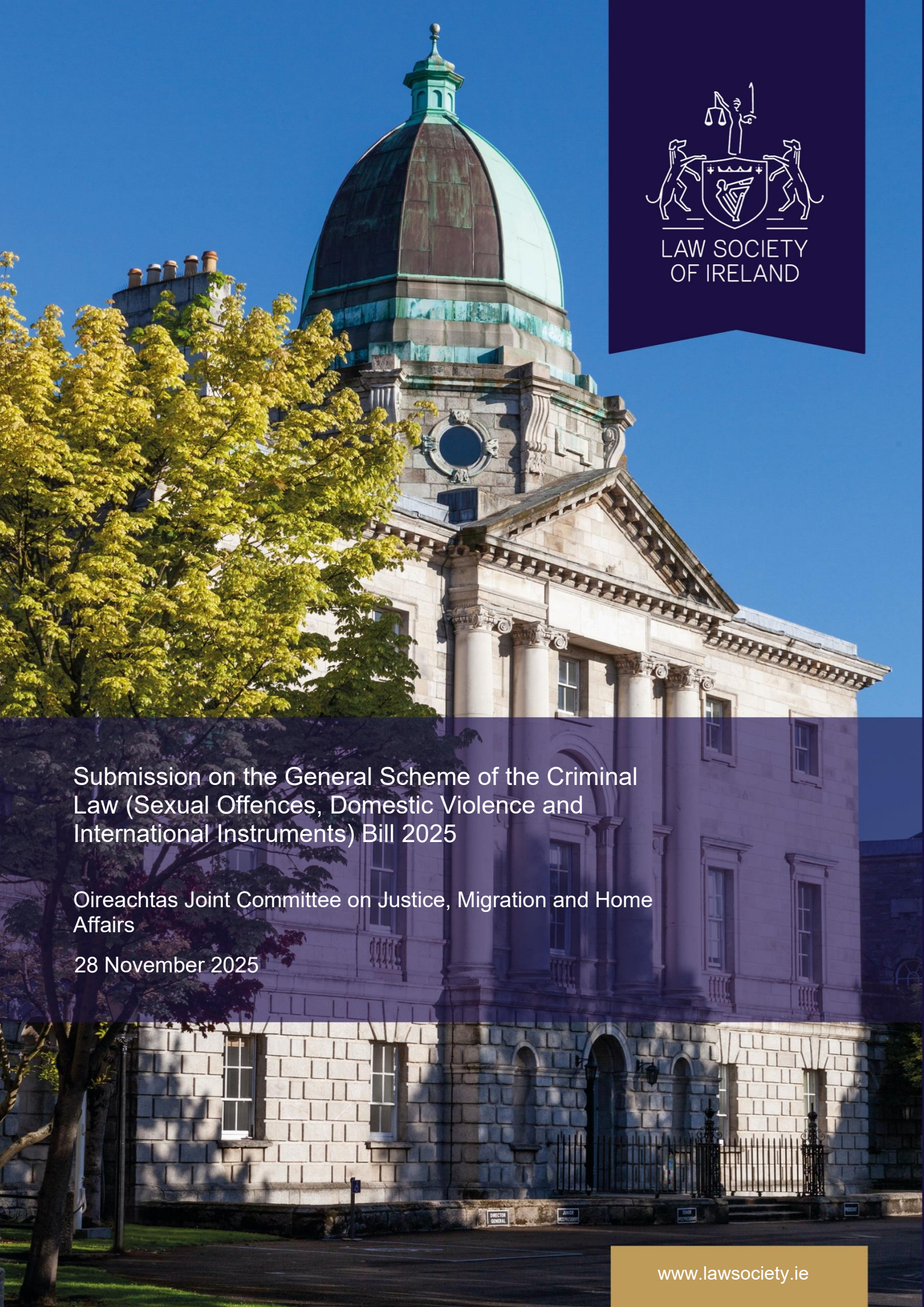


LAW SOCIETY OF IRELAND

Submission on the General Scheme of the Criminal Law (Sexual Offences, Domestic Violence and International Instruments) Bill 2025

Oireachtas Joint Committee on Justice, Migration and Home Affairs

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www.lawsociety.ie

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About the Law Society

The Law Society of Ireland (the **Law Society**) is the educational, representative and professional body of the solicitors' profession in Ireland.

The Law Society's main statutory functions in relation to the education, admission, enrolment, and discipline of the solicitors' profession are provided by the *Solicitors Acts 1954 to 2015*. These statutory functions are exercised by the Council of the Law Society or by the various committees, task forces and working groups to which the Council may delegate certain statutory functions. A separate organisation - the Legal Services Regulatory Authority - is responsible for regulating the provision of legal services by legal practitioners.

The Law Society delivers high-quality legal education and training and also places significant emphasis on civic engagement, supporting local community initiatives and driving diversity and inclusion. The Law Society is committed to participating in discussion and advocacy on the administration of justice and the effective implementation of public policy.

Introduction

This Submission focuses on specific provisions of the recently published General Scheme of the Criminal Law (Sexual Offences, Domestic Violence and International Instruments) Bill 2025 (the **General Scheme**).

The General Scheme introduces measures to:

(a) reform the law on sexual consent from a subjective "honest belief" mental element to an objective "reasonable belief" test (which will change the existing offences of both rape and sexual assault),
(b) establish a publicly accessible Domestic Violence Register of Judgments, operated by the Courts Service, which allows those convicted of domestic violence against a partner or former partner to be publicly named on the Register.
(c) introduce information sharing with school regarding children involved in domestic violence incident,
(d) further transpose elements of Directive (EU) 2024/1712 to strengthen Irish law on human trafficking,
(e) remove dual criminality in respect of certain offences including forced marriage, female genital mutilation, and rape, and
(f) replace all statutory and legal references to "child pornography" with "child sexual abuse material."

Although close scrutiny of the entire General Scheme is warranted, this Submission focuses on:

(i) the suggested reforms to the law on sexual consent,
(ii) the proposed Domestic Violence Register of Judgments, and
(iii) the information sharing with schools.

Head 3 – Amendment of the Criminal Law (Rape) Amendment Act 1990: Sexual (Indecent) Assault & Head 4 – Amendment of Criminal Law (Rape) Act 1981: Rape.

Head 3

Head 3 of the General Scheme presents an amendment to section 2 of the Criminal Law (Rape) (Amendment) Act 1990 (the **1990 Act**) which will place the offence of sexual assault on a statutory footing.

Section 2 of the 1990 Act re-labelled the offence of indecent assault to one of "sexual assault", although the constituent parts of the criminal offence of indecent assault are still contained in common law (i.e. assault with elements of indecency). The General Scheme aims to reform the mental element (or *mens rea*) of the crime of sexual assault to reflect reforms proposed in Head 4 of the General Scheme (described in more detail below).

Head 4

Head 4 of the General Scheme presents an amendment to section 2 of the Criminal Law (Rape) Act 1981 to reform the mental element of the rape offence. It intends to provide that an accused's belief in consent should be objectively, rather than subjectively, reasonable.

Under the General Scheme, section 2 of the Criminal Law (Rape) Act 1981 would be amended as follows:

> "(1) A man commits rape if—
> (a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
> (b) at that time he does not reasonably believe that she consents to the intercourse,
> and references to rape in this Act and any other enactment shall be construed accordingly.
>
> (2) If at a trial for a rape offence the jury has to consider whether a man reasonably believed that a woman was consenting to sexual intercourse, the jury shall, in its consideration, have regard to all the circumstances, including the steps (if any) taken by the man to ascertain whether the woman was consenting to the intercourse.
>
> (3) The amendment [of section 2 of the Act of 1981] effected by subsection (1) shall not apply in relation to a rape offence committed, or alleged to have been committed, before the coming into operation of this section and the said section 2 shall have effect as respects such a rape offence as if the amendment effected by subsection (1) had not been made."

The primary focus of this section will be the reforms to the *mens rea* of rape contained in Head 4.

Background

The General Scheme's suggested amendments to the *mens rea* of the rape offence are derived from a 2019 Law Reform Commission (**LRC**) *Report on Knowledge or Belief*

Concerning Consent in Rape Law (the **Report**)[1].This Report was produced on foot of a direct request from the Attorney General in April 2017 "*to examine and make recommendations on whether changes should be made to the element of knowledge or belief in the definition of rape in section 2 of the Criminal Law (Rape) Act 1981.*"[2]

The current legal framework

Section 2(1) of the Criminal Law (Rape) Act (the **1981 Act**) deals with the offence of rape. It includes (a) a physical element or *actus reus*: that a man has a sexual intercourse with a woman who does not consent, and (b) a mental element or *mens rea:* at the time of the sexual intercourse he knows that she does not consent or is reckless as to whether or not she is consenting.

Consent is defined at section 9 of the 1990 Act, as a free and voluntary agreement to sexual activity. The 1990 Act provides a non-exhaustive series of examples as to when a person cannot be considered as consenting to sexual intercourse.

The *mens rea* is addressed in section 2(2) of the 1981 Act which requires a jury to have regard to the "presence or absence of reasonable grounds" for a man's belief in consent where the issue of knowledge or belief in consent arises during the course of a rape trial. This test for the presence or absence of reasonable grounds is *primarily subjective* in nature, as it is the accused's own perception of consent that determines his criminal liability for the act.

In *The People (DPP) v C O'R*[3] the Supreme Court confirmed that an accused's honest belief in consent negates their guilt under the current framework, regardless of whether the accused's belief in consent is reasonable or unreasonable[4].

Honest belief or reasonable belief test?

The *honest belief* test determines an accused's innocence by whether or not the accused had an honest belief that the woman was consenting to sexual intercourse.

This test contrasts with the *reasonable belief* test which is a more objective form of the test that compares the accused's belief in consent with the belief of a hypothetical reasonable third party in the same scenario.

The proposed wording of Head 4 seems to indicate that the General Scheme adopts the *reasonable belief test.* However, the reference to the requirement for the jury to have regards to "all the circumstances", when considering whether could have reasonably believed that a woman was consenting to the intercourse, introduces an unwelcome degree of subjectivity.

[1] Law Reform Commission, *Knowledge or belief concerning consent in rape law*, 2019 (LRC 122-2019).
[2] Ibid1.
[3] [2016] IESC 64; [2016] 3 IR 322. See para. 51: "[T]*he model chosen in the Act of 1981, as amended, clearly adopts not what a reasonable man believed as to the presence of consent, but rather what the individual accused actually believed.*"
[4] LRC Report at p.33.

The Law Reform Commission's recommendations

After an extensive consultation with external stakeholders on this specific area of the law the LRC acknowledged strong criticism of the subjective nature of the test for honest belief[5].

In their report, the LRC recommended that the honest belief test should be reformed into a primarily objective test of reasonable belief[6]. The Law Society encourages the implementation of the recommendation on reasonable belief. The introduction of this recommendation into Irish law via the General Scheme would be a positive step towards making the justice system more inclusive towards, and accessible for, plaintiffs in rape trials. A reform of this nature will improve access to justice and will help prevent potential secondary victimisation.

It is clear that the definition of consent, contained in the 1990 Act and defined as free and voluntary, is incompatible with the current honest belief test and that a more objective test of reasonableness would be more appropriate.

Have regard to "all the circumstances"

Head 4 provides that:

> "…(2) If at a trial for a rape offence the jury has to consider whether a man reasonably believed that a woman was consenting to sexual intercourse, the jury shall, in its consideration, have regard to ***all the circumstances***, including the steps (if any) taken by the man to ascertain whether the woman was consenting to the intercourse."(emphasis added).

When considering the feasibility of the reasonable belief test in Irish law, the LRC Report also considered whether or not there should be an instruction in the legislation (similar to one contained in the Sexual Offences Act 2003 of England & Wales) requiring the jury to take into account "*all of the circumstances*" for the purpose of determining whether or not an accused's belief in consent was reasonable.

After careful consideration of the legislation adopted in other common law jurisdictions (England and Wales, and Scotland) the LRC concluded that introducing the requirement for the jury to consider all of the circumstances of the case "*could risk eroding the primarily objective standard being proposed by reintroducing a substantial subjective element.*"[7].

Specific characteristics

To temper the absolute objectivity of the reasonable belief test and to take into consideration the accused's specific characteristics such as their age or maturity, physical or mental abilities, or mental illness, the LRC recommended that a provision should be written into the legislation requiring the jury to have regard to *certain specific characteristics*, and only those, of an accused where these characteristics affect that person's capacity to perceive or understand cues of sexual consent. It noted that a reasonable person for the purpose of the reasonable belief test can set an excessively high standard[8].

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[5] LRC Report, pp. 48 - 52.
[6] Ibid., 52.
[7] Ibid., 68.
[8] LRC Report, see Chapter 3.

The LRC argued that including these circumstances would focus the jury's attention on the hypothetical reasonable person while also limiting their analysis to characteristics, such as disability, without the risk of eroding the objectivity of the reasonableness test.

Further considerations

While the Law Society acknowledges that implementing such test with a jury might call for delicate and detailed directions from the trial judge during the charge of the jury, we see the inclusion of specific characteristics to the frame of the reasonable belief test as appropriate and necessary. For example, a person aged as young as 15 years old may be charged with rape (and potentially be given a life sentence), would it be fair in these circumstances to apply the same test criteria to a child than it would to an adult in assessing whether they could have reasonably believed that the woman was consenting to the intercourse? We submit that in such circumstances the test applied should be whether a child of the same age would have reasonably believed that consent has been given.

The test proposed by the LRC seems to strike a balance between respecting the jury's role in assessing the facts while considering circumstances relevant to the reasonable belief test.

Retaining the current wording of Head 4 risks undermining the well-intentioned reforms advanced by successive governments and the LRC to improve the law on sexual offences in this jurisdiction.

Accordingly, and as per the original LRC recommendation, the Law Society suggests that the wording of Head 4 should be revised and consideration should be given to the introduction of a requirement for the jury to undertake a more targeted consideration of specific characteristics of the accused, when the issue of reasonable belief arises at trial and only where these characteristics affect the accused's ability to understand or perceive sexual consent.

In addition, the Law Society recommends revisiting the language used in the proposed new section 2(1)(b) of the 1981 Act to ensure that the test applied to assess the reasonableness of the accused is objective.

The current wording arguably results in a shift back to a subjective standard of proof:

> "(1) A man commits rape if—
> (a) (…)
> (b) at that time **he does not reasonably believe** that she consents to the intercourse, …" (emphasis added)

In contrast, section 39(1) of the Domestic Violence Act 2018 on coercive control adopts a wording establishing a clear objective test:

> "(1) A person commits an offence where he or she knowingly and persistently engages in behaviour that—
> (a) is controlling or coercive,
> (b) has a serious effect on a relevant person, and(c) **a reasonable person would consider likely to have a serious effect on a relevant person**, and
> … ." (emphasis added).

We propose that the new section 2(1)(b) of the 1981 Act, as provided for in Head 4, be worded to reflect the objectivity of the reasonable belief test as discussed above. To that effect, we

recommend the adoption of the following wording for section 2(1)(b): "*at that time he could not reasonably believe that she consents to the intercourse,…"*

Recommendations

In respect of Heads 3 and 4 of the General Scheme, the Law Society recommends:

- in respect of Head 4, removing the requirement that the jury should have regard to "all the circumstances" of the case when assessing if an accused's belief in consent is reasonable,

- introducing a requirement into Head 4 that the jury should only have regard to specific characteristics of the accused, such as a disability, but only where these specific characteristics affect an accused's ability to interpret and perceive sexual consent, and

- that the proposed new section 2(1)(b) of the 1981 Act be worded as follows:

  "*at that time he ~~does~~* ***could*** *not reasonably believe that she consents to the intercourse,(…)"* [the word 'does' is replaced with 'could']

Head 5 – Insertion of new Part 5 into the Domestic Violence Act 2018 – Domestic Violence Register.

Head 5 provides for the creation of a publicly available register of domestic violence judgments (the **Register**). It will insert a new section 57 into the Domestic Violence Act 2018 (the **2018 Act**).

Background

The Register created by the proposed new section 57(1) will include conviction judgments concerning one or more specified offences committed against a relevant person. For the purpose of the section, a relevant person is someone who was in a relationship with the accused. The offences concerned are indictable offences referenced at subsection (6). Convictions in respect of summary offences will not be reflected in the proposed Register, even though they constitute the bulk of domestic violence cases.

The Register will be maintained by the Court Service and will be hosted on their website and will be accessible to any member of the public. Head 5 does not provide for any restriction on the access to the Register.

The Law Society welcomes the Government's action on its commitments to improve the protection of people and prevention mechanisms in place to reduce domestic violence. However, greater care needs to be exercised in order to ensure that the proposed measures are proportionate and in-line with Ireland obligations towards the fundamental rights of individuals.

In our view, substantive amendments should be made to the General Scheme in order to provide for a safe, proportional and efficient register. We now outline our specific concerns.

Criteria for publication in the Register

Subsection (1) of Head 5 (which provides for a new section 57 of the 2018 Act) as drafted by the General Scheme leaves to the discretion of the judge, with the consent of the victim, the liberty to publish the judgment.

It is of concern that full discretion will be granted to the court in making the decision whether to publish a judgement in the Register. The only requirement seems to be the consent of the victim when they are able to express their view.

In our view the General Scheme should set out clear criteria for the judge to take into consideration in making their decision on publication. The failure to specify the criteria is likely to lead to inconsistencies in the approach adopted by the courts.

Additionally, it should be clarified whether the judge is bound by the consent of the victim to publish the decision. The current wording seems to indicate that it is possible for the judge to refuse to publish the judgment at its own discretion despite the consent of the victim to do so. However this is not clear from the current wording and should be clarified to avoid difficulties of interpretation in the future.

Information included in the Register

Head 5 mentions that:

> "…the Court may, at its discretion, and with the consent of the victim, publish a judgment outlining the sentence imposed on the convicted person to include **such information as the Court deems necessary**".

The proposed new section 57 is not explicit as regards what will be included in the judgment published in the Register. From the general wording of the section, it seems that different approaches to publication will be possible, for example:

- simple mention of the type of offence and name of the parties,
- name of the parties and particulars of the offence (similar to the wording of an indictment),
- name of the parties and a summary of facts.

In the current climate where solicitors practising in certain areas of law are targeted and threatened– in this jurisdiction or abroad, the Law Society is concerned that the publication of the name of the accused's legal team could lead to threats to the safety of individuals due to the association of the accused's actions with their legal representatives. More generally, the Law Society is concerned at the prospect of sharing the name and details of any member of the profession involved in a trial whether by representing an accused, prosecuting the case or assisting the victim.

The Law Society would strongly recommend the prohibition of publication of the identity and details of the legal representatives in the Register and the provision of clear guidelines, in the legislation, of the elements to include in the published judgment.

Proportionality of the inclusion in the Register.

The Register, as currently envisaged, will include any judgment deemed relevant by the court, irrespective of the sentence imposed or the previous convictions of the convicted person.

In addition, convicted persons will have the opportunity to apply to be erased from the Register. The victim will have the right to object to the application. This application can be made after 3 years of inscription in the Register.

As currently drafted, the proposed new section 57 raises concerns in relation to the proportionality of the measures adopted to achieve its aims. While the Law Society agrees with and welcomes the adoption of measures to protect persons in relationship against domestic violence, those measures ought not to be in breach of legal principles such as the proportionality, spent convictions, and the presumption of innocence. The creation of the Register places differing interests in the balance. Therefore, it is important to adopt a cautious and carefully considered approach.

Lack of restriction on access to the Register

It should be noted that there is currently no publicly available register of criminal convictions. Previous conviction records are kept by An Garda Síochána and the circumstances in which they can be accessed or shared is clearly defined. For example, they can be accessed when someone request garda vetting or when someone is sentenced in order to provide the judge with a list of the previous convictions.

The Sex Offender Act 2001 creates a register referencing persons convicted of a sexual offence. Their period of inscription on the register ranges from 5 years to an indefinite period, depending on the length of the sentence imposed.

The coexistence of the Sex Offenders Register and the Register proposed under the General Scheme could potentially lead to scenario where details relating to a convicted person could be included in the Sex Offenders Register for a period of 5 years, but remain indefinitely in the Domestic Violence Register if they are not in position to afford the costs associated with making an application for deletion from the Register.

Removal from the Register

The proposal that the inscription on the Register is not time bound or limited but is left to the consideration of the court after an application is brought by the convicted person, introduces a degree of disproportionality.

It is possible that convicted person may not be in a financial position to afford the legal representation to initiate this application on their behalf. Considering the complexity of the application, legal representation will invariably be necessary.

In circumstances where a convicted person cannot afford to make an application for removal from the Register, under the General Scheme as currently drafted, they will be recorded indefinitely in the Register. To some extent this could be construed as a form of punishment additional to the sentence that had been imposed by the court at the conclusion of the case.

In light of the above, the Law Society recommends that consideration be given to setting a predetermined period of inscription in the Register with the duration varying depending on the sentence and or the nature of the offence (similar of the criteria for inscription to the Sex Offender Register). In addition, the legal aid scheme should be extended to cover the making of an application for removal from the Register.

Impact on the judicial system

The General Scheme provides that the addition of a case to the Register will be made by the trial judge. It is not clear whether the inclusion will be made immediately after the sentencing or at a later stage.

The date of addition to the Register is a delicate matter. If the judgment is included in the Register before the expiration of the appeal period, it may create an issue later on. If the conviction is later quashed on appeal and the case sent for re-trial, there will be an increased risk that the jury's knowledge and opinion will be coloured by the publication of the first instance conviction in the Register. In an age where it is increasingly difficult to protect a jury from outside information sources (eg social media, press etc) it would be naïve to believe that a jury would not have had access to the court's decision on the initial conviction with all the details it might include (including potentially the facts of the case).

The Irish criminal trial system is built on the premise that the jury is not aware of anything concerning the accused except the facts and evidence that are presented at the trial.

In light of the above, the Law Society recommends that any publication in the Register be delayed until final determination of the case, which will be either the expiration of the time period for appeal without any application for appeal having been made, or following the final determination of the case.

Impact on the society

The proposed Register is being created to allow easy access to it by the relevant person to enhance their safety. The note under Head 5 of the General Scheme indicates that:

> "This will in turn assist people who are in or considering entering into a relationship with a person to ascertain whether they have a history of domestic violence convictions."

However, as noted by the Minister, the Register must not become a "vigilante's charter"[9]. It is therefore important to include safeguards within the General Scheme to avoid encouraging misuse of the information, public retribution or public unrest.

The introduction of an access restricted to current partner, person in a relationship with the convicted person or interested third party (such as family members) would mitigate this risk[10].

A different approach

The Law Society would encourage the Government to consider a different approach than a unrestricted publicly available register of domestic violence judgment as currently envisaged.

A review of our European neighbours and other common law jurisdictions revealed that, to our knowledge, no other jurisdiction has adopted a register similar to that now being proposed in the General Scheme.

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[9] Eoin Kelleher, "Register of domestic violence offenders will not be a 'vigilante's charter' insists Justice Minister", The Irish Independent,10 March 2025

[10] The below reference to the UK Domestic Violence Disclosure Scheme.

The United Kingdom is the only jurisdiction where we have identified a mechanism designed to meet the same objectives and it merits closer examination.

The "Domestic Violence Disclosure Scheme (the **DVDS**)" (also known as "Clare's Law") is grounded on the common law power of the police and partially placed on a statutory footing with section 77 of the Domestic Abuse Act 2021. The UK system consists of two elements, the 'Right to Ask' and the 'Right to Know'. The Right to Ask allows an individual or relevant third party (for example a family member) to ask the police to check whether a current or ex-partner has a violent or abusive past. If records show that an individual may be at risk of domestic abuse from a partner or ex-partner, the police will consider disclosing the information. On the other hand, the Right to Know enables the police to make a disclosure on their own initiative if they receive information about the violent or abusive behaviour of a person that may impact on the safety of that person's current or ex-partner. This could be information arising from a criminal investigation, through statutory or third sector agency involvement, or from another source of police intelligence[11].

Recommendations

The Law Society is conscious of the necessity to increase the protection against domestic violence. However, in our view, the current framework creating the Register does not provide necessary safeguards. The Law Society recommends the consideration of a different approach to this issue to take into account competing interests such as protection against domestic violence, protection of victims, societal unrest, judicial certainty, and proportionality.

If the proposed model of Register was to be retained in the General Scheme, the Law Society would recommend the amendment of Head 5 to:

- Clarify the criteria that should be taken into consideration by the court when deciding on the publication of a judgment.
- Clarify the elements to be included in the judgment to be published.
- Prohibit the inclusion of details of the legal team representing the parties involved.
- Extend the legal aid scheme to include the provision of legal advice to the victim in relation to giving their consent to publication.
- Delay the inclusion of the case in the Register until expiration of the appeal period or the final determination of the case.
- Restrict the access to the Register to interested parties (ex-partner or individual in a relationship with the convicted person or an interested third party).
- Review the mechanism for removing a judgment from the Register.
- Extend the legal aid scheme to include the making of an application for removal from the Register.

[11] Domestic Violence Disclosure Scheme factsheet published by UK Government.

Head 6 - Insertion of new section 58 in the Domestic Violence Act 2018 – Information sharing with school

Head 6 of the General Scheme will allow members of An Garda Síochána to share with a school that a "*domestic violence incident may have occurred in the child's household"* and the name of the child concerned for the purpose of protecting the rights and welfare of children.

The lack of a definition of a 'domestic violence incident' within the General Scheme and precisely how this would be interpreted, is of concern and would lead to difficulties in practice in the application of the legislation.

For instance, is it intended that the term 'domestic violence incident' be confined to the following, or is it broader in scope:

- the fact that an order under the Domestic Violence Act 2018 has been made by a court,
- an offence under the 2018 Act or other such Acts has been alleged or committed

Conclusion

The Law Society would like to thank the Joint Committee for their invitation to provide our comments on this General Scheme.

For further information on any aspect of this submission, please contact the Policy Department of the Law Society of Ireland at: PolicyTeam@LawSociety.ie



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