Turkey*, Application no. 33401/02 (9 June 2009) para 153.

order to prevent domestic violence, considering how vulnerable victims of domestic abuse usually are".<sup>146</sup>

114. The ECt.HR has further "underline[d] that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity."<sup>147</sup>

**115. The NIHRC would welcome further clarity about the nature of any restorative justice processes related to serious sexual offences that would operate outside the criminal justice system. The State is under an obligation to carry out a full investigation in relation to human rights abuses and violations, although the NIHRC recognises that there may be scope for restorative practice to complement the criminal justice process in order to support victims of crime.**

116. The review also proposes to recommend the repeal of section 5 of the Criminal Law Act (NI) 1967, save in cases where an individual with knowledge of a child or vulnerable person would be obliged to report it to the police in the absence of a reasonable excuse.<sup>148</sup>

117. Both the Istanbul and Lanzarote Conventions require that confidentiality rules should not constitute an obstacle to the reporting of serious acts of violence.<sup>149</sup> In respect of children, the Lanzarote Convention requires State Parties to, "take the necessary legislative or other measures to ensure that the confidentiality rules imposed by internal law on certain professionals called upon to work in contact with children do not constitute an obstacle to the possibility, for those professionals, of their reporting to the services responsible for child protection any situation where they have reasonable grounds for believing that a child is the victim of sexual exploitation or sexual abuse."<sup>150</sup>

**118. The NIHRC welcomes the partial repeal of section 5, in relation to adults. The NIHRC welcomes that the duty to report will still apply in respect of children and vulnerable adults, in line with the Lanzarote Convention.**

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<sup>146</sup> T.M. and C. M. v. The Republic of Moldova, Application no. 26608/11, 28 January 2014, para 46.

<sup>147</sup> Opuz v Turkey, Application no.33401/02, 9 June 2009, para 147, citing CEDAW Committee jurisprudence, Yildirim v. Austria (decision of 1 October 2007) and A.T. v. Hungary (decision of 26 January 2005).

<sup>148</sup> Gillen Review, recommendation 221.

<sup>149</sup> Article 28, Istanbul Convention; Article 12(1), Lanzarote Convention.

<sup>150</sup> Article 12(1), Lanzarote Convention.

## Resources

119. The final chapter of the review considers the resources that will be needed to implement the recommendations made in the report. No further individual recommendations are made in connection with resources; however, it is clear from the other recommendations made by Sir John Gillen that these may involve both short and long-term investment.<sup>151</sup>
120. The Istanbul Convention requires that State Parties “allocate appropriate financial and human resources for the adequate implementation of integrated policies, measures and programmes to prevent and combat all forms of violence”.<sup>152</sup>
121. The NIHRC recalls that the UN Declaration on the Elimination of Violence against Women states that States should “include in government budgets adequate resources related to the elimination of violence against women.”<sup>153</sup>
122. Following her 2014 visit to the UK, the UN special Rapporteur on violence against women recommended that the State should establish necessary safeguard to ensure that “authorities operate within a human rights framework, and in compliance with the international obligations of the United Kingdom, when addressing the issue of violence against women and girls, particularly when making commissioning decisions.”<sup>154</sup>
- 123. The NIHRC recommends that the Department provide sufficient resources in order to ensure that the rights of victims and witnesses, in line with international standards, are protected.**

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<sup>151</sup> Gillen Review, para 18.69.

<sup>152</sup> Article 8, Istanbul Convention.

<sup>153</sup> Article 4(h), UN Declaration on the Elimination of Violence against Women.

<sup>154</sup> UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, A/HRC/29/27/Add.2 (19 May 2015) para 107(3)(iii).