



## Trauma and the Construction of Suffering in Irish Historical Child Sexual Abuse Prosecutions

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### Abstract

Adopting the special issue's broad definition of criminal law reform, this article explores some of the ways the Irish criminal process is grappling with the demands for justice of adults who report childhood sexual abuse. In particular, it shows how the cultural notion of trauma is bound up with the construction of victims' suffering. In historical child sexual abuse prosecutions, trauma is shown to be an effect of the abuse on the victim/survivor; a site of mediation of the relationship between the state and victims; and a site of mediation of the relationship between the state and its past. The article first explores these insights in relation to the law's approach to questions of alleged procedural unfairness to defendants flowing from the passage of time. Trauma is exposed as both legitimating some forms of suffering, and disqualifying others. The article then employs the trope of trauma to expose the problems with current approaches to cross-examination of vulnerable victims and recent reforms of the rules on disclosure of victims' counselling records. Finally, the article explores the possibilities of trauma discourse in thinking anew about how to address the suffering of victims of historical child sexual abuse.

### Keywords

Victims; historical child sexual abuse; Ireland; trauma; disclosure; trial process.

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## Introduction

How to respond to the legitimate demands for justice presented by victims of historical sexual abuse of children is a major social issue of our time. Societies in Europe, Australia and North America have attempted to meet these demands in a variety of ways, including official inquiries; apologies by political leaders and representatives of institutions; monetary reparation to victims; and reforms to civil statutes of limitations to allow victims to sue for redress. In many countries, specialised criminal investigations into historical child sexual abuse have been developed and changes made to legal procedures to facilitate prosecutions.

In parallel with these developments, the past twenty years have seen a surge in political and scholarly interest in the needs and experiences of victims in the criminal process (Doak 2008; Kilcommins and Leane 2010; Ministry of Justice 2012). Increasingly, attention is being paid to the potential of a trauma-informed perspective on criminal justice to improve our understanding of victims' needs and how best to ensure their full participation in the criminal process (see, for example, Ellison and Munro 2016; Gavey and Schmidt 2011; Hill 2003; Moulding 2015). Trauma is a powerful cultural concept that has moved beyond the confines of the psychological domain and is now part of everyday language. Its power lies in its potential to broach differences of experience and to allow insights and connections, political and analytical, to be drawn between groups, such as victims and actors in the criminal justice system and the public. This article examines the criminal process's treatment of historical child sexual abuse through a trauma lens. In keeping with current conceptions of trauma as relating to the authenticity of suffering, it explores how trauma may help us understand our relationship to victimhood in historical abuse cases. Taking Ireland as a case study, it shows how trauma in this context can be understood in three ways: as an effect of the abuse on the victim/survivor; as a site of mediation of the relationship between the state and victims of historical child sexual abuse; and third, as a site of mediation of the relationship between the state and its past.

## Ireland's 'discovery' of historical child sexual abuse

Ireland was one of the first countries in the global north to be forced to reckon with its history of pervasive sexual violence against children. A number of factors contributed to a greater willingness at a societal level to discuss the problem of sexual violence against children in the present and in the past. First, since the late 1970s, feminist activists had been drawing attention to the problem of violence against women and children; the first Rape Crisis Centre opened in 1979 in Dublin, followed by a Sexual Violence Centre in Cork in 1983. Feminist activists and counsellors made public statements on the extent and nature of child abuse and campaigned for legal and social change (see McKay 2005). Second, a series of high profile legal proceedings involving the Irish State focussed public attention on the problem of child abuse. The so-called 'X' case involved a 14-year-old girl from a middle-class area of Dublin who had been raped by a neighbour and subsequently became pregnant. The case became a focal point for anxieties about abortion when the Attorney General sought (and failed to get) a High Court order to prevent the girl travelling to England to obtain a termination (*Attorney General v X* [1992] IESC 1). The case publicly demonstrated that sexual violence against children could occur in 'ordinary' communities (Buckley and Nolan 2013). Another high-profile incident that precipitated Ireland's 'discovery' of historical abuse was the case of Brendan Smyth. Smyth was a Catholic priest who pleaded guilty to 74 charges of indecent and sexual assault, involving the sexual abuse of 20 young people over a period of 36 years.<sup>1</sup> The case became notorious when it emerged that the Attorney General delayed processing requests for Smyth's extradition to Northern Ireland where he faced more abuse charges. The Taoiseach (Prime Minister), Albert Reynolds, TD<sup>2</sup> was forced to resign as a result of the political fallout. In addition to these two dramatic cases, a number of reports of investigations in the 1990s into abuse within families and in Church- and State-run institutions received significant media and public scrutiny (Department of Health and Children 1996; Moore 1995; South Eastern Health Board 1993;). Most important, however, was the courage of individual victim-survivors (such as Marie Collins, Colm O'Gorman, Christine Buckley and

Andrew Madden<sup>3</sup>) in speaking publicly about their experiences, coupled with investigative journalists (for example, Lentin 1996; Macdonald 2002; Raftery 1999; Raftery and O'Sullivan 1999) highlighting victims' stories. These exposures at the level of public discourse led to a shift in attitudes and a growing recognition that child sexual abuse was a deeply rooted societal problem that had been happening for years in Ireland.

The heightened public awareness around child sexual abuse eventually resulted in an apology in 1999 by the Taoiseach Bertie Ahern, TD to victims of sexual and physical abuse in institutions. Other legal and political responses followed, including: the extension of limitation periods for civil claims of abuse (see Gallen 2017); changes to criminal law and procedure; improved procedures for police investigations; the establishment of a redress board; a new statutory basis for child protection; numerous non-statutory reviews of child safeguarding practices by the Catholic Church (for example, see National Board for Safeguarding Children in the Catholic Church in Ireland Reviews and Overview Reports available at <https://www.safeguarding.ie/publications>); and the establishment of a number of statutory inquiries and investigations. The most high-profile inquiry was the Commission to Inquire into Child Abuse, chaired by Mr Justice Seán Ryan, (the 'Ryan Commission') which found that child abuse was endemic in industrial and reformatory schools (Commission to Inquire into Child Abuse 2009). Inquiries chaired by Judge Yvonne Murphy into abuse in various Archdioceses made similarly shocking findings (Commission of Investigation 2009, 2010).

Another consequence of the increased public discussion of child abuse was that unprecedented numbers of adults reported to the Gardaí (police) that they had been abused as children decades earlier (Ring 2012, 2013). These trials continue to feature regularly in the work of the courts and are often reported in the press (see, for example, Heylin 2016; Keena 2016). Somewhat surprisingly, given the volume of these trials and their importance to Irish society's understanding of the nature and dynamics of victimisation of children, little public and scholarly attention has been paid to the treatment of victims of historical child sexual abuse by the criminal justice system.<sup>4</sup> The remainder of this article explores how the trope of trauma may reveal the various dynamics at play in the Irish criminal process's treatment of historical sexual abuse, and what this means for victims, and for society's responsibility to remember its past.

## Trauma

Etymologically rooted in the Greek for 'wound', the original use of the term 'trauma' derives from medicine. It was later borrowed by psychoanalysis and psychiatry to designate a blow to the self and to the tissues of the mind, a shock that creates a psychological split or rupture, an emotional injury (Felman 2002: 171). In the late nineteenth century, sufferers of 'trauma neurosis' were viewed with extreme suspicion (Fassin and Rechtman 2009: 21-22). Nowadays, however, the term is no longer limited to the psychiatric domain, but is embedded in everyday usage. Indeed, in their anthropological study of the concept, Fassin and Rechtman argue that the person suffering from trauma has gone from being seen as inherently suspicious to being cast as the embodiment of our common humanity (Fassin and Rechtman 2009: 23).

The roots of trauma as it is currently used lie in the desire to understand and authenticate victims' experiences. In the late nineteenth century Sigmund Freud and Josef Breuer developed the idea that neuroses (phobias, hysterical paralysis and pains, some forms of paranoia, and so on) originated in deeply traumatic experiences which had occurred in the patient's past but which were later forgotten (Freud and Breuer 2004). Although Freud subsequently abandoned this theory, the idea of trauma was resurrected by veterans of the Vietnam War and by feminist psychologists as a way of connecting present suffering to past violence. In this way, activists could make claims for justice on the criminal process and on the healthcare and welfare services. Furthermore, feminists such as Judith Herman used trauma to effectively resist the dominant view of sexual abuse as unusual (Herman 1992). The culmination of feminists' efforts in this area

was the inclusion in 1980 of Rape Trauma Syndrome as a subcategory of Post-Traumatic Stress Disorder (PTSD) in the American Psychiatric Association's Diagnostic and Statistical Manual (DSM), where it remains.

### **PTSD and Rape Trauma Syndrome (RTS) in the DSM**

The current version of the DSM specifies that, for PTSD to be diagnosed, there needs to be an exposure that involves actual/threatened death, serious injury, or sexual violence (American Psychiatric Association 2013). This must have happened in any of the following ways with respect to the traumatic event: directly experiencing it; personally witnessing it; learning about it as it applies to a close family member/friend; or experiencing repeated or extreme exposure to its aversive details. Additionally, an individual must have experienced a certain number of symptoms within four symptom clusters: re-experiencing; avoidance; negative alterations in cognition and mood; and hyperarousal.

The International Classification of Diseases (ICD) (Reed et al. 2016; World Health Organization 2017) constitutes another classificatory system. The eleventh revision of the ICD (ICD-11) is underway at the time of writing; this update will be using a simpler version of PTSD symptoms, while adding Complex PTSD (CPTSD). Under ICD-11, classification of PTSD is to be composed of three criteria: re-experiencing, avoidance, and heightened sense of threat/arousal. Under the proposed descriptions, for a diagnosis of PTSD, at least one symptom of each criterion must have been present for a period of several weeks after exposure to an 'extremely threatening or horrific event or series of events' (which includes sexual violence) and must cause significant impairment in personal, family, social, educational, occupational, or other important areas of functioning (First et al. 2015).

One of the key elements of both the psychological and cultural conceptions of trauma is the passage of time; the violent event is said to cause such a rupture in the psyche of the individual that time stands still. In the model of RTS, the victim is described as either cut off from her past self by the event or as stuck in the time of the event, reliving the distress through flashbacks or episodes of anxiety. RTS also explains that many victims of sexual violence will not discuss the rape with others for many years, because of feelings of shame, self-blame, fear of stigma, and a fear of not being believed. Expert evidence on RTS has been used by the prosecution, particularly in US courts, to explain some victims' seemingly 'counter-intuitive' behaviours, such as: failure to immediately report; lying to the police; refusing to name the perpetrator; exhibiting emotional 'flatness'; and returning to the scene of the attack.

As a diagnostic category, RTS remains extremely controversial (O'Donohue et al. 2014). However, the notion of trauma as a cultural concept infuses discussions of victimhood and justice. Fassin and Rechtman note that, while trauma has two distinct meanings—psychiatric and cultural—'often the discourse shifts from one meaning to another within the same passage, without particularly marking the distinction—the idea of trauma is thus becoming established as a commonplace of the contemporary world, a shared truth' (Fassin and Rechtman 2009: 2). As the next section shows, trauma's political power has been harnessed by the criminal justice system to bring once-marginalised victims of historical child sexual abuse within its jurisdiction.

### **Trauma and time in historical abuse cases**

The frame of trauma transforms the complainant of historic child sexual abuse from a liminal figure, into a member of a defined category of victims. Trauma, in tandem with the feminist insight regarding the impossibility of consent in adult-child sexual behaviour, allows the criminal process to hear the victim's story in a way that would otherwise not be possible under traditional legal rules that view lengthy delay in reporting as fatal to the prosecution (Ring 2009). Trauma's political function is most obvious in the United States, where it has been instrumental in the public and legislative debates surrounding extensions to and abolition of criminal statutes of limitations

for child sexual abuse at federal and state levels. Such statutes are intended to balance the right of the defendant to a fair trial against the public interest in having such crimes prosecuted. The cut-off period beyond which a prosecution is not allowed is intended to reflect a judgement that it would not be in the public interest to pursue a prosecution given the length of time that has passed. However, when the victim eventually fully realises the significance and extent of her psychological injuries caused by the abuse, the ordinary time limitation for the prosecution may have expired. This 'delayed discovery' may be due to emotional and psychological trauma. Thus, trauma has been used as justification for allowing statutes of limitations to be 'tolled' or paused until the victim has reached a certain age (for example, 28 years in Alabama) or to eliminate the application of the limitation period altogether for certain abuse offences (Leibowitz 2003). More controversially, trauma has also been used to explain the phenomenon of so-called 'recovered' memories (Ring 2012).

Although statutes of limitations do not apply to prosecutions for serious crimes in Ireland, the courts traditionally did not hear cases involving significant time lapses. The courts took the view that lengthy delay meant that the matter was beyond the reach of justice and any trial would be unfair to the defendant. If the courts had continued to adopt this legal framework, no historical sexual abuse prosecution would ever have been heard by a jury. However, in the late 1990s, the Irish High Court and Supreme Court developed a more flexible approach to issues of due process and fair trial rights in this context. Courts hearing defence applications to halt the trial on the grounds of unfairness would inquire into the reasons for the delayed reporting. If the delay could be attributed to the defendant's actions in (allegedly) abusing the victim, the trial would normally be permitted to take place (Ring 2009). A core feature of the inquiry was the evidence of an expert psychologist who had examined the victim and who could provide a report and testimony on whether the delay in reporting was 'reasonable'. Reasonable delay in this context was that which was attributable to a relationship of dominion between the defendant and the victim. In the landmark Supreme Court decision that set out the importance of dominion in historical abuse cases, Denham J quoted from the psychologist's affidavit, noting that the shame and guilt felt by the victim was a classical reaction of abuse victims, and stated that, as 'a direct result of this psychological reaction to the abuse she was unable to report the matter to an external agency' (*B v DPP* [1997] 3 IR 140: 197).

Where delay was found to be 'reasonable', the courts would normally refuse the defendant's application to halt the trial. Therefore, 'dominion/trauma' can be seen as facilitating victims in circumventing law's traditional suspicion of them, and providing the courts with a mechanism to carve out an exception to common law authority and allow the trial to proceed. To put it another way, trauma allowed the Irish courts to hear matters that might otherwise have remained buried in the past.

Dominion was thus a juridical version of trauma created specifically for and in the context of historical child sexual abuse cases. However, it was not unequivocally positive for victims. Indeed, the choice of the word 'dominion' as the name for this new kind of trauma is important as a signifier of law's approach to victims' suffering. Its roots lie in the Latin word for property, 'dominium'. It has various meanings, connected to sovereignty and ownership including: the power or right of governing and controlling; sovereign authority; lordship, sovereignty; rule, sway; control, influence; ownership, property; right of possession, domination (OED Online 2015). The use of a word bound up with notions of sovereignty and property in relation to the experiences of people subjected to sexual abuse draws on the notorious tradition of law treating sexual violence as a property question rather than one of bodily integrity (Brownmiller 1975). Indeed, from the case law, it is clear that dominion invoked a territorial imagination in which the subjectivity of sexual abuse victims was secondary to that of the abuser. While victims were constructed as passive and dominated, the abuser was assigned sovereignty/agency and centrality; his (assumed) actions were accorded primary significance in the court's analysis.

Furthermore, within the dominion paradigm, the victim was interpolated into a totalised identity of the traumatised child, paralysed for decades in emotional and agentic terms by the effects of the abuse. This denied the reality of victims who testified that they had indeed tried to report the abuse at the time, thus silencing stories of complicity on the part of members of society (Ring 2017). It also meant that victims who were not traumatised/*dominated enough*—people who had gone on after the abuse to lead happy lives, for example, or who had kept the abuse secret because of fear of it ruining their careers—were deemed inauthentic victims; thus, the delay was not excusable and the trial would be halted (Ring 2017). Therefore, trauma in the guise of dominion mediated the relationship between the Irish State and victims of abuse; the decision on whether to allow the trial to proceed was contingent on how traumatised the victim was. Furthermore, by silencing broader stories of societal toleration and possible complicity in abuse, trauma/dominion prevented a broader reckoning by the Irish courts and the State with the past.

Since 2006, the legal test applied to applications to halt the trial for delay has been modified; the courts no longer inquire into the reasons for the delayed report. Instead, the focus is on the defendant's claim that he<sup>5</sup> cannot obtain a fair trial due to the evidential difficulties caused by the passage of time (Ring 2009). However, despite this welcome change, historical child sexual abuse victims are still very reluctant to engage with the criminal process. Victims' rights organisations point to consistently low rates of reporting to the police. The reasons for this low reporting rate may be related to the credibility contests at the heart of historical abuse trials. One in Four, an organisation that works with survivors of child sexual abuse and provides support for those who engage with the criminal process, states that only 15 per cent of their clients report the crime to the Gardaí. Every one of their clients who has taken part in a criminal trial has found the experience humiliating and re-traumatising (One in Four 2015: 16).

The next section examines some ways in which trauma mediates how trial courts, and by extension, the state and the community, hear the experience of victims of historical child sexual abuse.

### **Trauma and constructions of victims' credibility in the trial**

Adults who have been subject to sexual violence as children may have suffered from, or may be still suffering from, a form of post-traumatic stress disorder. This may lead them to give inconsistent accounts of the abuse, to be hesitant witnesses and to become silent on the stand. In cross-examination, defence counsel may seek to exploit these apparent indicators of untruthfulness by connecting them to myths about historical child sexual abuse victims, such as that the delay in reporting means they are so damaged either by the abuse or some other incident(s) that they are not worthy of belief. This is in direct contradiction of the fact that delay in reporting sexual abuse is well established and may be understood as 'normal' in these cases (Cossins 2010).

For victims of historical child sexual abuse, the adversarial trial process can be a particularly challenging experience. As Judith Herman puts it, 'if one set out by design to devise a system for provoking intrusive post-trauma symptoms, one could not do better than a court of law' (Herman 1992: 72). Concerns arise about how recounting the detail of a traumatic event such as past child sexual abuse goes against avoidance symptoms and is likely to cause an intense negative emotional reaction for victims experiencing PTSD. Ellison and Munro point to the possibility of flashbacks to the event while traumatised victims are giving evidence and the possibility of disassociation that may make concentration and communication more difficult, as well as feelings of shame or guilt which may render the person especially sensitive to negative insinuations made during cross-examination (Ellison and Munro 2016: 8).

In England and Wales, the Court of Appeal has encouraged judges to take a more active role in protecting vulnerable witnesses from improper or unduly distressing cross-examination

(Henderson 2016) and in providing for 'ground rule' hearings (*R v Lubemba* [2014] EWCA 2064). These hearings may involve matters relating to the general care of the witness, such as the length of the questioning and frequency of breaks and the nature of the questions to be asked. Similar guidance from the Irish Court of Appeal could greatly mitigate the potential effects of trauma on victims giving evidence in historical child abuse trials.

Furthermore, the obligation on the state to properly regulate 'robust' cross-examination techniques is particularly keen given the recent coming into effect of the EU Victims' Directive.<sup>6</sup> Article 18 of the Directive provides that states shall ensure that measures are available to protect victims 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. The Directive also requires states to assess the needs of victims and consider whether their needs would be better protected by special measures in criminal proceedings due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.<sup>7</sup> Special measures include avoiding unnecessary questioning concerning the victim's private life not related to the criminal offence.<sup>8</sup> The requirements of the Directive have particular significance in relation to the disclosure of historical abuse victims' counselling records, which is examined next.

### **Credibility and disclosure of therapeutic records**

One of the primary ways in which the victim's credibility may come under scrutiny is when defence counsel seeks to undermine the victim's credibility through the use of their counselling records. Counselling records may often be reviewed by the prosecution because its investigation has uncovered the existence of such information. If the defence is allowed to access these records, it may seek to exploit differences between the accounts of abuse recounted in counselling and the account given in the statement or at trial. Defence access to therapeutic records raises fundamental questions about the interaction of the right to a fair trial and the victim's right to privacy which is protected by Article 40.3 of the *Irish Constitution*, by Article 8 of the European Convention on Human Rights and by the Victims' Directive.

Disclosure may be important in order to protect the defendant's right to the presumption of innocence and the constitutional right to a trial in due course of law.<sup>9</sup> This argument is illustrated by the notorious case of *Wall* in which a former nun was convicted of raping and sexually assaulting a 12-year-old girl some six years earlier.<sup>10</sup> Ms Wall received a life sentence, the first sentence of its kind for rape (O'Sullivan 2008). She was subsequently granted a miscarriage of justice certificate and settled a case against the Irish State (Carolan 2016). This was based on a finding of prejudice arising from the introduction into evidence, without prior notification to the defence, of the complainant's flashbacks and recovered memories, which was not supported by any scientific evidence, and the fact that the prosecution had not disclosed the complainant's psychiatric history to the defence.<sup>11</sup> Thus, in historical child abuse cases, which are often devoid of physical evidence and may have only a limited number of witnesses, counselling records present a rare opportunity for the defence to challenge the complainant/victim's credibility by exploring how accounts emerged and in examining potential inconsistencies in accounts of abuse.

However, evidence of past inconsistent statements made during therapy may not necessarily be indicative of unreliability or untruthfulness.<sup>12</sup> Descriptions of abuse may change over time as victims reinterpret their experience in light of new experiences and new insights into the harm they suffered (Scheppelle 1992). In addition, the revisions of stories are often preceded by silences, delays and hesitations. As has been explored earlier, victims of sexual abuse may seek to blame themselves, and express feelings of guilt and shame (Burgess and Holstrom 1974; Kletter et al. 2009). These feelings of blame relate to the inner (perhaps traumatised) world of the victim of sexual abuse and have no relation to the factual external reality of what has occurred (Temkin 2002: 130). Furthermore, there is a fundamental gap between the aims of psychotherapy and

those of the criminal process. While the criminal process is concerned with communicating an accurate and fair message to the defendant, the victim and the community, the focus of counselling is on the client's state of mind, feelings and distress. It is not on producing an accurate account of the facts of what happened. The notes (which are not seen or checked by the client) contain the counsellor's perceptions of the victim's account(s) filtered through a therapeutic lens (Bollas and Sundelson 1995). Furthermore, the setting in which the victim/patient makes statements is a crucial part of the difficult work of interpreting their meaning. Although the meaning of what is said may seem obvious to a non-expert, outside of that setting, it is almost impossible to understand (Hayman 2002).<sup>13</sup> Disclosure of those statements is therefore likely to produce evidence that is not only unreliable but also likely to be prejudicial, inflammatory, distracting or misleading. In short, the traumatic effects of abuse on the victim and the attendant need for counselling should not be used against him/her.

In this context, the role of rape myths cannot be overestimated. Defence arguments for disclosure may be grounded in the idea that people who have attended counselling or psychiatric treatment are witnesses of weakened or dubious credibility (Kelly et al. 2005). This argument appeals to the distinction between the rational liberal legal subject and the irrational, traumatised, raped woman (Gotell 2002: 134). It also reflects medical and psychoanalytic myths about women being prone to hysterical delusions (Bronitt and McSherry 1997: 262). Furthermore, public ignorance of mental illness may exacerbate the prejudicial impact of records disclosure; jurors may overestimate the significance of counselling records; or they may incorrectly interpret a psychological condition such as depression as indicative of weakened credibility (Ellison 2009; Raitt 2011).<sup>14</sup> Defence arguments that a failure to mention the abuse during counselling or a failure to describe the abuse in detail is indicative of dubious credibility may be rooted in discredited notions that 'real' rape victims complain contemporaneously ('raise a hue and cry') and do not change their story over time. In short, therefore, the probative value of the cross-examiner's technique of drawing out inconsistencies between the statements made in counselling and the testimony at trial is not automatically to be assumed.

The Irish parliament (the Oireachtas) has recently passed an Act that regulates the disclosure of counselling records. This is a positive move towards greater recognition of the potentially re-traumatising effect of disclosure of counselling records.<sup>15</sup> In deciding whether to disclose a record to the defence, judges are required to take into account factors such as the expectation of privacy with respect to the record; the potential prejudice to the right to privacy of any person to whom the record relates; and the extent to which the record is necessary for the accused to defend the charges against him.<sup>16</sup> If the trial judge decides to order disclosure, s/he may impose certain conditions, such as that the record be viewed at the offices of the court; or that a part of the content of the record be redacted; or that no copies of the record be made.<sup>17</sup> However, the Act has a number of significant flaws. It does not expressly state the risk of re-traumatisation and distress that can be caused by the disclosure of therapeutic records to the defence. Instead, the court shall take into account the reasonable expectation of privacy in the record and the potential prejudice to the victim's right to privacy.<sup>18</sup> The failure to explicitly delineate the psychological harm that may flow from disclosure of counselling records leaves victims at risk of insufficient weight being given to the need for non-disclosure, or disclosure of redacted records. Furthermore, the Act does not prevent the accused person personally seeing the victim's records, something that could seriously exacerbate victim's stress in the run-up to a trial. Most significantly, none of the protections of the Act applies if the victim waives his/her right to non-disclosure.<sup>19</sup> This means that victims will remain the target of pressure by State agents (including the police during the course of an investigation) and others to waive their protections and simply consent to disclosure (see Rape Crisis Network Ireland 2015b). This is especially worrying given that the Act does not require the State to provide the victim with information or representation regarding a waiver. Therefore, despite the important reforms contained in the 2017 Act, it still leaves victims in historical abuse cases, and their therapists and advocates, including rape crisis centres, in a position of uncertainty when it comes to therapeutic records. This inadequate protection risks



other victims postponing their engagement with therapy or counselling until after the trial process has concluded, which may delay recovery from trauma by years.

The insights offered by a trauma-informed critique of the rules of evidence and procedure in historical child sexual abuse trials point to an urgent need to develop better credibility evaluations, not only to ensure accurate fact finding but also to bolster the trial's role of providing community recognition of victims' suffering. We need to reimagine the trial of historical child sexual abuse to allow victims 'both the status of personhood and the chance to approach *the court as an audience capable of acknowledging their trauma* [emphasis added]—a process which is arguably crucial to surviving the trauma and among the most important things which a public rape trial should achieve' (Lacey 1998: 116). There is also a need to think more carefully about the potential benefits and pitfalls of integrating restorative justice principles into the criminal process as a way of minimising the traumatic impacts of the process on victims.<sup>20</sup>

### **Broader questions: Traumatic presents**

The need to minimise the trauma of the trial must be tempered with an acknowledgement that it is impossible to ever fully reconcile the need for victims to tell their stories on their own terms with the requirements of the criminal trial. This may prompt a turning towards other ways of acknowledging victims' trauma and, in doing so, developing new forms of truth-telling. This may involve exploring the literature in psychology (see, for example, Caruth 2016; Haaken and Reavey 2009) and in cultural studies (for example, Pine 2010) that grapples with the possibility of creating new spaces for hearing and debating narratives about the past and the commitment to developing institutional audiences for this purpose. These range from Truth and Reconciliation Commissions, to psychotherapists and historians who reject positivist approaches (Whitty and Murphy 2000: 160). For example, it may be possible for both 'pure' and legally-shaped victims' narratives to function alongside each other. As Almog notes, this will involve adjusting social expectations:

The importance and societal relevance of other narrative platforms [besides law] should be recognised. In theoretical terms, the mutual flow of the two channels ... brings to mind the paradigm of literature alongside law. This paradigm ... acknowledges the inability to reach full settlement and harmony between different needs that leads to different stories, and thus accepts the *possible validity of several contradicting stories* [emphasis added].<sup>21</sup> (Almog 2008: 300)

Therefore, it may be possible to begin thinking about parallel systems of truth-telling to run alongside the criminal process. Such innovations are being explored in England and Wales by the Independent Inquiry into Child Sexual Abuse (the Jay Inquiry) through the mechanism of the Truth Project, in which victims share their experiences with the Inquiry in a private session. Their accounts are not tested, challenged or contradicted. The information supplied is anonymised and will be considered by the Chair and Panel members when reaching their conclusions and making recommendations for the future. According to the Jay Inquiry website (<https://www.iicsa.org.uk/how-we-work>), victims and survivors will be given an opportunity to write a message to be published together with the Inquiry's annual reports. Another such innovation is the possibility for victims who provide evidence to the Australian Royal Commission into Institutional Responses to Child Sexual Abuse (2017) to write a message to the Australian community reflecting on their experience and hopes for creating a safe environment for children.

Thinking about new ways of hearing victims of historical child sexual abuse is also important for addressing the worrying indications that Irish society is still unwilling to engage with their stories. One dimension of this is ordinary members of society's complicity in the silencing of children in the past. Deference to the Catholic Church by the police and by parents and teachers was identified as contributing to the silencing of children (for example, Commission of Inquiry

into Child Abuse 2009; Commission of Investigation 2009: 1.103, 24.50). It is also a feature of victim testimony in criminal prosecutions (Ring 2017). Irish people have not ignored these shocking findings: 71 per cent of respondents to a poll conducted for Amnesty International stated that society bears 'some responsibility' for what has been revealed in the various reports of statutory inquiries (Holohan 2011: 420).

In this respect, it is crucial that we acknowledge that silencing by the community was part of the trauma suffered by victims and, furthermore, that ongoing processes of silencing by the political elite and by the courts contribute to further re-victimisation. Indeed, as Stauffer (2015) and Cohen (2001) have noted in different contexts, if there is a fate worse than that of being a trauma victim, it is that of not being recognised as such by one's community. However, rather than engaging with these uncomfortable truths, the Irish State has continued to silence victims. Despite the recommendation of the Ryan Commission (Commission of Inquiry into Child Abuse 2009), no memorial has been erected to the suffering of the victims of abuse perpetrated in industrial schools. Those victims who engaged with Ireland's Residential Institutions Redress Board (RIRB) are threatened with contempt of court if they speak about their experiences in this adversarial forum.<sup>22</sup> The files of those who attended the RIRB are to be stored in an archive for 75 years, without any exceptions for researchers or family members.<sup>23</sup> The State is also adopting an extremely hostile and adversarial approach to the claims for redress of people who were abused as children in schools (Irish Human Rights Commission 2016). A high-profile victim has described the treatment of these victims as abuse (O'Keeffe 2015). Thus, the traumatic effects of abuse are exacerbated and replicated by a policy of using silencing and adversarial tactics against victims.

## Conclusion

For people who are abused when aged younger than 13 years (the largest cohort of child abuse survivors) the average time lapse between the abuse and attending a rape crisis centre is 26 years (Rape Crisis Network Ireland 2015a: 23).<sup>24</sup> If this standard delay in reporting is to change, part of the solution, alongside improved child protection policies, is to learn from the experiences of victims of historical abuse. A trauma-informed perspective allows new insights into the ways victims' identities are being constructed through law and how unfounded stereotypes about the behaviour of 'real' victims may unjustly affect credibility assessments at trial. New ways of thinking about addressing historical wrongs beyond the traditional inquiry model and the criminal justice system are urgently needed. Trauma discourse may be one way of beginning to think through these alternatives.

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<sup>1</sup> He had previously served four years in a Northern Ireland prison for similar offences. Smyth's abuse formed the basis of a module of the Inquiry into Historical Institutional Abuse 1922 to 1995 in Northern Ireland (Hart et al. 2017: ch. 10).

<sup>2</sup> 'TD' stands for *Teachta Dála*. A TD is a member of *Dáil Éireann*, the lower house of the Irish parliament.

<sup>3</sup> See, for example, Doyle 1989; Madden 2004; O'Gorman 2009.

<sup>4</sup> With some important exceptions (McAlinden 2013, 2014; Ring 2012, 2013, 2017).

<sup>5</sup> 'He' is used here because the vast majority of people accused of historical child sexual abuse crimes are men. A notable exception to this trend is Nora Wall, who is discussed later in this article.

<sup>6</sup> Directive 2012/29/EU establishing Minimum Standards on the Rights, Supports and Protections of Victims of Crime, and replacing Council Framework Decision 2001/220/JHA.

<sup>7</sup> Article 22.1.

<sup>8</sup> Article 23(3)(c). On special measures see generally Articles 22 and 23.

<sup>9</sup> *Constitution of Ireland*, Article 38.1.

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- <sup>10</sup> People (DPP) v Wall and McCabe [2005] IECCA 140.
- <sup>11</sup> There was also non-disclosure of a previous allegation of rape (which was not pursued) against another man in England.
- <sup>12</sup> Indeed, PTSD has been associated with Overgeneralized Autobiographical Memory (OGAM), a phenomenon in which individuals have difficulty recalling specific memories of their past (Lapidow and Brown 2016).
- <sup>13</sup> 'If a psychoanalyst or psychotherapist wished to offer a patient's description of an event as objective evidence, it would be necessary to produce every version of the event, explaining the difference by detailing all the known underlying meanings with the misleading, probable, result of the court's either accepting one version unequivocally or discrediting patient or therapist as unreliable' (Hayman 2002: 23).
- <sup>14</sup> I have made this argument about the jury's lack of epistemic competence in relation to the significance (or lack thereof) to be accorded to recovered memories (Ring 2012).
- <sup>15</sup> S 39 of the *Criminal Law (Sexual Offences) Act 2017*. At the time of writing, the section has yet to be commenced: see [http://www.irishstatutebook.ie/eli/isbc/2017\\_2.html](http://www.irishstatutebook.ie/eli/isbc/2017_2.html) (accessed 23 July 2017).
- <sup>16</sup> S 19A(10) of the *Criminal Evidence Act 1992*, as inserted by s 39 of the *Criminal Law (Sexual Offences) Act 2017*.
- <sup>17</sup> S 19A (12) of the *Criminal Evidence Act 1992* as inserted by s 39 of the *Criminal Law (Sexual Offences) Act 2017*.
- <sup>18</sup> Ss 10(c) and (d) of the *Criminal Evidence Act 1992* as inserted by s 39 of the *Criminal Law (Sexual Offences) Act 2017*.
- <sup>19</sup> S 19A(17) of the *Criminal Evidence Act 1992* as inserted by s 39 of the *Criminal Law (Sexual Offences) Act 2017*.
- <sup>20</sup> There have been some moves made towards other approaches outside of the criminal justice response. These include a report exploring the possibilities of restorative justice to address sexual offending, including historical child sexual abuse (Keenan 2014) and the development by the Probation Service of a Circles of Accountability (COSA) programme to work with offenders. (The Probation Service n.d).
- <sup>21</sup> Footnotes omitted.
- <sup>22</sup> S 28(6) of the *Residential Institutions Redress Act 2002*
- <sup>23</sup> General Scheme of a Retention of Records Bill 2015, available at <http://www.education.ie/en/The-Education-System/Legislation/General-Scheme-of-the-Retention-of-Records-Bill.pdf> (accessed 24 July 2017).
- <sup>24</sup> This is compared to an average of 6-7 years' delay for children aged between 13-17 years when the abuse took place, and a 5-year gap for the largest group of survivors of abuse that took place when they were adults (that is, those who suffered abuse when they were between 18 and 29 years of age).

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## Cases

### Ireland:

- Attorney General v X* [1992] IESC 1.  
*B v DPP* [1997] 3 IR 140: 197.  
*People (DPP) v Wall and McCabe* [2005] IECCA 140.

### England and Wales:

- R v Lubemba* [2014] EWCA 2064.

## Legislative material

### Ireland:

- Criminal Evidence Act 1992*  
*Criminal Law (Sexual Offences) Act 2017*  
General Scheme of a Retention of Records Bill 2015  
*Residential Institutions Redress Act 2002*

European:

Directive 2012/29/EU establishing Minimum Standards on the Rights, Supports and Protections of Victims of Crime, and replacing Council Framework Decision 2001/220/JHA