The Realities of Rape Trials in Ireland: Perspectives from Practice

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INTRODUCTION

This project sought to uncover the realities of Irish rape trials to determine how the current laws and procedures in this area operate and to assess whether they represent best practice in ensuring that complainants are treated fairly within the criminal justice process. Although Irish sexual offences law was significantly modernised with the passage of the Criminal Law (Sexual Offences) Act 2017, there is still much work to do to deliver best practice in the investigation, prosecution and trial of sexual offences. This is evidenced by the recent publication of the *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*[1] which identified further reforms which are required in this area. This aim of this project was to provide a new perspective on the operation of Irish sexual offences law, seeking to uncover the realities of rape trials by obtaining the views of legal professionals and court accompaniment workers who work in these trials on a regular basis. The views of these stakeholders will thus inform evidence-based recommendations for legal, procedural and policy reforms which will bring us closer to achieving best practice in the treatment of complainants within the trial process.

This project contributes to filling a gap in knowledge about sexual offences in Ireland, that is, the lack of empirical data on the practical operation of the current law. Although Ireland has research on prevalence of sexual abuse[2], attrition in rape trials[3] and limited evidence of Irish attitudes on sexual abuse and consent[4], other comparable jurisdictions like England and

[1] O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences,* (Dublin: Department of Justice and Equality, 2020).

[2] McGee, et al, *The SAVI Report: Sexual Abuse and Victimization in Ireland*, (Dublin: The Liffey Press, 2002).

[3] Hanly et al, *Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape*, (Dublin: The Liffey Press, 2009); Corr, et al, *Different Systems, Similar Outcomes?: Tracking Attrition in Reported Rape Cases in Eleven Countries, Country Briefing: Ireland*, (Child and Woman Abuse Studies Unit, London Metropolitan University, 2009).

[4] McGee, et al, *The SAVI Report: Sexual Abuse and Victimization in Ireland*, (Dublin: The Liffey Press, 2002); Ryan, 'Rape: Our Blame Culture', *Irish Examiner*, 26 March 2008; European Commission, *Special Eurobarometer 449 Report: Gender-Based Violence* (European Commission, 2016). Irish young people's attitudes to consent have also been explored in a number of studies: MacNeela et al, *Young People, Alcohol and Sex: What's Consent Got to Do with It? Exploring How Attitudes to Alcohol Impact on Judgements about Consent to Sexual Activity: A Qualitative Study of University Students* (Rape Crisis Network of Ireland, 2014); MacNeela et al, *Development, Implementation, and Evaluation of the SMART Consent Workshop on Sexual Consent for Third Level Students* (Galway, 2017); MacNeela et al, *Are Consent Workshops Sustainable and*

Wales have much richer data available to them. This includes: numerous mock jury studies[5]; rape trial observation studies[6], and; data from research with criminal justice stakeholders who work in the area of sexual offences.[7] The absence of such data in Ireland is a significant knowledge-gap which must be addressed if further attempts to improve the operation of the criminal justice system in this area are to achieve their intended objectives. Such research is vital to identify whether recent reforms are successfully delivering change and the shape which future reforms should take.

This research has been conducted in partnership with Dublin Rape Crisis Centre. The research was funded by the Irish Research Council's New Foundations Scheme. In this report, key findings from the project are outlined. The report also provides recommendations for reform. At the outset, it is important to emphasise that the recommendations for reform here are informed by the views and perspectives of the research participants only. There may be instances where the author would recommend reforms beyond those indicated as necessary by the participants (and this will be acknowledged as appropriate). Further, while Dublin Rape Crisis Centre are partners for this project, as the views on reform expressed here represent those of the research participants, they should not be construed as representing the views of Dublin Rape Crisis Centre on the changes which are required to current law and policy in this area. Reforms which align with the participants' views have been designed with reference to the author's own research on best practice from other

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Feasible in Third Level Institutions? Evidence from Implementing and Extending the SMART Consent Workshop,(Galway, 2018); D'Eath et al, *Research Evaluation of The Manuela Programme Sexual Violence Prevention Programme for Secondary School Students* (Galway, 2020).

[5] See, for example: Ellison and Munro, 'Turning Mirrors in Windows? Assessing the impact of (mock) juror education in rape trials', (2009) 49 *British Journal of Criminology*, 363. Ellison and Munro, 'A Stranger in the Bushes, Or an Elephant in the Room? Critical Reflections upon Received Rape Myth Wisdom in the Context of a Mock Jury Study (2010) 13 *New Criminal Law Review*, 781; Ellison and Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 *International Journal of Evidence and Proof*, 299; Finch and Munro, 'Breaking boundaries? Sexual consent in the Jury Room' (2006) 26 *Legal Studies*, 303.

[6] Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths*, (Palgrave 2018); Smith & Skinner, 'How Rape Myths Are Used and Challenged in Rape and Sexual Assault Trials' (2017*)* 26 *Social and Legal Studies*, 449.

[7] Carline & Gunby, '"How an Ordinary Jury Makes Sense of it is a Mystery": Barristers' Perspectives on Rape, Consent, and the Sexual Offences Act 2003', (2011) 32(3) *Liverpool Law Review*, 237-250; Gunby et al (2010), 'Alcohol-Related Rape Cases: Barristers' Perspectives on the Sexual Offences Act 2003 and Its Impact on Practice' (2010) 74 *Journal of Criminal Law*, 579.

comparable jurisdictions, as well as the *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*[8] (hereafter the *O'Malley Review*).

[8] O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences,* (Dublin: Department of Justice and Equality, 2020).

METHODOLOGY

Interview Design

This research was conducted via semi-structured interviews with legal professionals and court accompaniment workers who have experience working within Irish rape trials. The interview guide was designed in consultation with Dublin Rape Crisis Centre who were the partners for this project. Questions focused on issues such as the functioning of the new statutory definition of consent which was introduced by the Criminal Law (Sexual Offences) Act 2017 and whether it has had a positive impact on the operation of trials and relevant issues relating to the rules of evidence (e.g. the extent to which sexual experience evidence and complainant's counselling records are introduced in trials). Participants were also asked for their views on the reforms they would like to see in the current system.

Ethical Approval

Once the project was designed, ethical approval was sought and received from the University of Limerick, Faculty of Arts, Humanities and Social Sciences Ethics Committee. Part of the satisfaction of the ethical requirements required the creation of a formal informed consent process for participation and the guarantee of anonymity for all participants. Regarding the former, all participants were provided with an information letter prior to taking part in the project. This set out the purpose of the project and the uses to which their information would be put and provided a list of the questions which would be asked in the interviews. Participants were also provided with a consent form which permitted the researcher to audio-record the interview and guaranteed anonymity. These forms were signed by each participant and the researcher.

Sampling and Participant Recruitment

Once ethical approval was finalised, a purposive sampling method was adopted to identify suitable participants for the project. All participants took part on an entirely voluntary basis.

Court accompaniment workers were recruited through Dublin Rape Crisis Centre and Victim Support at Court (V-SAC). These organisations were chosen as they represent the two primary organisations offering accompaniment services in the Central Criminal Court in Dublin where the majority of rape trials take place. Each organisation advertised the research amongst their court accompaniment workers, with those willing to participate making themselves known to the researcher.

Legal professionals were recruited via the Bar Council of Ireland and the Office of the Director of Public Prosecutions. The Bar Council advertised the research amongst its membership and interested barristers contacted the researcher directly to participate. With the barristers, there was also an element of 'snowball sampling' where participants referred other colleagues who may be interested in participating to the researcher. Participants from the Office of the Director of Public Prosecutions were identified by the Office and were put in contact with the researcher.

In total, 12 court accompaniment workers and 16 legal professionals were recruited to take part in the research. At the outset, it is important to emphasise that the information within this project is not presented as authoritative or as representing the views of *all* of those involved in court accompaniment or legal representation in Irish rape trials. Rather, the views of the participants are offered here on an instructive basis, providing an insight in to the operation of these cases and a perspective on further reforms which may be required to the law and policy which governs these trials.

Data Collection

The project interviews took place between July and September 2019. Interviews were conducted in person or on the telephone and all interviews were audio-recorded with the

consent of the participants.[9] Interviews were subsequently transcribed verbatim for analysis. The average length of interviews was 45 minutes.

All participants took part anonymously and are referred to within the report only by pseudonyms: AW for court accompaniment workers and LP for legal professionals. No information which may serve to identify any of the participants is included in the report.

Data Analysis

The interview transcripts were analysed with reference to the key themes which were addressed with the participants in the interviews, including: consent; judicial directions; sexual experience evidence; counselling records; legal representation for complainants, and; delay. Interview transcripts were read and coded using both manual and computer-aided analysis (using NVivo software).

[9] One participant took part via written questionnaire instead of interview.

THE FINDINGS

The findings are discussed here with reference to the core themes of the interview questions posed to participants. The views of legal professionals and court accompaniment workers are discussed separately under each theme. Each section concludes with recommendations for reform pertinent to that theme which are based upon the views and recommendations of the participants.[10]

CONSENT

A statutory definition of consent was introduced for the first time in Irish law by section 48 of the Criminal Law (Sexual Offences) Act 2017, which introduced the following definition of consent into section 9 of the of the Criminal Law (Rape)(Amendment) Act 1990:

> '(1) A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act.
>
> (2) 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,
> >
> > (b) he or she is asleep or unconscious,
> >
> > (c) he or she is incapable of consenting because of the effect of alcohol or some other drug,
> >
> > (d) he or she is suffering from a physical disability which prevents him or her from communicating whether he or she agrees to the act,
> >
> > (e) he or she is mistaken as to the nature and purpose of the act,

[10] As noted within the Introduction to the report, the recommendations on reform are based upon the findings of this study only. They do not represent the only reforms which may be required in any particular aspect of the law.

(f) he or she is mistaken as to the identity of any other person involved in the act,

(g) he or she is being unlawfully detained at the time at which the act takes place,

(h) the only expression or indication of consent or agreement to the act comes from somebody other than the person himself or herself.'

This definition became operative on 27th March 2017.[11] Participants were asked for their view on whether the statutory definition of consent was having, or was likely to have, an impact on the operation of rape trials.

Legal Professionals

Significantly, in general, the legal professionals had not encountered the definition in operation at the time of interview (July to September 2019). This provides some evidence of the delay in these cases, with trials occurring in that period still not relating to incidents which had occurred after the definition of consent became operative in March 2017. However, for the most part, the legal professionals interviewed were ambivalent about the likely impact of the definition.

> *'I don't think so, not hugely, because it is what it is. There is more words to be used in explaining it to a jury, but I think people have an idea in their own heads as to what is involved in consent. So they could listen to the words, but I don't know that the expanded definition will make a huge difference.'* (LP3)

> *'Personally, I don't think it moves the matter forwards or backwards enormously.'* (LP4)

> *'So what impact will it have? I'm not too sure that it will have an enormous impact except I suppose that it just emphasises that there isn't a grey area on those particular things. So, it's not I think that it extends anything. I think it just makes it a little bit crisper.'* (LP11)

[11] Criminal Law (Sexual Offences) Act 2017 (Commencement) Order 2017 (S.I. No. 112 of 2017), art. 2.

The views of the legal professionals on the limitations of the introduction of a definition of consent are to some extent understandable. Prior to the introduction of the statutory definition in 2017, the prevailing guidance on consent was predominantly based upon case-law. . In *The People (DPP) v C*,[12] Murray J described consent as:

> 'voluntary agreement or acquiescence to sexual intercourse by a person of the age of consent with the requisite mental capacity. Knowledge or understanding of facts material to the act being consented to is necessary for the consent to be voluntary or constitute acquiescence.'[13]

At common law, an apparent consent to sexual activity may be vitiated by force, fear of adverse consequences,[14] fraud as to the nature of the act,[15] or the identity of one's partner,[16] or incapacity[17] (eg through sleep,[18] unconsciousness or intoxication[19]). The only positive statutory guidance which was offered on consent prior to the 2017 reforms was section 9 of the Criminal Law (Rape) (Amendment) Act 1990 which provided that:

> 'in relation to an offence that consists of or includes the doing of an act to a person without the consent of that person any failure or omission on the part of that person to offer resistance to the act does not of itself constitute consent to the act.'

The second tier of the definition of consent, which lists situations where consent will be deemed absent, admittedly largely replicates the pre-existing guidance under common law. However, the positive formulation of the statutory definition marks a break with the previous guidance, providing a definitive statement on the meaning of consent. Applied

[12] *People (DPP) v C* [2001] 3 IR 345.
[13] *People (DPP) v C* [2001] 3 IR 345, 360.
[14] *R v Olugboja* [1982] QB 320.
[15] *R v Flattery* (1877) 2 QBD 410; *R v Williams* (1923) 1 KB 340.
[16] *People (DPP) v C* [2001] 3 IR 345.
[17] Capacity to consent requires that an individual be over the legal age of consent (17 years) and have the requisite mental capacity to consent. Where individuals lack capacity to consent due to age or limited decision-making capacity, sexual activity with them is prohibited.
[18] *R v Mayers* (1872) 12 Cox CC 311; *R v Larter & Castleton* [1995] Criminal Law Review 75.
[19] *R v Lang* (1976) 62 Cr App R 50.

appropriately and imaginatively, this new positive definition can be used to develop the understanding of sexual consent within rape trials. Some recommendations on how this might be achieved are offered below.

Court Accompaniment Workers

Like the legal professionals, the court accompaniment workers interviewed also commented that, at the time the interview, it was too early to see the impact of the new statutory definition of consent on trials. However, in contrast to the legal professionals, many of the court accompaniment workers were keen to emphasise the importance of social understandings of consent, beyond the legal definition. In this regard, they highlighted that more work is needed in this area so that consent is more readily understood in society.

> *'I think there are a lot more issues surrounding consent than just the legal definition and I don't think that just by defining consent, that automatically that's meaning that all jurors…that you will fully understand or overcome their own biases surrounding that area as well. … it's a very small part of the overall reforms that need to be enacted…'* (AW1)

> *'…people that I accompany have a great sense of what consent is to them. Maybe not the actual lawful definition of it but what consent is and their kind of take on it is.'* (AW2)

A further interesting point made by some of the accompaniment workers[20] is that younger people[21] may have a better understanding of consent, suggesting that education initiatives targeted at this age-group are taking effect. It was also suggested that this age-group are more influenced by media and social media campaigns about consent and/or sexual violence more generally. This is an interesting perspective, suggesting that education and

[20] AW5; AW7; AW12.

[21] The participants did not specifically define what they mean by 'young people'. However, initiatives on consent awareness and education to date in Ireland have predominantly focused on adolescents in secondary schools and young adults (18-25 years of age). Thus, it is presumed that this is the cohort to whom these participants are referring.

awareness initiatives might need to be targeted specifically at older age groups to ensure that the message about consent is reaching all generations of Irish society.

Recommendations:

The findings on the definition of consent are limited given the fact that the majority of participants did not have direct experience of the statutory definition in operation at the time of the interviews. However, it is disappointing that the potential benefits of having a positive, statutory definition of consent to replace the pre-existing common law guidance in this area were not acknowledged, particularly by the legal professionals who would be applying the definition in practice. It is clear that further efforts are required if the definition of consent is to contribute to a greater understanding of consent in rape trials. Further, the comments of court accompaniment workers demonstrate the importance of education and awareness initiatives in developing an understanding of sexual consent amongst the general population. The latter is obviously important as a means of preventing sexual violence but also ensuring that individuals who may serve on juries understand consent and the complexities of sexual violence. With the foregoing in mind, the following recommendations may be made in relation to the definition of consent.

- As the comments of the legal professionals outlined above indicate, the list of situations where consent will be deemed to be absent in particular does not depart significantly from the pre-existing common law guidance on consent. While the clarity of having this list clearly presented in legislation cannot be denied, there may be potential to use this list to push forward and develop the understanding of situations where genuine consent to sexual activity is not possible. For example, in the current list of situations where consent will be deemed to be absent, the guidance on threats is limited to a situation where a person:

  > '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'

With this provision, the legislature did not stray far from traditional understandings of force which are found within the common law. This is a good example of an opportunity for the statutory guidance on consent to go further in seeking to provide a broader understanding of sexual coercion, thereby acknowledging that there are a number of threats other than those of force which can obviate sexual choice. Thus, the list of situations where consent will be deemed to be absent could meaningfully be expanded to include the situation where 'the complainant submits to sexual activity as a result of threats of serious harm or serious detriment of any type to the complainant or a third party.'

Of course, as the second tier of the statutory guidance on consent is non-exhaustive, the definition of consent in the first tier can be used by judges to extend the legal understanding of threats to include sexual coercion which does not involve physical force or the threat thereof. However, given the conservative judicial development of understandings of consent to date in this jurisdiction and the persistence of the 'real rape' stereotype[22] which continues to create an expectation that rape involves forcible compulsion, positive legislative action emphasising that sexual coercion involves more than physical force and threats thereof would be beneficial and is one possible extension of the definition of consent which should be considered in future reform efforts.

- It is clear from the responses here that the statutory definition of consent by itself is not sufficient to achieve a change in how consent is understood by juries. It is proposed that additional guidance should be provided to juries so that the significance of the new positive definition of consent is successfully imparted to

[22] Estrich defines 'real rape' as 'a sudden surprise attack by an unknown, often armed, sexual deviant' which 'occurs in an isolated, but public, location and the victim sustains serious physical injury, either as a result of the violence of the perpetrator or as a consequence of her efforts to resist the attack': Estrich, *Real Rape: How the Legal System Victimizes Women Who Say No* (Cambridge MA, Harvard University Press, 1987), 4. Where individuals are influenced by this stereotype, incidents which do not adhere to the 'violent stranger in a dark alley' stereotype are less likely to be seen as rape.

jurors. Recommendations for judicial directions for guiding jurors on consent and related issues are discussed below.

- The views of court accompaniment workers demonstrate the importance of developing societal awareness and understanding of sexual consent. Although efforts have already been made with regard to education of young people in Ireland[23], more is required to make sure that all age-groups and demographics in Irish society are successfully educated about sexual consent. Given the diverse needs of different age cohorts and demographic groupings, this will necessitate a variety of different approaches, each of which must be carefully researched and designed and delivered in appropriate, focused and sustained ways to maximise their impact. This will require the provision of significant resources by government to support both the design and implementation of such campaigns.

JUDICIAL DIRECTIONS

Successfully directing a jury in a rape trial can be a challenging task for a judge. In these trials, the evidence often amounts to one person's word against another. Further, research has shown that societal attitudes or so-called 'rape myths'[24] may exert an influence on juror deliberations such that judges may wish to remind jurors to concentrate their minds on the facts of the case before them only and not to be influenced by preconceived ideas they may

[23] See, for example, the SMART Consent workshops which have been developed and run by researchers from NUI Galway: MacNeela et al, *Development, Implementation, and Evaluation of the SMART Consent Workshop on Sexual Consent for Third Level Students* (Galway, 2017); MacNeela et al, *Are Consent Workshops Sustainable and Feasible in Third Level Institutions? Evidence from Implementing and Extending the SMART Consent Workshop*,(Galway, 2018). Another example of such education initiatives is the Manuela programme for secondary school students: D'Eath et al, *Research Evaluation of The Manuela Programme Sexual Violence Prevention Programme for Secondary School Students* (Galway, 2020). University College Cork also runs a Bystander Intervention programme for third level students: https://www.ucc.ie/en/bystander/ (Last accessed: 29 April 2021).

[24] The 'real rape' stereotype is one such rape myth, discussed above at note 21. Another commonly cited rape myth is the 'real victim' stereotype which suggests that a genuine victim will behave in a certain way (e.g. report immediately or not have engaged in what may be perceived as 'risky' behaviour such as being intoxicated at the time of the incident). For a discussion of rape myths and how they may influence juror deliberations in rape trials, see: Leahy, 'Bad Laws or Bad Attitudes? Assessing the Impact of Societal Attitudes upon the Conviction Rate for Rape in Ireland' (2014) 14(1) *Irish Journal of Applied Social Studies*, Article 3, available at: https://arrow.tudublin.ie/ijass/vol14/iss1/3 and Leahy, 'Sexual Offences Law in Ireland: Countering Gendered Stereotypes in Adjudications of Consent in Rape Trials' in Black and Dunne (eds), *Law and Gender in Modern Ireland: Critique and Reform*, (Hart Publishing, 2019).

have about sexual violence. Calibrating such instructions can be difficult as a judge needs to ensure that any direction given is sufficiently dispassionate so that it does not interfere with the rights of the defendant. Judicial directions on the complexities of consent, particularly to ensure that the message of the statutory definition of consent is properly understood by juries, are also important. As is evident from the participants' responses regarding the impact of the statutory definition of consent in the 2017 Act, the legislation in itself is not sufficient to achieve change in how consent is understood in rape trials.

Interview participants were asked whether judges could benefit from assistance in directing jurors in rape trials. The model for achieving this which was proposed to the participants was the English *Crown Court Compendium*[25] which includes guidance for judges when directing juries on issues such as consent and on the avoidance of reliance on stereotypes in deliberations. To illustrate the type of guidance which the *Compendium* provides, participants were provided with the following extract, which they read before offering their views on whether such guidance would be useful in an Irish context.

Avoiding Assumptions about rape[26]:

It would be understandable if some of you came to this trial with assumptions about rape. You may have ideas about what kind of person is a victim of rape or what kind of person is a rapist. You may also have ideas about what a person will do or say when they are raped. But it is important that you dismiss these ideas when you decide this case.

From experience we know that there is no typical rape, typical rapist or typical person that is raped. Rape can take place in almost any circumstance. It can happen between all different kinds of people. And people who are raped react in a variety of different ways. So you must put aside any assumptions you have about rape. All of you on this jury must make your judgment based only on the evidence you hear from the witnesses and the law as I explain that to you.

[25] Maddison et al, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (Judicial Council, 2017).

[26] It should be noted that the *Crown Court Compendium* has been updated since these interviews took place. The extract provided here is updated in the current version. For the updated version of the *Crown Court Compendium*, see: https://www.judiciary.uk/wp-content/uploads/2020/12/Crown-Court-Compendium-Part-I-December-2020-amended-01.02.21.pdf (Last accessed: 4 February 2021).

Legal Professionals

The majority of the legal professionals interviewed agreed that the introduction of guidance similar to the *Crown Court Compendium* would be useful in Ireland. However, some legal professionals did express reservations about the suitability of the introduction of this type of guidance. For example, LP4 indicated that sample directions would not make too much practical difference as judges already give instructions on these issues where this is appropriate:

> *'The judge will tell them in every case that they're not entitled to speculate but equally as importantly…you don't bring your sympathy, you don't bring your emotion, you don't bring your prejudice to play or to bear in any of the decisions that are about to be made.'*

LP14 raised the point that there may be a danger in introducing such sample directions as they may introduce prejudicial lines of thinking to jurors where they did not have those ideas to begin with:

> *'I think probably in relation to the perception it would be very beneficial. But then I don't know, then it could be a double-edged sword, because if they didn't have those perceptions to begin with and now you are planting the seed.'*

The importance of ensuring balance in the wording of such directions so as to avoid any potential prejudice to the defence was emphasised by two of the legal professionals.[27] For example, LP16 recommended that:

> *'The terms of such a direction would have to be couched carefully in an explanation of the presumption of innocence lest it be misread by a jury as giving a subliminal message such as "he doesn't look like a stereotypical rapist but he is a rapist".'*

[27] LP9; LP16.

One means of potentially avoiding prejudice which might attach to the provision of such guidance by the judge is for prosecution counsel to provide instructions on issues such as consent and the avoidance of reliance on stereotypical attitudes in deliberations. The potential for prosecution counsel to provide the direction was mentioned by LP6 and LP9. Finally, four of the legal professionals[28] emphasised the importance of the guidance being sufficiently flexible so that judges retain discretion to tailor it to suit the circumstances of individual cases. These practitioners emphasised that such guidance should not be *'prescriptive'* or a *'script'* (LP12) or *'too formulated'* (LP15).

Participants were also asked when such guidance should be given in a trial: at the beginning; at the end, or; at both the beginning and the end. There were differing views on this. Six of the 15 legal professionals who felt that guidance similar to the *Compendium* would be useful in Ireland were of the view that such guidance should be given at the end of the trial.[29] Concerns were raised that the provision of such guidance at the start of a trial may potentially be prejudicial or encroach upon the rights of the defendant. For example, LP13 questioned whether giving guidance like this at the start of the trial may *'risk loading it against the defence*'. Most significantly, the legal practitioners who recommended that such guidance be offered at the end of the trial did so on the basis that such instruction would be most helpful when jurors had heard the evidence in the case. For example, LP13 questioned whether providing guidance on rape myths and consent at the start of the trial could be helpful when jurors are not yet appraised of the facts of the case:

> *'…if you talk about consent and these nebulous concepts at the start of the trials, then you have nothing practical to hang them on.'*

[28] LP1; LP12; LP13; LP15.
[29] LP3; LP5; LP6; LP13; LP14; LP16.

Similarly, LP3 spoke of the importance of such guidance being *'tailored to the evidence'* at the end of the trial and LP5 noted that providing the guidance at the end means that jurors *'can apply it to what they have heard*'.

Four of the legal professionals[30] recommended that such guidance be given at the beginning of the trial, with a further three[31] suggesting that such guidance could be given at both the beginning and the end.[32] Those who recommended that it should be given at the beginning of the trial spoke of the importance of clarifying issues for jurors from the start of the trial. This is articulated well by LP4 who commented that *'there's no harm in inputting information before the process begins lest somebody have to self-correct later on'*. It was also suggested that such guidance might fit well within the general instructions which are already given to jurors at the start of trials (LP9). Those who recommended that such guidance be given at both the beginning and the end all emphasised the specific importance of having such guidance at the start but that revisiting it at the end would be helpful. This is articulated well by LP8:

> *'…it would be no harm to reiterate it [at the end of the trial] because sometimes people look absolutely terrified when they sit in the jury box. …it is a fairly intimidating scenario if you're not used to it… . So I would think probably to repeat it. …What harm in repeating it again to reiterate it. It could be three weeks later, you know?'*

Court Accompaniment Workers

All of the accompaniment workers interviewed agreed that guidance similar to the *Compendium* should be introduced in Ireland. The majority of these participants (8)[33] recommended that this guidance should be given at the beginning and the end of the trial.

[30] LP9; LP2; LP1; LP4.
[31] LP7; LP8; LP10.
[32] Two of the legal professionals in favour of the adoption of guidance similar to the *Compendium* did not provide an opinion on when the direction should be given.
[33] AW3; AW4; AW6; AW7; AW8; AW10; AW11; AW12. The remaining 4 accompaniment workers felt that such guidance should be given at the beginning of the trial: AW1; AW2; AW5; AW9.

Notably, accompaniment workers were particularly keen to emphasise the importance of such guidance at the beginning of trials.

> *'I think at the beginning, I would say at the end as well. But definitely the beginning so that they…otherwise their minds will be set I think. If the trial goes through, because they have so much in here when the trial is over, they are trying to absorb so much that it may be a little bit too late. They can be reminded of it at the end, but definitely start off with it.'* (AW4)

> *'I certainly think that in the beginning because I mean are [we] going to ask people to question their beliefs at the beginning of a trial or are we going to shoehorn [it] in at the end? Are we saying look, this is a sexual violence case and that brings with it an awful lot of issues and perhaps you've never thought about what a rape victim looks like? But they don't behave a certain way. They don't look a certain way.'* (AW9)

The accompaniment workers who recommended that such guidance be provided at the beginning and at the end highlighted the amount of information jurors are required to retain and the length of trials. For these reasons, re-iterating the guidance or reminding jurors about it at the end of the trial was seen to be important.

> *'…a trial can go on for the guts of two weeks, well 10 days sometimes. It's a long time to be listening intently and to have something, a reminder of what you heard at the beginning at the end, may be useful.'* (AW6)

Recommendations:

The views of both the legal professionals and court accompaniment workers broadly support the introduction of guidance similar to the *Crown Court Compendium* in Ireland. Such guidance would provide direction not only on consent but also on the avoidance of reliance on stereotypes or misperceptions about rape and rape victims in trials. The following is thus recommended:

- Guidance similar to that contained in the *Crown Court Compendium* should be introduced in Ireland as a matter of priority. The task of creating such guidance could be undertaken by the Judicial Council, in consultation with experts, practitioners and stakeholders in the area and should be informed by authoritative research on societal attitudes towards sexual violence and how this may likely impact jury deliberations.

- Consideration should be given to when such guidance would be most appropriate in trials. The views of participants in this study are mixed in this regard. It is proposed that appropriate guidance should be couched sufficiently flexibly to permit appropriate directions to be given at the beginning and/or end of the trial. The timing and wording of such directions should be at the discretion of trial judge in each trial, informed by consultation with defence and prosecution counsel. However, there is a strong case to be made for offering at least some guidance on key issues like consent and a general guideline on avoidance of assumptions at the beginning of the trial. As noted by some of the interview participants, it is too late to provide information on key definitions such as consent and advising them to approach the evidence and their deliberations dispassionately at the end of the trial. At that stage, they will have received the information against the backdrop of their own pre-existing beliefs and attitudes. While it may not be possible to address specific issues in relation to the evidence at the start of the trial, there is no reason why general guidance could not be meaningfully provided at this stage.

- When such guidance is introduced, judges and legal professionals who work within sexual offence trials should receive training on its appropriate and meaningful use to ensure that it is used effectively to guide and educate jurors.

SEXUAL EXPERIENCE EVIDENCE

The admissibility of sexual experience evidence is regulated by section 3 of the Criminal Law (Rape) Act 1981 (as amended). Section 3(1) provides that in a trial for a sexual assault offence:

> 'no evidence shall be adduced and no question shall be asked in cross-examination at the trial, by or on behalf of any accused person at the trial about any sexual experience (other than that to which the charge relates) of a complainant with any person.'

To admit such evidence, the defence must make an application to the judge in the absence of the jury. Notice of an intention to make such an application 'shall be given to the prosecution by or on behalf of the accused person before, or as soon as practicable after, the commencement of the trial'.[34] The complainant will be notified that such an application has been made and that they will be entitled to legal representation for that purpose, during the course of the application.[35] Such legal representation will be funded by legal aid. However, the availability of separate legal representation is not available for complainants in all sexual offence trials. As highlighted below by the participants in this research study (and by the *O'Malley Review*[36]), separate legal representation is not available for complainants in sexual assault cases.

The test for admission of sexual experience evidence is set out in section 3(2)(b) which provides that a judge will grant leave to admit such evidence:

> '…if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied.'

[34] Criminal Law (Rape) Act 1981, section 4A(2) (as amended by section 34 of the Sex Offenders Act 2001).
[35] Criminal Law (Rape) Act 1981, section 4A(3) (as amended by section 34 of the Sex Offenders Act 2001).
[36] O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences,* (Dublin: Department of Justice and Equality, 2020), para 6.10.

The decision in *People (DPP) v GK*[37] suggests that the courts apply the regime for the admissibility of sexual experience evidence carefully and that such evidence should only be introduced where it is genuinely relevant. Kearns J noted that:

> 'Having regard to the severely restrictive terminology of the statutory provision…, in general, a decision to refuse to allow cross-examination as to past sexual history may more readily be justified in most cases than the converse. Indeed the Act is quite explicit in so providing. … Where a form of questioning is allowed, it should be confined only to what is strictly necessary and should never be utilised as a form of character assassination of a complainant.'[38]

More recently, in *People (DPP) v EH*[39], the Court of Appeal stated that '[t]he statutory threshold [under section 3(2)(b)] is…a high one, though we hasten to add not an impossible or unattainable one'.

Legal professionals and accompaniment workers were asked for their perspective on the operation of the regime for the regulation of the admissibility of sexual experience evidence and whether there are any improvements which are required.

Legal Professionals

Legal professionals interviewed were generally of the view that the current rules in this area are working well and operate to ensure that sexual experience evidence is only introduced where it is genuinely relevant, with judges being quite strict on when such evidence may be adduced. For example, LP14 commented that '*judges…approach it thoroughly in my experience'* and LP5 expressed the view that *'judges are very slow to allow [such evidence] in'*. Similarly, LP4 stated that: '*I think the system works very well. I think it is jealously guarded by the courts. I think it is very well policed*'. Some of the legal professionals also made the point that sexual experience evidence is not used (and would not be permitted to

[37] [2007] 2 IR 92.
[38] Ibid, 103-104.
[39] [2019] IECA 30.

be adduced) merely for the purpose of impugning the character of the complainant. It must be relevant to the facts of the case. LP12 commented that sexual experience evidence *'…is certainly not used for the purposes of simply blackening a complainant's character'* and that, in this sense, *'the objective of the legislation has been achieved'*. Similarly, LP15 made clear that even where sexual experience evidence is adduced, this must be done in a *'very controlled way'* and that using such evidence to suggest that someone is, for example, promiscuous, would be *'poison in front of a jury. If you are defending somebody and that's the argument you are making, you are going to sink like a stone, I would have thought'*.

The only issues which legal professionals raised regarding the regulation of the admissibility of sexual experience evidence was in relation to the procedure surrounding such applications. The most frequently cited issue was the tendency for applications to be made late, often on the day that the trial is due to commence. Commenting on the challenges when such applications arise on the day of the trial, LP6 stated that *'it's mad on the day of the trial…and suddenly the complainant is meeting a new lawyer to discuss issues that haven't really been raised with her or him before'*. Similar points were made by LP7 and LP8 who both recommended that such applications should have to be made in advance of the trial.

A further shortcoming in the current process identified by LP8 and LP16 was the potential for there to be a disparity in levels of experience between the counsel instructed by the Legal Aid Board to represent the complainant and that of the defence and prosecution counsel in the case. LP8 indicated that this can be due to the haste with which counsel for the complainant may need to be sought where there is a late application. This inequality of arms may impact on the level of protection afforded to complainants within the process. Finally, LP3 highlighted the current lack of fairness caused by the fact that complainants of sexual assault are not entitled to legal representation for the purposes of these applications.

Court Accompaniment Workers

Court accompaniment workers expressed largely similar views to the legal professionals, with the accompaniment workers interviewed who had experience of the operation of this area of the law[40], in general commenting that the current regime works well in the sense that applications to admit such evidence are not granted lightly. Some accompaniment workers did, however, question whether such evidence should ever be adduced in trials. This view is articulated well by AW10:

> *'I personally don't think…it should be brought in, because it isn't directly involved. I don't see why something that's not directly involved with the rape should come into trial. Because nothing from the accused is brought into trial, which is very upsetting. So I don't see why the victim…the victim to me is put on trial, not the accused.'*

Like the legal professionals, some accompaniment workers raised issues regarding the procedure surrounding such applications. For example, AW9 highlighted the need for proper case management so that applications take place in advance of the trial (unless an issue arises during the trial which requires an application). AW4 also expressed the view that complainants do not get enough time with counsel representing them for these applications: *'I don't think they get enough time. I don't think things are explained enough to them. And they are so confused and upset, they don't absorb everything'.*

Recommendations:

From the interviews, the consensus in relation to the current regime for the regulation of the admission of sexual experience evidence seems to be that it is working well, in the sense that applications are only successful where the evidence is genuinely relevant to the case. Of course, the ultimate way of determining this is conducting research such as a case file analysis which examines the frequency of such applications and their likely success rates.

[40] It should be noted that four of the accompaniment workers did not have experience of the operation of the application process as sexual experience evidence had not featured in trials they were involved in. Thus, the sample of accompaniment workers who could offer a view on this question was more limited than for other questions.

Research of this nature would be very worthwhile in Ireland to ascertain whether the criteria for admission of such evidence requires reform.[41] Arguably, only research of this nature could definitively determine whether the scheme is operating sufficiently well in ensuring that sexual experience evidence is only being admitted where it is genuinely relevant to the case. Thus, while the recommendations for reform here focus on the procedure relating to applications for the admission of sexual experience evidence, further discussion and exploration of the rules relating to the test for admissibility is required to ensure that our current regime represents best practice.[42] However, based on the findings in this study, the following recommendations in relation to the procedure surrounding applications for the admission of sexual experience evidence are proposed:

- There appears to be a gap in the current regime, whereby complainants in sexual assault trials are not afforded separate legal representation for the purposes of an application to adduce sexual experience evidence. This omission has also been highlighted by the *O'Malley Review* which recommends that the relevant legislative provisions be amended to provide 'separate legal representation (and the associated right to legal aid) to all trials for sexual assault offences'.[43] This reform would ensure equal protection for all complainants in sexual offence cases. All such complainants are affected equally by the prospect of such evidence being adduced at trial.

- Some of the participants in this study have highlighted issues relating to the experience of counsel appointed to represent complainants in relation to section 3 applications, specifically that such counsel are often less experienced than the defence and prosecution counsel who practice routinely in rape trials. This echoes the findings of the *O'Malley Review* which notes that 'the barrister briefed by the

[41] Hanly et al provide some insights in to the operation of section 3 as part of their analysis of 35 rape trial transcripts in attrition study *Rape & Justice in Ireland* which was published in 2009. See: Hanly et al, *Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (Dublin: The Liffey Press, 2009), 341-343.

[42] For a discussion of potential reform of the rules regulating the admissibility of sexual experience evidence in Ireland, see: Leahy, 'Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials' (2014) 4(1) *Irish Journal of Legal Studies*, article 4, available at: https://ulir.ul.ie/handle/10344/7868

[43] O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences,* (Dublin: Department of Justice and Equality, 2020), para 6.10.

Legal Aid Board in these circumstances is almost invariably a junior counsel'[44], while 'the prosecution and defence will almost always be represented by experienced senior as well as junior counsel'.[45] This potentially creates an inequality of arms between the complainant's representation and that of the prosecution and defence as they will not have similar levels of experience with such trials. Consequently, the Review recommends that 'the Legal Aid Board…should endeavour to ensure that the victim is represented by a counsel of a level of seniority similar to that of counsel representing the prosecution and the defence'.[46] This recommendation is certainly warranted. However, ultimately, issues relating to the experience of counsel appointed to represent complainants in these cases owes to the fact that the Legal Aid Board is often required to provide legal representation on very short notice. It is understandably very challenging to find appropriately experienced counsel in such circumstances. Thus, a key means of ensuring that suitably experienced counsel are always available is the application of strict time limits in such applications so that there is always appropriate time to appoint and brief counsel for the complainant.

- To maximise protection for complainants in this area, the *O'Malley Review* has recommended that where an application to admit sexual experience evidence is successful, the complainant's legal representative should continue to represent the complainant while the questioning is taking place.[47] This is an important added protection for complainants which would ensure that any questioning on sexual experience evidence goes no further than is necessary and is in accordance with the leave provided by the trial judge. While the trial judge will be overseeing such questioning carefully, having the support of separate legal representation will provide added reassurance and confidence to the complainant during this particularly challenging and traumatic form of questioning.

- The participants in this study highlighted the inadequacies with the current procedure whereby late applications are common and can often occur on the day the trial begins. Therefore, it is recommended that the application procedure be

[44] Ibid, para 6.13.
[45] Ibid.
[46] Ibid, 84.
[47] Ibid.

strengthened by the creation of strict time limits for applications so that they are made at an appropriately early stage. This will minimise stress for complainants as they will have an opportunity to prepare for the application. It will also allow sufficient time for legal advice and representation to be meaningfully provided to complainants. The proposed introduction of preliminary trial hearings in the Criminal Procedure Act 2021 will hopefully assist in ensuring that applications for the admission of sexual experience evidence are dealt with early in the process.

- A noteworthy omission from the current regime is the absence of a definition of 'sexual experience evidence'.[48] Obviously, clarity on what precisely constitutes 'sexual experience evidence' is important to ensure that such evidence is not inappropriately or inadvertently admitted. It is thus proposed that a definition of 'sexual experience evidence' should be added to the legislation.[49] The Rape Crisis Network of Ireland has previously recommended that 'sexual experience' should be 'broadly statutorily defined…to include references to pregnancy, miscarriage, abortion, contraception and other indicia of sexual activity'.[50] Leahy and Fitzgerald-O'Reilly recommend that such a definition should also clarify that both consensual and non-consensual sexual experience is included (i.e. including previous experiences and/or complaints of sexual violence).[51]

  Consideration could also be given to including what McGlynn refers to as 'implied sexual behaviour' (e.g. where evidence of a complainant exchanging phone numbers or text messages with a third party may be portrayed as a form of preliminary sexual behaviour).[52] It is noteworthy that an amendment to the sexual experience evidence provisions in the Canadian Criminal Code in 2018 included 'any communication made for a sexual purpose or whose content is of a sexual nature' within the definition of

[48] This omission was raised by some of the legal professionals interviewed in the study. However, as some of this discussion related to specific examples from practice, they are not cited here in order to protect the identity of these participants.
[49] Leahy and Fitzgerald-O'Reilly, *Sexual Offending in Ireland: Laws, Procedures and Punishment*, (Dublin: Clarus Press, 2018), 154.
[50] Rape Crisis Network of Ireland, *Previous Sexual History Evidence and Separate Legal Representation: RCNI Position Paper* (Rape Crisis Network of Ireland, 2012), 9.
[51] Leahy and Fitzgerald-O'Reilly, *Sexual Offending in Ireland: Laws, Procedures and Punishment*, (Dublin: Clarus Press, 2018), 154.
[52] McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81(5) *Journal of Criminal Law* 367, 389.

'sexual activity'.[53] Given the potential for communications or mobile phone data (including evidence of engagement on messaging apps or other social media and dating sites) to be introduced as evidence in rape trials, expanding the understanding of 'sexual experience evidence' to include such evidence offers one means of regulating its introduction so that it will only be admitted where it is genuinely relevant to the case. While broadening the types of evidence which are included within the definition of 'sexual experience' will bring more categories of evidence within the application process, this does not mean that such evidence cannot be admitted where it is genuinely relevant and thus, defendant's fair trial rights will not be affected. However, it may help to ensure that irrelevant and potentially prejudicial information regarding the complainant's private life is not unnecessarily referred to during the trial process.

COUNSELLING RECORDS

The disclosure of counselling records can pose significant challenges in rapes trials. The Criminal Law (Sexual Offences) Act 2017[54] introduced a regime to regulate disclosure of counselling records for the first time in Ireland. For the purposes of this process, a 'counselling record' is defined as:

> '…any record, or part of a record, made by any means, by a competent person[55] in connection with the provision of counselling[56] to a person in respect of whom a sexual offence is alleged to have been committed ('the complainant'), which the prosecutor has had sight of, or about which the prosecutor has knowledge, and in relation to which there is a reasonable expectation of privacy.'[57]

[53] Section 276(4) of the Canadian Criminal Code (as amended).
[54] Section 39 of the 2017 Act inserted this new regime into section 19A of the Criminal Evidence Act 1992.
[55] A 'competent person' is defined as 'a person who has undertaken training or study or has experience relevant to the process of counselling': section 19A(1) of the Criminal Evidence Act (as amended).
[56] 'Counselling' means listening to and giving verbal or other support or encouragement to a person, or advising or providing therapy or other treatment to a person (whether or not for remuneration)': section 19A(1) of the Criminal Evidence Act 1992 (as amended).
[57] Section 19A(1) of the Criminal Evidence Act 1992 (as amended).

Where a counselling record exists, the prosecution must notify the defence about the existence of the record (but not its contents).[58] If the defence wishes to gain access to the record, a written application must be made to the court[59] and a private hearing will be held to determine whether the record should be disclosed.[60] This hearing is quite similar to that which applies where an application is made for the admission of evidence of a complainant's sexual experience. The complainant is entitled to separate legal representation for the purposes of this hearing and legal aid is available to fund this.[61] The legislation provides the judge with a list of factors which s/he must consider in deciding whether to order disclosure of the record[62] and s/he must provide reasons for his/her decision on disclosure.[63] The judge must order disclosure of the content of the counselling record to the defendant 'where there would be a real risk of an unfair trial in the absence of such disclosure'.[64] The introduction of this regime is important to ensure that counselling records are not disclosed unless this is necessary. However, it must be noted that complainants may waive the application of this scheme and permit disclosure of their counselling records without going through this process.[65]

This regime became operative on 30th May 2018.[66] Participants were asked about its impact and whether it was operating well.

[58] Section 19A(2) of the Criminal Evidence Act 1992 (as amended). Where no disclosure application has been made by the defence and the prosecutor believes that it is in the interests of justice that the record should be disclosed, the prosecutor may make a disclosure application in writing to the court: Section 19A(5) of the Criminal Evidence Act 1992 (as amended).

[59] This application must provide particulars identifying the record sought and state the reasons grounding the application, including grounds relied on to establish that the record is likely to be relevant to an issue at trial: Section 19A(3) of the Criminal Evidence Act 1992 (as amended).

[60] Section 19A(8) of the Criminal Evidence Act 1992 (as amended).

[61] Section 19A(16) of the Criminal Evidence Act 1992 (as amended).

[62] These factors are: (a) the extent to which the record is necessary for the accused to defend the charges against him; (b) the probative value of the record; (c) the reasonable expectation of privacy with respect to the record; (d) the potential prejudice to the right to privacy of any person to whom the record relates; (e) the public interest in encouraging the reporting of sexual offences; (f) the public interest in encouraging complainants of sexual offences to seek counselling; (g) the effect of the determination on the integrity of the trial process; (h) the likelihood that disclosing, or requiring the disclosure of, the record will cause harm to the complainant including the nature and extent of that harm: Section 19A(10) of the Criminal Evidence Act 1992 (as amended).

[63] Section 19A(13) of the Criminal Evidence Act 1992 (as amended).

[64] Section 19A(11)(b) of the Criminal Evidence Act 1992 (as amended).

[65] Section 19A(17) of the Criminal Evidence Act 1992 (as amended).

[66] Criminal Law (Sexual Offences) Act 2017 (Commencement) (No. 2) Order 2018 (S.I. No. 172 of 2018), art. 2(f).

Legal Professionals

In general, the legal professionals interviewed had little, if any, experience of the operation of the regime for the regulation of the disclosure of counselling records in practice. This may owe to the fact that the regime was only in operation for a little over a year when the interviews were conducted. However, it may also suggest that complainants are waiving the operation of the regime and consenting to disclosure of their records. Six of the legal professionals[67] indicated that complainant waiver is common and that this can obviate the application of the regulatory regime. LP1 suggested that complainants consent to disclosure *'because they don't want anything to derail the trial'*, with LP12 mentioning that sometimes complainants waive *'for the purposes of expedition'*.

Due to their lack of experience of the operation of the disclosure regime at the time of the interviews, the legal professionals did not have specific suggestions for reform of the regime itself. However, some did question why it was limited to counselling records, proposing that other types of records (e.g. medical or social work records) should also be included.[68]

> *'…because the counselling records tend to be written in a way where the counsellor seems to know that these may well be disclosed, so very little of substance tends to be recorded. But it's the much more personal stuff, the psychiatric records, the psychological records going back ten years, you know, that was prior to a complaint. That can be much more personal…'* (LP12)

> *'…the problem with [section 19A] is though, it just refers specifically to counselling records. So whoever came up with that idea doesn't really understand that well, you can have psychiatric records, medical records, psychological records, are they counselling records?* (LP14)[69]

Finally, some of the legal professionals highlighted the importance of appropriate note-taking and documentation of complainants, that is, that professionals such as counsellors

[67] LP1; LP2; LP12; LP13; LP7; LP10.
[68] In total, four legal professionals raised this issue: LP9; LP10; LP12; LP14.
[69] LP14 also mentioned that social work records could be relevant and should be protected by the regime.

and medical practitioners need to be more aware that the information they record may ultimately be used as evidence in a trial. While some counsellors who practice regularly in the area of supporting victims of sexual abuse are aware of this potential and accordingly take limited notes, other practitioners who have less experience of the area may not be as aware of what LP13 refers to as the potential *'ramifications'* of the notes which they take. As LP3 explains, '*the less notes the less material there is to be disclosed'.*

Court Accompaniment Workers

In general, the court accompaniment workers interviewed had limited, if any, experience of the operation of the regime for the disclosure of counselling records. However, they offered their views on the appropriateness of the use of counselling records as evidence in trials, highlighting how traumatic and upsetting the introduction of this evidence can be for complainants:

> *'…people in counselling I imagine feel they are in a safe place. And when they are pouring out things that they probably never heard themselves say before, the fact that that could be used in court to try and discredit them to a jury, or you know, raise some other issues about them, would be very unfair.'* (AW6)

> *'…it breaks…confidentiality. I think that they go through enough, and I think what happens with the counsellor in that room stays in that room.'* (AW8)

> *'…I don't think it's right…people when they go to a counsellor, it's supposed to be confidential, so why is it coming out in court?... The whole point of counselling is to help you get over what has happened. So I think it's quite wrong, that they can actually do that.'* (AW10)

> *'…if somebody is coming for counselling and they bear their souls to that person and maybe tell that person things they've never told anybody else before in their lives, and it's borne out in court, it's very demoralising and it's very, it's also very shocking for anybody coming along later that feels like they'll hold back, they won't actually be honest with that counsellor if they feel that it's going to be used in a court…against that person.'* (AW12)

Some accompaniment workers also highlighted how the potential for counselling records to be disclosed and adduced at trial can influence a complainant's decision-making around reporting and/or seeking therapeutic support. For example, AW7 referred to instances where victims of sexual abuse chose not to pursue a formal complaint due to a fear that their counselling or other such records would be introduced at trial. Similarly, AW9 and AW11 recounted instances where complainants had delayed engaging in counselling until after a trial was concluded due to a fear that their counselling notes would have been used as evidence in the case.

Recommendations:

As the comments of the accompaniment workers above highlight, there is a wider debate to be had as to whether counselling records should ever be used as evidence in sexual offence trials. A discussion of this is outside the scope of this report and is perhaps a more long-term objective for reform efforts in this area. In the mean-time, the introduction of the scheme to regulate the disclosure of counselling records is an important recognition of the challenges posed by this type of evidence and the trauma and upset complainants may experience if details of their experiences of counselling are introduced as evidence at trial. While the regime was very much in its infancy when these interviews were conducted, it is still clear that there remain some issues with the current rules which require attention if complainants are to be offered full protection. As noted by the accompaniment workers in this project, the introduction of these records as evidence is a matter of some concern for complainants so protection from unnecessary and inappropriate introduction of this evidence is vital. The following reforms are recommended to ensure best practice in protecting complainants in this area:

- Although the participants had limited experience of the operation of the disclosure regime at the time of the interview, the issue of complainant waiver was specifically mentioned and accords with anecdotal evidence on the operation of the law in this area. Indeed, the *O'Malley Review* reports that '[i]t seems to remain the norm for

victims and other witnesses to waive their right to a court hearing and to consent to the disclosure of their counselling records'.[70] While complainants are, of course, entitled to waive the operation of the regime and consent to disclosure of their records, it must be questioned whether they are making such decisions on a fully informed basis. For example, complainants may not be aware at the early stage of an investigation that their records may provide the basis for cross-examination by the defence at trial. Further, complainants may not fully understand that they have a choice whether to disclose and that they have the option of letting a judge adjudicate on this. Some complainants may fear that non-disclosure would result in their case not proceeding to trial.

It is vital that complainants who waive the application of the disclosure scheme fully understand the implications of this and are aware that they have the option of a court hearing to decide whether their records should be disclosed. It is important to acknowledge that there is a comprehensive information leaflet provided by the Office of the Director of Public Prosecutions which explains the law relating to the release of counselling records for complainants.[71] Further, there is a commitment in *Supporting a Victim's Journey: A Plan to help victims and vulnerable witnesses in sexual violence cases*, that information on section 19A will be available for release by An Garda Síochána in the first quarter of 2021.[72] However, while such information is valuable, its provision does not go far enough to protect complainants and ensure that they are making decisions on waiver in a fully informed manner. A robust informed consent process, ideally supported by independent legal advice (discussed below), should be completed before a waiver can be provided. A mechanism for ensuring that such informed consent is always obtained must be introduced to ensure that complainants who waive the application of the scheme do so in full

[70] O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences,* (Dublin: Department of Justice and Equality, 2020), para 6.39.
[71] Office of the Director of Public Prosecutions, 'Releasing my Counselling Records', available at: https://www.dppireland.ie/app/uploads/2019/03/Releasing_my_counselling_records_ENG_revised_Feb_2019.pdf (Last accessed: 28 April 2021).
[72] Department of Justice and Equality, *Supporting a Victim's Journey: A plan to help victims and vulnerable witnesses in sexual violence case* (Department of Justice and Equality, 2020), recommendation 5.6.

knowledge of what is entailed and of their entitlement to insist on a court hearing on this matter.

- A further important reform to consider is the extension of this regime beyond counselling records. The *O'Malley Review* suggested that consideration should be given to whether the disclosure of medical records should be made subject to a statutory disclosure regime because they give rise to a similar expectation of privacy.[73] However, based on the interviews here, there is an argument for going further and extending the disclosure regime to apply to all 'personal records', as defined by section 278 of the Canadian Criminal Code (on which the Irish regime on counselling records is closely modelled). For the purposes of the Canadian regime, a 'record' is defined as:

> '...any form of record that contains personal information for which there is a reasonable expectation of privacy and includes medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, personal journals and diaries, and records containing personal information the production or disclosure of which is protected by any other Act of Parliament or a provincial legislature, but does not include records made by persons responsible for the investigation or prosecution of the offence.'[74]

Extending the Irish regime to include all personal records, as defined above, would maximise protection for complainants' privacy rights and minimise the potential for intrusive questioning on evidence which is not directly relevant to the case.

- Finally, the comments by some of the legal professionals regarding excessive or unnecessary note-taking by counselling, healthcare or social work professionals indicate a need for those who may be in a position to document victims of sexual violence to be trained on appropriate note-taking. While adequate notes are obviously important to ensure continuity of care for patients and clients in these settings, recording information which is not directly relevant to treatment can raise unnecessary problems where such records are subsequently disclosed in trials.

[73] O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences,* (Dublin: Department of Justice and Equality, 2020), para 6.41
[74] Section 278.1.

Ensuring that professionals who work in these areas understand the possible ramifications of their note-taking practice can minimise the potential for irrelevant or unnecessary information to be adduced at trial.

LEGAL REPRESENTATION FOR COMPLAINANTS

As mentioned already, complainants in sexual offence trials are entitled to separate legal representation, funded by Legal Aid, where there is an application to introduce sexual experience evidence or counselling records at trial. These are important protections which provide complainants with a voice in this part of the proceedings. However, apart from these applications, as witnesses for the prosecution, complainants are not legally represented during trials.

However, there are other provisions which provide support and information to complainants in relation to the legalities of the trial process. Section 26(3A) of the Civil Legal Aid Act 1995 (as amended) entitles complainants in a prosecution for certain sexual offences to obtain legal advice from the Legal Aid Board once a prosecution has been initiated.[75] In addition, while complainants cannot seek legal advice from or consult with the Office of the Director of Public Prosecutions about the trial, they may request a pre-trial meeting with the prosecution solicitor or barrister before the trial begins. In this pre-trial meeting, the trial process is explained to the complainant.[76] The Office of the Director of Public Prosecutions also provides a number of resources for complainants which are available on their website. This includes leaflets on: 'The Role of the DPP'; 'Going to Court as a Witness'; 'Making a Victim Impact Statement', and; 'Releasing my Counselling Records'.[77] Complainants may also request a pre-trial court familiarisation visit by contacting the Office of the Director of

[75] Section 26(3A) of the Civil Legal Aid Act 1995 (as inserted by the Civil Law (Miscellaneous Provisions) Act 2008 provides that the Legal Aid Board shall grant legal advice to a complainant in a prosecution for rape, aggravated sexual assault, rape under section 4 of the Criminal Law (Rape)(Amendment) Act 1990, an offence under section 6 of the Criminal Law Sexual Offences Act 1993 (as amended), an offence under the Criminal Law (Sexual Offences) Act 2006 or an offence of incest.

[76] *Victims' Charter*, 40. Available at: https://www.victimscharter.ie/wp-content/uploads/2020/04/Victims-Charter-22042020.pdf (Last accessed: 29 April 2021).

[77] See: 'Information for the Public' on the website of the Office of the DPP, available at: https://www.dppireland.ie/publications/information-for-the-public/ (Last accessed: 28 April 2021).

Public Prosecutions.[78] This allows complainants to visit the courtroom and get information about the operation of the trial process.

While the foregoing supports provide important protections and information for complainants in rape trials, it is questionable whether they go far enough to ensure that complainants have a full knowledge of the law relating to the case and, indeed, whether they are sufficiently protected as they journey through the criminal justice process. Consequently, research participants were asked for their views on whether complainants should have greater access to legal representation and/or legal advice and what would constitute best practice in ensuring that complainants are sufficiently informed and protected within the legal process.

Legal Professionals

The majority of the legal professionals were not in favour of the provision of separate legal representation to complainants (outside of the existing provisions for legal representation in applications for the introduction of sexual experience evidence or counselling records).[79] One reason for this was the view that existing supports (e.g. separate legal representation for applications for the introduction of sexual experience evidence and counselling records and the pre-trial meeting with prosecution counsel) provide sufficient protections for complainants.[80] Further, LP4 felt that separate legal representation is unnecessary because judges ensure that complainants' interests are protected:

> *'The judge is the ultimate arbiter of what is fair and unfair, what is permissible, what is not permissible, what crosses a line and where that line is to be found.'*

[78] *Victims' Charter*, 32. Available at: https://www.victimscharter.ie/wp-content/uploads/2020/04/Victims-Charter-22042020.pdf (Last accessed: 29 April 2021).
[79] LP1; LP2; LP4; LP5; LP7; LP8; LP11; LP12; LP13; LP14; LP15; LP16. LP10 was the only legal professional who expressed a clear view that complainants should have a lawyer with them 'for the currency of the trial'.
[80] These protections were highlighted by a number of the legal professionals: LP1; LP3; LP4; LP7; LP12; LP14; LP15; LP16.

The legal professionals also drew attention to the way in which trials operate in the current system where the parties to the trial are the State (represented by the Office of the Director of the Prosecutions) against the defendant. In this State-accused dyad, the complainants are witnesses for the State. In this context, legal representatives for complainants would not have a right of audience in proceedings. For these reasons, some of the legal professionals questioned the benefit of separate legal representation for complainants for the duration of the trial and suggested that it may complicate the trial process. For example, LP1 felt that having separate legal representation in court *'would upset the balance of [the trial] completely'*. Similar views were expressed by other legal professionals as follows:

> *'It is hard to imagine what separate legal representation would usefully bring to the trial process.'* (LP16)

> *'I just see it as immensely complicating. …and possibly the cause, I think, of a lot of technical difficulties because if [a complainant] is legally represented then what are their rights to say anything? And if they don't have a right to say anything, like, what are they doing?'* (LP11)

However, while the legal professionals were generally not in favour of legal representation for complainants during the trial, many of them agreed that the provision of legal advice to complainants prior to and during the trial was not objectionable and could be beneficial.[81] For example, LP6 cited this as an *'interesting idea'.* The views of these legal professionals are encapsulated well in the following quotes:

> *'…I certainly [am not] in favour of them being separately represented, but anything that aids their understanding of the process…I think is a great idea. I have no problem with it.'* (LP15)

> *'…I feel that we ask so much of these victims, getting in to the witness box. …they are entitled to know as much about the system in objective terms as they can.'* (LP9)

[81] LP2; LP3; LP4; LP5; LP9; LP13; LP15.

> *'I would be up for anything which doesn't compromise the trial but make[s] the victim feel more comfortable...'* (LP9)

> *'I see no harm at all in a complainant being fully advised independently about the process, what's likely to happen.' (LP4)*

Notably, some of the legal professionals who were in favour of the provision of legal advice emphasised the importance of having proper guidelines for this so as to avoid potential conflicts with due process, for example, concerns that complainants may be perceived as having been coached by the legal advisors (LP5). With concerns like this in mind, LP9 suggested that there could be a panel of legal professionals trained to offer this advice and there should be guidelines on the limits of the advice which could be provided.

Court Accompaniment Workers

In general, the court accompaniment workers interviewed were also generally not in favour of the provision of separate legal representation for complainants. Their primary reasons for not supporting this proposal was that it would not fit within the existing trial process. Like the legal professionals, they questioned what the role of separate legal representation would be. For example, AW9 noted the potential for the creation of an *'unreal expectation because they had their own solicitor, they're going to keep objecting to things and then you're setting them up for: "well, why are you here because you're not doing anything?"'* .

Also similar to the legal professionals, the accompaniment workers highlighted the existing supports that are provided to complainants in an effort to familiarise them with the court environment and answer any questions they might have about the trial process. For example, AW5 noted the importance of the pre-trial court familiarisation visits:

> *'…the pre-court visit is very important too…and it helps them so they know when they go into the courtroom, they know where to go, they know where they're going to sit. They know where this person is going to be. They know where the jury's going*

to be, the judge and all that we help them with before the trial starts and that really helps them.'

There was also praise for the pre-trial meetings provided by the Office of the DPP[82] with AW8 commenting that, from her experience:

'They are really really good. And they always meet with them before the trial and even during the trial. …I will say from my experience, they have been really good…' (AW8)

Some of the accompaniment workers also highlighted the support which An Garda Síochána offer in providing information and answering questions about the case.[83] AW4 expressed the view that *'the guards are just wonderful in every case, the guards have been fantastic'*. Similarly, AW12 stated that: *'I can't fault the guards to be honest. They're very helpful, very informative and very supportive of any clients I was with'.*

However, while the accompaniment workers were not in favour of separate legal representation for complainants, the majority of them felt that making legal advice available to complainants throughout the process would be beneficial.[84]

'…not barristers or solicitors. …just people who know their stuff, who can take someone aside, who has had training…and know what to say and just explain in the simplest of terms, I think would be really useful' (AW7)

'…I certainly think that from the outset, when the DPP decide to take your case, there should be a place… . I know they have all the booklets and stuff like that and when I talk to people, I give them the whole rundown. There should be a place people go and say "this has happened, what does this mean?". There should be answers so that they can go and ask as many questions as they want and there isn't that for them.

[82] AW3; AW5; AW8: AW10.
[83] AW3; AW4; AW11; AW12.
[84] AW1; AW2; AW5; AW7; AW9; AW10; AW11; AW12.

Now if they ring [support organisation], they get it [there], but not everybody rings…' (AW9)

Recommendations:

Both the legal professionals and the court accompaniment workers were clear that current advice and support initiatives such as legal representation during applications for the admission of sexual experience evidence and counselling records, court familiarisation opportunities and the availability of the pre-trial meeting with representatives from the Office of the DPP are welcome and important supports for complainants. However, it is clear that more can be done to provide complainants with appropriate support and information throughout their journey in the criminal justice process. While neither legal professionals nor court accompaniment workers were generally in favour of the introduction of separate legal representation for complainants, the potential benefits of a scheme of legal advice were acknowledged. While there is some provision for legal advice in section 26(3A) of the Civil Legal Aid Act 1995 (as amended), the *O'Malley Review* points out that there is little public awareness about it.[85] Further, the availability of legal advice should be extended beyond that which is currently available under the regime in the 1995 Act. With this in mind, the following recommendations may be made for the introduction of a comprehensive legal advice scheme for complainants in sexual offence cases:

- Free legal advice should be available for anyone who has reported, or is considering reporting, a sexual offence. This would amount to a significant extension of the current situation in Ireland, where section 26(3) provides for legal advice only when a prosecution is initiated and only for certain sexual offences. Extending the availability of legal advice to all sexual offences and making it available at the reporting stage is vital as legal advice may be most important for many complainants when they are deciding whether to proceed with a formal complaint and want a full picture of what is involved. As discussed above, requests for access to material such as counselling records can also occur very early in the investigation so complainants

[85] O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences,* (Dublin: Department of Justice and Equality, 2020), para 7.13.

would benefit from access to legal advice in relation to such matters at these early stages.

- Legal advice should continue to be available for complainants at all stages of the criminal justice process so that queries they may have in relation to the prosecution or trial of the offence can be answered promptly. Further, consideration should be given to providing for legal advocacy as well as legal advice, for example, by allowing legal advisors to represent a complainant's interests to criminal justice stakeholders such as by seeking information about the case from An Garda Síochána or supporting complainants in requesting information from the Office of the Director of Public Prosecutions (e.g. requesting reasons for a decision not to prosecute).

- The legal advice and advocacy proposed here should be offered by a specially trained panel of legal advisors. In this sense, the proposed regime would resemble the Sexual Offences Legal Advisors (SOLAs) pilot project which was recently launched in Northern Ireland. Based within Victim Support NI, SOLAs are qualified legal professionals who can offer legal advice and support to victims of serious sexual offences.[86] The creation of a dedicated team of professionals to offer this service will ensure a uniformity and consistency of practice so that all complainants will receive the same level of support. Further, as these individuals would be specially trained and operate according to standardised procedures, there would be no concerns about the provision of inappropriate advice or coaching of complainants, thereby offsetting any potential for the provision of legal advice to complainants to interfere with defendants' fair trial rights. In Ireland, in the absence of an equivalent organisation to Victim Support NI, a suitable location for such a panel of advisors would seem to be the Legal Aid Board. As indicated above, it is also proposed that a legal advice regime in Ireland would go further than the current pilot project in Northern Ireland by offering advice to complainants of all sexual offences and making such advice available throughout the criminal justice process, including during the trial.[87] The possibility of a 'debrief' session after a trial concludes should

[86] https://www.victimsupportni.com/help-for-victims/solas/ (Last accessed: 29 April 2021).
[87] The Northern Ireland pilot project offers advice 'in serious sexual offence cases up to the commencement of the trial': Ibid.

also be considered to allow complainants an opportunity to ask questions about the trial outcome, sentencing or about how to obtain information in relation to release dates etc if the defendant is found guilty and sent to prison.

DELAY

At the end of the interviews, both legal professionals and accompaniment workers were asked to give their perspective on any issues with the current system which had not been addressed in the other questions. Overwhelmingly, the majority of both legal professionals and accompaniment workers highlighted delay as their biggest concern about the trial process as it currently operates. The views of each group of participants on this issue are highlighted below.

Legal Professionals

Nine of the legal professionals interviewed highlighted delay as an issue in need of attention in rape trials.[88] The following quotes illustrate the views of some of these legal professionals regarding delay.

> *'…I think that if the public were properly aware of the delay, I think it should be like a national outrage. People are waiting years for cases…it's almost an acceptance that if a rape trial is listed for the first time, that it's not going to get on.'* (LP6)

> *'…the delay…really is catastrophic. It is…horrendous. For everyone involved. You know, you have an accused, whose life is on hold. The complainant, everyone. It's the one thing that affects both sides equally, the delay.'* (LP6)

> *'….you have to explain to a complainant…this is the date your trial is set but you know it may not start on that day… . But, you know, they come ready for a trial and it doesn't get on. It's put off for six months. That's really terrible, you know, it's really terrible.'* (LP13)

[88] LP2; LP3; LP6; LP8; LP10; LP11; LP12; LP13; LP15.

Issues relating to disclosure were highlighted as contributing to some of the delay in these cases, with legal professionals noting that disclosure and admissibility of evidence should be dealt with in preliminary hearings which provide effective and timely case management.[89] As LP13 suggests, it might *'focus minds more if you had pre-trial hearings'*. Dealing with these issues in advance of trials should ensure that late applications for the introduction of evidence or the discovery of potentially relevant records which require disclosure will not happen on the day a trial begins or during a trial, resulting in adjournments and delays which are unfair and distressing not only for complainants, but for defendants also.

Court Accompaniment Workers

All of the accompaniment workers highlighted delay as a significant problem with the current operation of the law. They provided important insights on the effect which delay has upon complainants in compounding the trauma involved in engaging in the trial process. This is articulated well by AW1 who stated that *'the level of delay in our system is inexcusable'* and pointed out that *'…lives are put on hold and you don't get healing, you don't get closure with that level of delay that's currently in our court system'*. AW2 also emphasised the impact which the uncertainty caused by delay can have upon complainants:

> *'…they seem to set themselves kind of deadlines and that's the awful thing because there isn't that realisation that you just don't know how this is going to go. You just don't know, and that uncertainty, you can see the effect on them and you can see the effect on people that are supporting them as well, you know.'*

AW7 also highlighted the practical impact which delay can have for complainants, particularly where they have to travel from outside of Dublin for trials in the Central Criminal Court:

> *'…and so some people coming in from the country. …They have a full expectation that they are going to book [accommodation] somewhere for 10 days and be here. And then you say to them, "you've got to go home…it's adjourned". That's really difficult,*

[89] LP8; LP10; LP13.

it's very difficult. Because then you are just adding another level of distress to it. They have applied for time off work, they have told their family they are coming.'

This insight in to the emotional and practical impact of delay upon complainants is important and clearly demonstrates the need to tackle delay in order to minimise the potential of compounding the challenges experienced by complainants engaging in the criminal justice process. For accompaniment workers, the provision of additional resources is vital to ensure that trials go ahead in a timely and efficient manner and that complainants are not further traumatised by the uncertainty and disruption caused by delays and adjournments in the trial process.

Recommendations:

It is clear from the views of both the legal professionals and the court accompaniment workers that delay is a significant problem within rape trials, causing unfairness not only for complainants, but also for defendants. The *Gillen Review* in Northern Ireland noted that in rape trials, 'the pathway from initial complaint through to trial is too steep, too long and too unwieldy for both complainant and accused'.[90] The same is true of the position here in this jurisdiction. In particular, the accompaniment workers' comments outline very clearly how the delays and associated uncertainty and disruption caused by unexpected adjournments exacerbate the challenges experienced by complainants as they journey through the criminal justice process. Unfortunately, given the complexities of sexual offence cases, there is no 'quick fix' for this problem and tackling delay effectively will necessitate significant additional resourcing of the system. However, the steps outlined below must be taken as a matter of priority to ensure trials proceed as expeditiously and efficiently as possible.

- As the *Gillen Review* in Northern Ireland has recommended, there should be 'mandatory early proactive communication and engagement between the parties in serious sexual offence cases'.[91] This will ensure that the prosecution and defence

[90] Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland: Part 1*, (Belfast: 2019), v.
[91] Gillen, *Report into the law and procedures in serious sexual offences in Northern Ireland: Part 2*, (Belfast: 2019), 317.

engage with each other early and that issues in relation to disclosure or applications for the introduction of certain categories of evidence become apparent and are dealt with expeditiously, thereby minimising the potential for adjournments and delays where such matters arise at the beginning of or during the trial.

- There is a clear and urgent need for preliminary trial hearings where the issues identified above in relation to disclosure, applications for the admissibility of sexual experience evidence or counselling records and any other pertinent issues such as the use of special measures[92] can be dealt with in advance of the trial itself.[93] This would not only minimise delays but also prevent any unnecessary distress for complainants where applications for the introduction of sexual experience evidence or counselling records are made unexpectedly at the start of or during the trial. The Criminal Procedure Act 2021 which proposes to introduce such preliminary hearings is therefore very much welcomed and it is hoped that it will be commenced, and most importantly, supported by adequate resources within the court system, as a matter of priority.

- Alongside legislative change, it is also vital that there is a culture change within the system so that any ambivalence or tendency to accept delay is tackled. The professionals involved in these cases must all fully appreciate, and actively seek to avoid, delays and adjournments which worsen the challenges faced by complainants in these cases. One means of ensuring this culture shift is to incentivise early engagement and active avoidance of delays. For example, the *O'Malley Review* has recommended that '[l]awyers in private practice representing either the prosecution of the defence should be duly remunerated for their work in preparing for and attending preliminary hearings'.[94]

[92] For example, arrangements for complainants to give evidence via TV link or from behind screen.
[93] The introduction of such preliminary hearings has been recommended by the *O'Malley Review*: O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences*, (Dublin: Department of Justice and Equality, 2020), 63.
[94] Ibid.

CONCLUSION

The participants in this project have provided important insights into the operation of rape trials in Ireland. Their feedback illustrates that while much has been achieved with recent legislative and policy developments, there is much which remains to be accomplished. Significantly, the participants' perspectives on recent legislative developments such as the introduction of a statutory definition of consent and the regulation of the admissibility of counselling records demonstrate that legislative reform by itself is not enough to achieve change in practice. In many ways, in the area of sexual offences, legislative reforms mark the beginning of the process of change and must be supported with further extra-legal and policy initiatives, as well as additional updates to legislation, to ensure that reforms achieve their intended objectives. The legislative and policy reforms proposed in this report should be considered as a matter of priority in order to move Ireland closer to delivering best practice in the treatment of sexual offence complainants as they journey through the criminal justice process.

In addition to the specific insights that the participants have provided on the realities of rape trials in Ireland and on the need for further reforms to the law in this area, it is hoped that this project has also demonstrated the benefits of empirical research on the operation of sexual offences law and policy. As mentioned in the introduction to this report, Ireland lags considerably behind other comparable jurisdictions such as England and Wales in not having empirical research on how sexual offence trials are currently operating, how victims are experiencing the system or how jurors approach their deliberations. For example, a comprehensive trial observation study where researchers observe sexual offence trials to learn more about the process of examination and cross-examination of complainants (including the frequency of use of special measures) or how and when evidence such as counselling records or sexual experience are introduced during trials would provide very meaningful insights on the operation of trials.[95] Likewise, research with complainants who

[95] Analysis of trial transcripts such as that which was conducted by Hanly et al for the *Rape and Justice in Ireland* study would provide another desk-based means of investigating some of these issues: Hanly et al, *Rape & Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape*, (Dublin: The Liffey Press, 2009).

had engaged with the trial process would provide an opportunity to learn from their experiences of giving evidence and engaging with the criminal justice system. Finally, there remains a lot which we do not know about Irish jurors and how they approach deliberations in sexual offence trials. Research such as mock jury studies where participants observe a reconstruction of a trial and are then observed while they deliberate would provide important insights on issues such as: jurors' understanding of legal definitions such as the statutory definition of consent; the impact of judicial directions, and; whether rape myths or stereotypical attitudes about rape are likely to influence jurors' assessments of the evidence in these cases.

While research such as that suggested here has obvious resource implications, the benefits it would yield in providing a comprehensive, impartial overview of the operation of Irish sexual offences law are undeniable. The recent progress in developing the law in this area and the continuing drive for further changes (as evidenced in the *O'Malley Review* and subsequent implementation plans) are most welcome but in the absence of research like that which is proposed here, there remain many unknowns about the practical operation of Irish sexual offences law. The findings of such research would greatly enrich future reform efforts, maximising their potential to yield real changes for sexual offence complainants. Moreover, studies such as mock jury research would offer an opportunity to test potential law and policy changes before they are implemented, thereby ensuring that such measures have the potential to deliver the intended improvements to the system. For example, when designing jury directions, mock jury research would provide an opportunity to test the wording and the timing of the delivery of guidance to see how best it may be introduced in practice.

This study has demonstrated how investigating the realities of the operation of sexual offences law and policy can enhance our understanding of what is working within the system and what areas require further attention. For the most part, the findings support the current reform efforts which are thankfully ongoing in this area. However, it is vital to remember that sexual offences law is heavily influenced by the socio-cultural context in

which it operates, that is, the culture of our adversarial court structure and the wider societal context where many misperceptions and misunderstandings about the realities and complexities of sexual violence persist. Thus, while further law reform is undeniably necessary (and there are clear proposals here for meaningful developments of the law in the short-term), a deeper understanding of how the law in this area actually works in practice is a vital next step in fully unpacking the realities of the operation of Irish sexual offences law and responding effectively to maximise our criminal justice system's potential to deliver justice for sexual offence complainants.