Workshop Report: Revisiting Sexual Consent and the Law

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WORKSHOP REPORT

Revisiting Sexual Consent and the Law

Online event hosted by

Dr Eithne Dowds
Queen's University, Belfast

18th June 2021, 9:30am-1pm

QUEEN'S UNIVERSITY BELFAST | SCHOOL OF LAW

SLSA
Socio-Legal Studies Association

This half-day online event was designed to disseminate findings from a Socio-Legal Studies Association (SLSA) funded project on sexual consent and the 2019 Gillen Review into the investigation and prosecution of serious sexual offences in Northern Ireland (NI), and to allow for knowledge exchange between local and international participants.

1. Summary of the SLSA project

The final report of the independent judge-led review into how the criminal justice system handles sex offences in Northern Ireland (NI) ('the Gillen Review'), was published on 9th May 2019. Among the recommendations in this final report are proposals on reforming the definition of consent as contained within the Sexual Offences (NI) Order 2008. Consent is the central element in prosecuting the crime of rape: the prosecution is tasked with proving the absence of consent on the part of the complainant and that the defendant did not reasonably believe that the complainant consented. This SLSA project aimed to provide an insight into community and professional perceptions of the adequacy and scope of the requirement for reasonable belief in consent in the definition of rape in NI and the proposals made in the 2019 Gillen Review. The findings from sixteen interviews with a range of stakeholders, including those working within the criminal justice system, the health sector and the victim support sector, are situated within the wider international and comparative context, in particular the recent trend towards the adoption of an affirmative consent standard. A key consideration of the research was whether there is a need for further clarification/reform in relation to the definition of rape and, in particular, the element of 'reasonable belief'.

You can find two policy briefings from this research here

2. Speaker Bios

Sir John Gillen

The Right Honourable Sir John Gillen was educated at Methodist College and Queen's College, Oxford. Sir John was called to the Bar of Northern Ireland in 1970 and took Silk in 1983. He was appointed a High Court Judge in January 1999. In January 2001 he was assigned as the Family Judge and held this position and that of Chairman of the Children Order Advisory Committee until December 2006. In September 2008 he was assigned as the Senior Judge of the Queen's Bench Division. Sir John was sworn in as a Lord Justice of Appeal in September 2014. In September 2017, he published his Review of Civil and Family Justice which was undertaken at the request of the Lord Chief Justice. He retired on 7 November 2017. Since November 2017 he has served as a Judicial Commissioner under the Investigatory Powers Act 2016. Between May 2018 and April 2019 at the request of the Department of Justice he carried out a Review of Serious Sexual Offences in Northern Ireland.

Dr Susan Leahy

Dr Susan Leahy is a Senior Lecturer in the School of Law at the University of Limerick. She is also co-director of the Centre for Crime, Justice and Victim Studies, which has a dedicated research focus on the rights of victims of crime. Her research focuses on the law relating to sexual offences, particularly issues relating to consent, and the rights of victims of crime. She has co-authored books in both of these areas: *Sexual Offending in Ireland: Laws, Procedures and Punishment* (Clarus, 2018) (with Fitzgerald O'Reilly) and *The Victim in the Irish Criminal Process* (Manchester University Press, 2018) (with Kilcommins, Moore-Walsh and Spain). Her research in this area has also been published in national and international journals including the *Common Law World Review*, the *International Journal of Evidence and Proof*, the *Journal of Criminal Law,* and the *Criminal Law Review*. Susan has contributed to the development of law and policy in both sexual offences and victims' rights. Her research on consent in Irish sexual offences law was cited in both Dail and Seanad debates during the passage of the Criminal Law (Sexual Offences) Act 2017. In December 2019, she successfully tendered to lead a consultation on the revised Victims' Charter and delivered a report on same to the Department in January 2020. Most recently, she completed an empirical research project entitled The Realities of Rape Trials: Perspectives from Practice which was funded by the Irish Research Council and conducted with the support of Dublin Rape Crisis Centre. As part of this project, she has carried out research interviews with court accompaniment workers and legal professionals working in Irish rape trials.

Ms Katarina Bergehed

Ms Katarina Bergehed is a Senior Policy Adviser at Amnesty International, covering women's rights, LGBTI and sexual/reproductive health and rights. Her 25 years with Amnesty have included research, reports and advocacy on gender based violence against women in Sweden, including Amnesty International reports on rape and human rights in the Nordic countries including - *Time*

for Change: Justice for Rape Survivors in the Nordic Countries (2019), which was a follow-up to *Case Closed: Rape and Human Rights in the Nordic Countries: Summary Report (*2010) Katarina also previously worked at a prison, where a majority of the inmates were convicted for sexual crimes.

Dr Rachael Burgin

Dr Rachael Burgin is a Lecturer at Swinburne Law School and an Executive Director of Rape and Sexual Assault Research and Advocacy (RASARA). She attained her PhD in 2019 from Monash University. Her thesis explored the ways that affirmative sexual consent has been adopted into law and translated into legal practice in rape trials. Her research interests include legal responses to rape and sexual assault, consent law reform, gendered violence, feminist jurisprudence and the prevention of violence against women. Her work is among the first to critique the shift towards 'objective' standards of reasonableness in rape law. To date she has published work in a number of peer-reviewed journals, including the *British Journal of Criminology*, *Criminology & Criminal Justice* and *Contemporary Issues in Criminal Justice*. She has advocated for law reform across Australia alongside academics, lawyers, journalists, politicians and survivors.

Dr Eithne Dowds

Dr Eithne Dowds is a Lecturer in Law at Queen's University Belfast. Her research intersects the areas of international and domestic criminal law, feminist legal theory, sexual offences and sexual consent. Eithne has published a monograph, *Feminist Engagement with International Criminal Law: Norm Transfer, Complementarity, Rape and Consent* (Hart 2020) and co-edited a collection, *Sexual Violence on Trial Local and Comparative Perspectives* (Routledge 2021) with Dr Rachel Killean and Professor Anne-Marie McAlinden. To date she has published work in a number of peer-reviewed journals, including *Modern Law Review*, *Feminist Legal Studies*, *Journal of International Criminal Justice*, *International Feminist Journal of Politics* and *Children & Society*. Eithne has presented her work widely and has responded to a range of consultations, including those addressed to the International Criminal Court, the Extraordinary Chambers in the Courts of Cambodia, the United Nations Special Rapporteur on Violence against Women, the Northern Ireland Office and the Northern Ireland Criminal Justice Board. Eithne's work on consent has been cited in the Gillen Review on the investigation and prosecution of sexual offences in Northern Ireland.

3. Summary of Presentations

Sir John Gillen, *"Silent Grieving", "The most beautiful of all doubts Is when the downtrodden and Despondent raise their heads and Stop believing in the strength of their oppressors* (Bertolt Brecht 1932)

The first presentation of the day was delivered by Sir John Gillen who reflected on issues of sexual consent that arose during his high profile review into the investigation and prosecution of sexual offences in Northern Ireland. Sir John noted the low conviction rate for rape in Northern Ireland (1.8 per cent at time of review) and that establishing the presence or absence of consent is central to determining the existence of an offence. Yet it is a very complex and difficult legal area, and the definition is elusive. According to the Sexual Offences (NI) Order 2008 we have a three tiered model of consent based on: a definition of consent - a person consents if he agrees by choice, and has the freedom and capacity to make that choice (art 3); presumptions against consent - including for example where violence is used or complainant is detained or is deceived as to nature or purpose of act (art 9 and 10); and, a standard of reasonable belief – a defendant's guilt will be determined with reference to whether they reasonably believed the complainant consented and consideration of any steps the defendant took to ascertain whether the complainant consented (see e.g. art 5(1)(c) and 5(2)).

Sir John explained that the present legislation, following the approach in England and Wales, was designed to centre sexual offence law upon respect for individual sexual autonomy and freedom of choice. In noting that the new statutory definition of consent was meant to offer more clarity than the previous law, the difficulty is that the definition is vague, with the result that juries may bring sexual stereotypes into play in determining whether there was consent. Moreover, the law on the defendant's reasonable belief does not clearly define or suggest what should and should not be considered reasonable, again leaving the door open for stereotypes to determine assessments of reasonableness.

Sir John explained that the review explored approaches to consent in other jurisdictions, including so-called 'Yes means Yes' models. While there are differing approaches to this model, broadly speaking, a person should demonstrate free and positive consent through conduct and/or words. Sir John noted the appeal of these approaches and explained that Dr Dowds had supported a move to the formulation adopted in Sweden with a focus on the 'participation' of the parties: if someone is not actively participating, it is questionable whether they are consenting. However, Sir John was concerned that such an approach may be too far removed from the way in which sexual relationships develop and sets an unrealistic threshold that would be difficult to apply in practice. Sir John was also concerned that the focus on consent as expressed in some way might offer less protection to the complainant than the current law that focuses on whether the complainant in their mind consented. Sir John also noted that some jurisdictions seek to place an obligation on the defendant to take reasonable steps to ascertain whether the complainant consented, but he raised concern that this might infringe a defendant's ECHR rights.

In emphasising the need to address the current challenges while developing a formula that is workable, Sir John outlined his key recommendations in relation to amending the 2008 Order as follows:

- to provide that a failure to say or do anything when submitting to a sexual act, or to protest or offer resistance to it, does not of itself constitute consent;
- to expand the range of circumstances as to when there is an absence of consent to include, for example (i) where the complainant submits to the act because of a threat or fear of violence or other serious detriment to the complainant or to others; (ii) where the only expression of consent or agreement to the act comes from a third party; and (iii) where the complainant is overcome, voluntarily or not, by the effect of alcohol or drugs; and
- to add that, in determining whether there was a reasonable belief in consent, the jury should take account of a failure to take any steps to ascertain whether the complainant consented.

Sir John emphasised the importance of expanding the list of presumptions against consent, as outlined, to capture violations within abusive intimate partner relationships. In respect of the last recommendation on reasonable belief, it was noted that a weakness of this proposal is that there is no recommendation on what weight should be attached to the failure to take steps, but Sir John explained that he had faith in the jury to use common sense.

Sir John concluded his presentation by outlining the crucial role of education. He noted that there is a lack of societal understanding and that in his review he called on the Department of Justice to develop awareness raising campaigns on rape myths and consent (see here) and on the Department of Education to provide mandatory relationship and sex education (RSE) across schools in Northern Ireland. Sir John called for close partnership between schools and parents on a curriculum for issues of respect, consent and the need for clear boundaries. In response to questions, Sir John highlighted the issue of rape myths, his recommendations on myth busters, the need for preliminary hearings to ensure questions based on rape myths are not used by the defence and asserted that if the defence go on to use such myths this should amount to professional misconduct.

Dr Susan Leahy, *Addressing the Challenges of Proving an Absence of Consent in Relationship Rape Cases*

The second presentation of the day was delivered by Dr Susan Leahy who reflected on the role and operation of consent in the context of relationship rape cases. Dr Leahy opened with some statistics to set the scene, noting that there were 609 disclosures of sexual abuse made to the Women's Aid services in 2019, including 288 disclosures of rape within intimate relationships (Women's Aid Impact Report 2019); 365 clients commenced engaging with services of Dublin Rape Crisis Centre in 2019; 20.8% of those who had experienced adult rape or sexual assault disclosed the perpetrator was a boyfriend or partner (Dublin Rape Crisis Centre, Statistics Supplement, 2019); 6% of Irish women have experienced sexual violence from a current or former partner (FRA Report 2014). SAVI Report (2002) 23.6% of perpetrators of sexual violence against women were intimate partners or ex-partners.

Dr Leahy highlighted the difficulties associated with responding to relationship rape including the failure to recognise such experiences as 'real rape' (often associated with violent rape by a stranger), even by victims themselves, and noted that if the violation is recognised it is deemed to be less harmful than rape by a stranger. Within this context rape myths such as 'why didn't she just leave?' work to minimise the experience of the complainant. Drawing on mock jury studies by Ellison (2019) and Chalmers, Leverick & Munro (2021), Dr Leahy highlighted persistent problems with Mock jurors' understandings of force and resistance in rape cases, with a lack of resistance viewed with suspicion. Dr Leahy also drew from research on lived experience with victims of intimate partner rape speaking of submitting to sex to 'keep the peace'; offering sex to avoid a beating or to protect children or have access to finances.

In thinking through the issue of consent, Dr Leahy explained that there is a failure to understand the nature of consent as being required afresh for every sexual encounter. There is potential for consent to be presumed based on a pre-existing relationship or previous sexual encounters culminating in the view of married women as 'unrapable'. In this respect, it was noted that we need a whole new way of thinking – move beyond one incident model to holistic context based model.

Dr Leahy explained that under Section 9 Criminal Law (Rape)(Amendment) Act 1990 (as amended) (IRELAND) the current guidance on force/coercion is as follows:

A person does not consent to a sexual act if:

> *(a) he or she permits the act to take place or submits to it because of the application of force to him or her or to some other person, or because of the threat of the application of force to him or her or to some other person, or because of a well-founded fear that force may be applied to him or her or to some other person.*
>
> *Note also s 9(5): Any failure or omission on the part of a person to offer resistance to an act does not of itself constitute consent to that act.*

Dr Leahy advanced four proposals for reform in this area:

1. As recommended by the Gillen Review, add the following circumstance to the 'second tier' of the definition of consent: 'Where C submits to the act because of a threat or fear of violence or other serious detriment, such as intimidating or coercive conduct or psychological oppression to C or to others.'

2. Jury guidance on sexual coercion in relationships: in Ireland there is currently no equivalent document to the Crown Court Compendium. To bolster the definition of consent and provide jurors with clearer guidance on coercion and rape within relationships, it was submitted that more specific juror directions on this could be created. Dr Leahy suggested such guidance should be based on the doctrine of 'constructive force' which Dr Dowds has explained is used in US military law and can be meaningfully applied to sexual coercion within relationships e.g. 'Did D create an environment of coercion or a situation of dominance and control within which the complainant's freedom to make a choice was restricted?'

3. Offence of Sexual Coercion: proposal suggesting the introduction of an offence of sexual coercion/obtaining sexual activity by threats (i.e. a modernised version of the

older offence in section 2 of the Sexual Offences Act 1956). While controversial, would such an offence mean we capture wrongful conduct that currently falls outside of existing offences?

4. Prosecution as Domestic Abuse: establish a criminal offence of domestic abuse, incorporating sexual violence specifically within in might offer an alternative route to prosecution which would allow the context of coercion/control/abuse to be understood by jurors.

Ms Katarina Bergehed, *Time for Change: Justice for rape survivors in Sweden*

The third presentation of the day was delivered by Ms Katarina Bergehed who provided an overview of the developments in Sweden. Ms Bergehed noted the mass mobilisation and movements across the globe in respect of sexual violence and harassment. She noted the 'rugby rape trial' in Northern Ireland, the 'wolfpack case' in Spain and the 'bottle case' in Sweden. The latter case propelled calls for legal change in respect of sexual offences and consent in Sweden.

Ms Katarina Bergehed set out the new law, introduced to the Swedish Penal Code in 2018, for context:

> *Section 1:*
>
> *A person who performs sexual intercourse, or some other sexual act that in view of the seriousness of the violation is comparable to sexual intercourse, with a person who is not participating voluntarily is guilty of rape [...] When assessing whether participation is voluntary or not, particular consideration is given to whether voluntariness was expressed by word or deed or in some other way.*
>
> *A person can never be considered to be participating voluntarily if:*
>
> *1. their participation is a result of assault, other violence or a threat of a criminal act, a threat to bring a prosecution against or report another person for an offence, or a threat to give detrimental information about another person;*
>
> *2. the perpetrator exploits the fact that the person is in a particularly vulnerable situation due to unconsciousness, sleep, grave fear, the influence of alcohol or drugs, illness, bodily injury, mental disturbance or otherwise in view of the circumstances; or*
>
> *3. the perpetrator induces the person to participate by seriously abusing the person's position of dependence on the perpetrator.*
>
> *Section 1a:*
>
> *A person who commits an act referred to in Section 1 and is grossly negligent regarding the circumstance that the other person is not participating voluntarily is guilty of negligent rape [...]*

It was noted that some of the expectations surrounding the new law included that the number of reported cases would rise and the new offence - negligent rape - may lead to a slight increase

in the number of convictions. While some concern was raised that the new law might focus attention on the complainant, it attempts to focus on the defendant and what made them think the complainant consented

Following a review of the new law by the Swedish National Council for Crime Prevention (Brå), it was noted that the number of convictions increased from 190 in 2017 to 333 in 2019, which is an increase of 75 per cent. Brå concluded that 76 of these judgements involved cases that would not previously have resulted in prosecution and/or a conviction prior to the changes to the law. Of these, half led to an acquittal, 26 led to a conviction for rape, and 12 resulted in a conviction for negligent rape.

It was noted that the new law captures conduct not caught under the previous rape legislation. Stated examples of the types of vulnerability that have now received stronger legal protection include instances of so-called surprise rape e.g. perpetrator coming up behind complainant at festival and digital penetrating her, and where the complainant has remained passive during the assault. Law mostly welcomed although some issues around legal certainty in respect of terminology used in the definition e.g. participation; expressed.

In thinking more broadly based on research by Amnesty, Ms Bergehed explained that the quality of the criminal investigation is crucial to ensure survivors' right to access to justice and that in 2010-2012 the Prosecution Authority and the police developed a joint best practice working model for investigating sexual crimes and violence in intimate relationships to ensure nationally uniform investigations of high quality. However, the implementation of this model varies in different parts of the country. Ms Katarina Bergehed also noted concerns about the extremely long time it takes to get the results of forensic DNA analysis: up to nine months.

In an attempt to address these issues, Ms Bergehed highlighted developments in the police focusing on vulnerable victims of crime (rape, violence in intimate relations, sexual crimes against children), including 350 new staff (mainly investigators); serious crimes units or units specializing in violence in intimate relationships; training. Following the 2018 law reform, some positive initiatives have been taken to improve the knowledge, skills and working methods of the police; implementetion of best working model - involves implementation of the best practice working methods, focus on securing evidence at an early stage and reinforcing resources.

Additional measures include new curriculum for high school: consent as part of the sexuality and relationship education and a new 40-point program to stop men's violence against women.

Dr Rachael Burgin, *Reasonable Belief in Consent: Problems and Possibilities for Rape Law Reform.*

The fourth presentation of the day was delivered by Dr Rachael Burgin who provided an overview of developments across Australia. Dr Burgin began with a timeline of developments including a discussion of the Lazarus case in New South Wales (NSW). The accused in this case was acquitted on appeal because even though it was accepted that the complainant did not consent it was found that the defendant believed she consented. While a subsequent appeal found that the judge had failed to give adequate directions, another trial was refused. The complainant in the case, Saxon Mullins, has spoken publicly about her case and the need for legal change. Reviews took place in NSW, Queensland and Victoria. The review in Queensland was criticised due to the short timeframe

of review and lack of engagement with peer-reviewed research e.g. lack of adequate engagement with literature on influence of rape myths.

Dr Burgin explained that rape and sexual assault are defined by lack of consent in all Australian jurisdictions and that all jurisdictions hold that an honest and reasonable, but mistaken belief in consent is exculpatory, it is either:

- Built into definitions of the sexual offence itself (e.g. NSW, Vic), or
- Takes the form of the mistake of fact excuse (e.g. Qld, WA)

The defendant can thus offer two concurrent arguments – first that the complainant actually consented, and second, if she did not, then the defendant mistakenly believed that she did consent.

Dr Burgin explained that affirmative consent must be built into legislation and that this can be achieved in two ways: via the definition of consent and/or via the formulation of the accused's mindset. Dr Burgin and colleagues argue that without addressing both, affirmative consent is not the law.

The law in Victoria was used as an example of good practice, but Dr Burgin noted that the fact that there is a review ongoing in Victoria suggests that there are still issues with the law and practice in that jurisdiction.

According to the Crimes Act 1958 (Vic), consent is defined as 'Free agreement' (Section 36) and includes consent-negating scenarios and circumstances where the person is not consenting: fear or force; unlawfully detained; asleep; unconscious; so intoxicated that they are unable to give consent; does not say or do anything to indicate consent. It was explained that the latter circumstance embeds an affirmative dimension and that there are complementary directions in the Jury Directions Act 2015, part 5.

The framing of the accused's mindset in Victoria (s. 36.A.) is similar to Northern Ireland and provides that:

> (1) Whether or not a person *reasonably believes* that another person is consenting to an act depends on the circumstances.
>
> (2) Without limiting subsection (1), the circumstances *include any steps that the person has taken to find out whether the other person consents* or, in the case of an offence against section 42(1), would consent to the act.

Dr Burgin noted that while the approach in Victoria is good, it fails to embed affirmative consent fully in law because it does not place limits on the accused in relation to the mistake of fact defence. Compare the approach in Victoria to that of Tasmania, for instance, where the Criminal Code Act 1924 defines consent as 'free agreement', setting out circumstances where consent is not free, such as where the person does not say or do anything to communicate consent. The Code also sets a bar on the use of mistake as to consent (s 14A.) where the accused:

(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or

(b) was reckless as to whether or not the complainant consented; or

(c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.

Dr Burgin explained that the approach in Victoria means that a failure to take steps does not speak to unreasonableness whereas in Tasmania the law reflects the idea that it is reasonable to ensure the other person consents. In response to questions she explained that while the NSW Law Reform Commission previously made recommendations short of affirmative consent due to concerns that requiring a defendant to take steps to ascertain consent would place an unfair burden on the defendant, the government subsequently took advise from Dr Burgin and others and have now moved to implement affirmative consent. Dr Burgin explained, in defence of this model, that the burden of proof is not shifting to the defendant and that other areas of law require a defendant to produce sufficient proof to raise an issue.

Dr Eithne Dowds, *Reframing 'Reasonable Belief' in Consent: Reflections on Rape Law Reform.*

The final presentation of the day was delivered by Dr Dowds who presented findings from her empirical project entitled '*Perceptions of sexual consent in Northern Ireland: rape, responsibilisation and reasonable belief*'. Dr Dowds explained that the idea of responsibilsation refers to the process where attention is directed to the individual actions of the complainant and they are deemed in some way responsible for, or to blame for, what occurred. The issue of consent and the defendant's reasonable belief in consent are important in this regard as they have a role in attributing responsibility between the complainant and defendant.

Dr Dowds explained that although in determining a defendant's reasonable belief in consent consideration can be given to any steps taken by the defendant to ascertain consent, and this provision was viewed as injecting a communicative dimension to consent law, the defendant is not legally obliged to take steps. Significantly, one of the recommendations in the Gillen Review, was to reword the reasonable belief threshold so that:

- When considering whether an accused's belief in complainant's consent was reasonable jury must consider a *failure* of defendant to take steps to ascertain consent (Recommendation 155).

Dr Dowds' project sought to provide an insight into the views of individuals working in the sexual violence sector in NI on: the current law on reasonable belief in consent; Gillen's proposed reform; and whether any further reform or clarification was needed. The project involved a comprehensive multidisciplinary literature review and qualitative semi-structured interviews with sixteen individuals from within the sexual violence sector.

In terms of the interviews, four key themes emerged. First, the absence of reasonable belief: this relates to the lack of attention to the reasonable belief threshold within trial proceedings. This lack of attention is linked to the structure of offences, in that first it must be proven that the complainant did not consent and only once that is proven does attention turn to the defendant's belief.

But it was noted that the judge will mention belief in consent when summing up to the jury and the defence often present their case to 'as to even subconsciously in the jury's mind suggest either yes she consented or she might've acted in a way that he believed she consented'.

Second, the laws (in)ability to capture the complexity of human interactions: when asked about views on reasonable belief in consent and expectations around the defendant taking steps to ascertain consent, participants spoke about the complexity and spontaneity of sexual interactions as well as the implicit rather than explicit nature of sexual communication.

Third, societal ambivalence around consent and rape: it was noted that there is a wealth of literature documenting problematic or stereotypical assumptions about sex, consent and rape, with myths about who is a real rape victim or real rapists i.e. centred around the idea that rape involves someone forcefully attacked by a stranger, obscuring the reality of rape. The further removed an incident is from that stereotype the more sympathy there is for the accused and the more the complainant's actions get dissected in an attempt to attach reasonableness to the defendant's belief in consent. It was also noted that in NI when it comes to societal understanding of rape, it is broadly conceived as being forced sex with issues of belief in consent as something only lawyers know about.

In respect of the final theme, consent confusion, it was noted that the Gillen recommendation around shifting the focus onto the accused and their failure to take steps to ascertain consent was broadly welcomed. The language of 'failure' was described as brilliant and as focusing on the 'negatives' e.g. what the defendant did not do. Yet, the interviews raised the potential for confusion due to the absence of any further specification as to what the steps provision entails and that due to this lack of understanding the defence may exaggerate the interpretation of this provision and subject it to mockery.

Dr Dowds concluded by explaining that while the Gillen Review offers a reformulated reasonable belief and steps threshold that may result in more focused questioning of the defendant and the language of failure being welcomed by the interviewees, two key issues remain:

1. the lack of attention to this element suggests the need for a change in prosecutorial practice to more firmly embed this element into trial narratives

2. the uncertainty around the steps provision needs addressed.

In relation to point 2, attention was drawn to developments in NSW (see here pg 145) and the Republic of Ireland (see here pg 85) where further specification on the 'steps' requirement has been put forward:

> *'Verbal communication does not have to be an outright question such as: "Do you consent to this?" It could be: "Should I get a condom?" or "Do you like this?" or "What would you like me to do?" Non-verbal communication could be pausing to check the woman's reaction or moving the woman's hand to a body part. Relying on the woman's passivity as consent should not be regarded as a step. Less onerous steps will be expected in established relationships, whereas, in circumstances where there is no established relationship between the parties, more steps are likely to be expected'*

4. Breakout Sessions

The workshop concluded by splitting participants up into breakout rooms. The breakout sessions were designed to provide participants with the opportunity for informal discussion around the following three questions:

1. How can we normalise sexual consent?
2. How can we breakdown sexual communication?
3. If the law requires us to consider 'steps' taken by the accused to ascertain whether the complainant consented, what should we be looking for?

In thinking through these questions, participants were able to draw from the presentations as well as bringing their own expertise and ideas.

1. *How can we normalise sexual consent?*

It was noted that one challenge is that popular culture consistently fails to represent healthy consent. It is instead either implied or entirely absent, with sexual violence portrayed as seduction (e.g. teen comedies, James Bond etc.). It was observed that this messaging starts at an early age and it is only recently that TV shows and films have started to illustrate consent in a healthier way (e.g. Normal People). Criticism was also directed at pornography, due to the lack of representations of consent. Attendees noted that, in the context of porn, there is rarely any conversation at all, nobody ever says no, and viewers are left without visual representations of what negotiating consent looks like. This leads to a lack of understanding in relation to appropriate conduct, and individuals can then have difficulties in identifying their own experiences or recognising what happened to them as abuse. Relatedly, it was noted that while individuals might know the word consent and say they do not believe in rape myths, it can be difficult to translate this across to personal experience or scenario based examples.

In this respect, a concern was raised that legal recommendations alone are not enough: if we change the definition of consent within law, why would that make a significant difference in reality for our young people if they don't even know what consent is/looks like in their daily lives? Education is thus crucial; the groundwork needs to be there before individuals come to sit on a jury. It was also noted that education is about safeguarding and a preventative measure – reduce offending.

Attendees highlighted the Northern Ireland context and the fact that schools have a wide discretion to implement programmes as they see fit which leads to a wide range of approaches – often limited in nature. It was explained that we need to start with boards of governors and PTA groups as children can be pulled out of classes for RSE. In line with this, RSE should be a mandatory part of the curriculum.

It was explained that conversations about healthy relationships are crucial to normalising consent, starting with an education on how to treat each other with basic respect. The example of letting a child know they have a choice about whether they want to hug/kiss aunts/uncles etc was given.

There was also an emphasis on the need to take away the 'shame' of sex and the need to have open conversations about sex.

Attendees also highlighted the need to educate parents/teachers/guardians – civil education. If children are returning home to abusive families/relationships it will more than likely undo what they have been taught in school. Therefore education programmes should also be in place within workplaces. As one of the most significant challenges/barriers is that we exist in and rely on a system built on women's oppression, any education/awareness raising must acknowledge this and seek to dismantle that system.

A note of caution was also given in one of the groups due to the need to distinguish between what is required/provided for in law e.g. the law covers a range of mind-sets, and what is stated in educational or other material e.g. the emphasis being placed on affirmative/enthusiastic consent that is currently not the law in NI. A careful balancing in our messaging is therefore needed.

2. *How can we breakdown sexual communication?*

In response to this question, attendees emphasised the importance of language, with some welcoming the language of participation from Sweden. Other attendees explained that, in terms of encouraging buy in for training courses etc., it is possible that 'consent' is already off putting as it implies that the training/workshop is about getting things wrong, committing crimes etc. To counter this it was suggested that training should be framed around 'how to be good at sex'?.

It was noted that a barrier to sexual communication is lack of confidence. Once behaviour has escalated people may be unsure how to stop it. At a basic level the challenge is one of empathy and ability to read cues. When so much is unsaid, how do we give people the skills to pick up on cues and signals coming from another person? This again triggered a discussion around boundary training (e.g. you don't have to hug that person if you don't want) that can be challenging in light of social expectations around appropriate behaviour (i.e., you should want to hug your relatives).

It was also noted, as with question one, that the focus on young people for interventions overlooks the fact that older people are also navigating these challenges. Navigating consent may look very different for adults, particularly those in long-term relationships and marriages. There can be an assumption that marriage is the end of the conversation and blanket consent has been given. We need to break down myths and provide an understanding of why rape myths are myths. TV and radio programmes can play a big role in this by modelling consent, coercive control, rape, etc. responsibly.

An important resource relevant to these first two questions has been developed by Dr Burgin and others on behalf of RASARA, see here.

3. *If the law requires us to consider 'steps' taken by the accused to ascertain whether the complainant consented, what should we be looking for?*

In relation to this final question, attendees noted the need to define what 'steps' are but explained that this should not be too prescriptive or could be restricting: 'doing' and 'saying' would be best. There was a feeling that a greater onus should be on the prosecution to ask the defendant 'what did you do/say'?

There was also a concern that police often do not ask these important questions and they are the first people to cross-examine the defendant and these interview recordings are often played in court, so they are important.

However, there was concern around the wellbeing of those involved in a trial and that cross examination can be traumatic for both the complainant and defendant. This might lead to a reluctance to press on issues around steps taken – getting the balance can be difficult. Relatedly, in respect of myths raised by the defence, the prosecution may be viewed as combative if they object.

Drawing on additional measures proposed in the Gillen Review, such as myth buster videos, concern was raised that a 10 minute video to be shown to jurors is not efficient: how can that dispel maybe 20/30 years of rape myths embedded within society? Such a method was labelled as reductive and there was a strong feeling that jury directions should be given at the start of the trial, the end is too late as the seeds have already been sown and the lens through which the evidence has been viewed already exists e.g. tainted by rape myths.

In terms of what attendees would look for as proof of reasonable steps being taken, attendees would ask 1) did you have a conversation at all before initiating a sexual encounter? 2) If they claim they were reading body language, the question is then what body language they were reading? Attention was also drawn to the OMFG model of consent: Ongoing, Mutual, Freely Given. Again the model of participation was highlighted as helpful here: verbal cues; physical cues; relational cues.

Finally, there was recognition that consent is complex and nuanced. Someone could, for example, give verbal consent without truly consenting (e.g. in a situation of coercive control). Any consideration of consent or steps taken to ascertain consent must be explored contextually.

General thoughts from discussions

Outside of the specific questions, participants reflected on the area more generally noting that issues around consent cause confusion for practitioners and judges as well as victims /defendants. The importance of ensuing adequate expertise, experience and understanding across those involved in the criminal justice process was noted. In this respect, participants explained that it was not just about increasing convictions but facilitating high quality investigations and having a dedicated police and dedicated prosecution (such as is the case in Northern Ireland, see pg 55-58 here) makes an important contribution (Sweden also has specialised units, see pg 75 here).

Rape myths continue to be a problem and arise at all stages of criminal justice process (from investigation onwards). In Northern Ireland, a report by Victim Support indicated that court observers found that rape myths were a factor in trials. In about half of the cases observed the myth was that passivity/freezing/not running away was an indicator of consent. It was noted that there is inconsistency in the judicial response to the use of rape myths by counsel (judges can step in but they do not always do this). In Sweden, statistics surrounding prevalence of 'frozen fright' have been helpful in raising awareness that this is a common issue, but many other rape myths persist. Also in the Swedish context, lay magistrates can introduce myths (they do not have legal training, see relevant article here).

It was noted that when it comes to the prosecutor having to prove the guilt of defendant, the adversarial nature of the criminal trial obscures context, full facts etc., and the process becomes binary – guilt or innocence. Reinforcing Dr Dowds' presentation, it was noted that often when it comes to consent, the issue of reasonable belief does not really arise. What is more common is that the defence will argue that 'by words/actions, it is obvious that X consented'. The complainant then denies that consent was given, and we are left with two opposing accounts, which results in a focus on the truthfulness or credibility of the parties.

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6. List of Resources

Amnesty International (2019). *Time for Change: Justice for Rape Survivors in the Nordic Countries*. Index: EUR 01/0089/2019

Amnesty International (2010). *Case Closed: Rape and Human Rights in the Nordic Countries Summary Report.* Index: ACT 77/001/2010

BBC News (2019). Spain women: Top court rules Wolf Pack gang were rapists.

Bergehed, K. (2018). How activists got Sweden to recognise that sex without consent is rape. Amnesty International.

Burgin, R. (2019). Persistent Narratives of Force and Resistance: Affirmative Consent as Law Reform. *The British Journal of Criminology*, 59(2): 296–314.

Burgin, R. (2021). NSW adopts affirmative consent in sexual assault laws. What does this mean?. *The Conversation.*

Chalmers, R., Leverick, F. & Munro, V. (2021). The provenance of what is proven: exploring (mock) jury deliberation in Scottish rape trials. *Journal of Law and Society,* 48(2): 226-249

Crowe. J. (2020). Queensland rape law 'loophole' could remain after review ignores concerns about rape myths and consent*. The Conversation.*

Dixon-Smith, M. (2018). Last night's Four Corners shows we're having the wrong conversation about consent. *Voices.*

Dowds, E. (2020). *Feminist Engagement with International Criminal Law: Norm Transfer, Complementarity, Rape and Consent* (Hart)

Dowds, E. (2020). Reforming Sexual Consent in Northern Ireland: Reflections on 'Reasonable Belief'. *Queen's Policy Engagement.*

Dowds. E. (2020). Sexual Consent in Northern Ireland: The Social and Legal Dimensions. Queen's Policy Engagement.

Dowds, E. (2019). 'Towards a Contextual Definition of Rape: Consent, Coercion and Constructive Force'. *The Modern Law Review*, 83(1): 35-63.

Dublin Rape Crisis Centre (2020). Statistics Supplement 2019.

Ellison, L. (2019). Credibility in context: Jury education and intimate partner rape. *The International Journal of Evidence and Proof,* 23(3) 263–281

FRA (2014). Violence against women: an EU-wide survey. Main results report.

Gillen Review Implementation Team (2021) Survey of young people to gauge effectiveness of and to seek their views on online advertising campaigns relating to sexual consent and rape myths. Dec 2020-Jan 2021.

Judicial College. (2020). The Crown Court Compendium Part I: Jury and Trial Management and Summing Up.

Kennedy, L. (2021).'Bearing Witness: Report of The Northern Ireland Court Observer Panel 2018-2019'. *Victim Support NI,* Feb 2021

Kilcommins, S. Leahy, S. Moore-Walsh, K. and Spain, E. (2018). *The Victim in the Irish Criminal Process* (Manchester University Press).

Killean, R., Dowds, E., and McAlinden, A.M. (2021). *Sexual Violence on Trial*. Routledge.

Law Reform Commission (2019). Knowledge or Belief Concerning Consent in Rape Law. (LRC 122-2019)

Leahy, S. (2014) Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland. *Irish Journal of Applied Social Studies.* 14(1): 18-29.

Leahy, S. (2014). 'No Means No', But Where's the Force? Addressing the Challenges of Formally Recognising Non-violent Sexual Coercion as a Serious Criminal Offence. *The Journal of Criminal Law*. 78: 309–325

Leahy, S. (2021). 'The Realities of Rape Trials in Ireland: Perspectives from Practice. In Partnership with Dublin Rape Crisis'. Irish Research Council.

Leahy, S. and M. Fitzgerald O'Reilly. (2018). *Sexual Offending in Ireland: Laws, Procedures and Punishment* (Clarus).

Moller A, Sondergaard HP, Helstrom L. (2017). Tonic immobility during sexual assault – a common reaction predicting post-traumatic stress disorder and severe depression. *Acta Obstet Gynecol Scand,* 96: 932–938.

McGee, H., Garavan, R., de Barra, M., Byrne, J. and Conroy, R. (2002). The SAVI Report:

Sexual Abuse and Violence in Ireland. The Liffey Press

McKay, S. (2018) How The 'Rugby Rape Trial' Divided Ireland. *The Guardian*.

Queensland Law Reform Commission (2019) Review of consent laws and the excuse of mistake of fact. June 2020.

RASARA (2021) Sexual Consent Toolkit.

Smart Consent. (2018). Consent = OMFG. NUI Galway.

Swedish National Council for Crime Prevention (2019). Rape – from report to conviction A study of the criminal justice system's work in rape cases. English summary.

The Gillen Review. (2019). *Report into the law and procedures in serious sexual offences in Northern Ireland.*

The Local (2021). Violence against women: A look at the Swedish government's 40-point plan

The Victoria Law Reform Commission (2020). Improving the Response of the Justice System to Sexual Offences. April 2020.

Women's Aid (2019). Annual Impact Report.

Whitbourn, L. (2018). Sexual consent laws in spotlight as Lazarus case prompts review. The Sydney Morning Herald.

Legislation Referenced

Australia

Crimes Act 1958 (Vic),

Jury Directions Act 2015 (Vic)

Criminal Code Act 1924 (Tas)

Ireland

Criminal Law (Sexual Offences) Act 2017 (Ireland)

Criminal Law (Rape)(Amendment) Act 1990 (as amended) (Ireland)

Sweden

Swedish Penal Code in 2018

United Kingdom

Sexual Offences (NI) Order 2008

Sexual Offences Act 2003 (England and Wales)

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