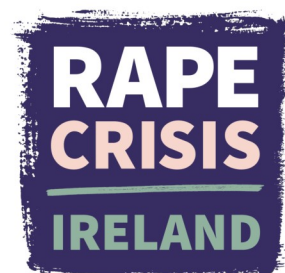


What's Sex Got to Do with It?



Sexual Experience Evidence and Irish Rape Trials

An Independent Academic Report
for Rape Crisis Ireland

Dr Sinéad Ring

2026

About this report

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Rape Crisis Ireland (RCI) works with stakeholders across Ireland and internationally to prevent sexual violence and improve response to survivors, drawing on data from Rape Crisis Centres nationwide to advocate on support, prevention, and justice. A central strand of this work is a focus on justice for survivors including legislative reform: RCI engages policymakers to advance changes to the laws and legal processes governing sexual violence cases, grounded in evidence from survivors' experiences of services and justice. Its advocacy includes specialist legal information and the shaping of public discourse around sexual violence - all grounded in survivor experience, rigorous analysis, and the data gathered from across the sexual violence sector. RCI also delivers training and supports collaboration across communities of practice, with survivors' voices and experiences at the heart of everything it does.

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Executive summary

This report presents the findings of the first qualitative study of the Irish rape shield: section 3 of the Criminal Law (Rape) Act 1981. Section 3 restricts the defence's ability to cross-examine the complainant in a sexual offences trial about his or her other sexual experiences beyond the events charged. Like all rape shields, section 3 aims to protect the jury's fact finding process by filtering out arguments that smuggle in discredited rape myths. It targets the illogical inferences that (1) prior consent is indicative of later consent and (2) that prior sexual activity connotes weakened credibility. Both of these inferences are rooted in myths about what is a 'real' rape and who is a 'legitimate' rape victim.

If defence counsel applies to have evidence of the complainant's sexual experiences admitted, the judge must decide whether or not to grant the application. The judge must consider the arguments made by defence counsel about the evidence's relevance to the issues in the trial, and any counter-arguments made by the complainant's legal representative or by prosecution counsel. The judge must also vindicate the defendant's constitutional right to a fair trial.

Centred on 21 in-depth interviews with key stakeholders, this study provides groundbreaking findings about how section 3 operates in practice and the kinds of arguments made to judges about sexual experience evidence. A qualitative methodology was chosen for this exploratory study, using in-depth semi-structured interviews to achieve nuanced and rich perspectives on section 3. Participants' answers, while subjective, were grounded in their considerable experience and expertise in this highly specialised context.

Little is known about how Irish rape trials are run and what kinds of arguments are made in the cross-examination of the complainant. By focussing on the rule governing the introduction of this controversial category of evidence, this study opens a window onto defence and prosecution narratives in rape trials.

The rape shield is not working as intended.

Research participants

13 Practising lawyers (PL)	3 Policy specialists (PS)	3 Court accompaniment support workers (SW)	2 Legal Aid Board clerks (LA)
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The study was designed to achieve a multiplicity of perspectives on section 3 from lawyers and other actors involved in section 3 applications. The majority of participants were practising lawyers (13) with experience of section 3 applications. The lawyers were predominantly senior legal practitioners, with an average of 18.5 years’ professional experience, including in sexual offences cases. Most (7) were barristers engaged in a mix of criminal prosecution and criminal defence work. One barrister was primarily criminal defence and one was solely criminal defence. Four participants worked exclusively as prosecutors, either as employees of the Office of the Director of Public Prosecutions, or as independent barristers.

To understand the perspectives of those working with complainants, the project recruited policy specialists (3) and court accompaniment workers (3) from the following national organisations: One in Four, Dublin Rape Crisis Centre, Rape Crisis Ireland and Victim Support at Court.

Two Legal Aid Board Clerks were also recruited to gain insights into the Legal Aid Board’s practice around section 3 applications. Legal aid clerks receive requests for separate legal representation for the complainant from the Serious and Sexual Offences Unit of the Office of the DPP and arrange for a barrister to act in this role. They also provide paralegal services to barristers acting as a complainant’s separate legal representative in section 3 applications.

The study draws on case law on section 3, current scholarship on rape myths and international research on rape shield laws, to create a nuanced analysis of the rich interview data. The report offers unprecedented insights into how defence and prosecution lawyers and separate legal representatives reason about the relevance of the complainant’s other sexual experiences to the issues in the trial, and how lawyers approach section 3 applications. The report also makes a number of important findings regarding the operation of the section 3 regime, including the provision of notice and the role of the separate legal representative for the complainant in section 3 applications.

Main findings

1. Evidence of the complainant's other sexual experiences can be important evidence that is vital to ensure that the defendant's constitutional right to a fair trial is vindicated. Sexual experience evidence should be admitted into a trial in limited circumstances, where appropriate. An appropriate case might be, for example, where the evidence supports the defendant's claim that he did not have sexual intercourse with the complainant on the occasion charged.

2. The rape shield is not working as intended.

Although overt, character-based attacks on complainants have declined in recent years, section 3 continues to play an important role in sexual offences trials. In 2025 **at least an estimated 39% of sexual offences trials involved a section 3 application and cross-examination on sexual experience evidence.** This is a surprisingly high figure. Importantly, **lawyers continue to often frame admissibility arguments in ways that reproduce the very inferences section 3 was designed to exclude.** The report finds that **the meanings given to relevance in section 3 applications are often underpinned by discredited rape myths.** Sexual experience evidence is being used in certain cases to exploit culturally potent notions of 'real rape' and 'the lying complainant' and thereby to cast complainants as suspicious, and as outside the category of a 'legitimate' rape victim.

3. In cases where the complainant and defendant had been in a casual sexual relationship or were acquaintances, digital evidence of communications is often used to support a defence of honest belief in consent and/or to undermine the complainant's credibility. The report shows how this is at odds with the purpose of the rape shield and the core tenet that consent must be given freely on each occasion with each sexual partner. The report also notes the issues with the probative value of text and social media messages.

4. Two groups of complainants are especially vulnerable to being cross-examined about the most intimate aspects of their private lives: a) adults who were in a relationship with the defendant and b) child and adolescent complainants.

Adult Complainants in Relationship Cases

Sexual experience evidence was almost always described by lawyers as admissible to provide context in these cases. The report shows that evidence of prior consent is being used to cast the complainant as inherently untrustworthy or as an illegitimate rape victim. The introduction of evidence of prior sexual experiences with the defendant amounts to inferring that consent is irrevocable. This is a surprising finding, particularly in light of the legislative clarification of consent as revocable, specific to each partner, and given on each occasion of sex.

Child and Adolescent Complainants

Lawyers described section 3 applications as being very common in cases involving adolescents, and to a lesser extent, children. The heightened vulnerability of young people to section 3 applications is tied to the volume of information available about them. It is also tied to the resilience of the stereotype of

the virginal, innocent child victim, which is argued to be persuasive to a jury and therefore in need of rebutting, regardless of whether it has been presented as part of the prosecution's case. Lawyers stated such evidence was necessary to counter the jury's assumed impression of the complainant as 'sexually innocent' due to their youth. It was clear that participants would make this kind of argument even when the prosecution (or complainant) had not made any claims about virginity.

What counted as relevant 'sexual experience' in these cases was given an overly broad interpretation. Acts other than sexual intercourse, such as accessing pornography, sending texts or social media messages were understood by lawyers as highly probative. Rather than being suggestive of an entirely natural curiosity about sex and sexuality, a normalised form of interaction among adolescents, or simply living in an unregulated online space, such evidence was taken to be important information about the complainant's credibility or even important information that would help the jury decide whether the defendant honestly believed the complainant was consenting. Any interest in sexual matters was said to be indicative of dubious credibility or damaged moral status. Participants talked about the evidence being combined with a history of truancy or drinking alcohol. The focus on girls' behaviour runs counter to the legal definition of consent.

5. The report does not find that defence lawyers are deliberately exploiting rape myths that they know to be false in their cross-examination of witnesses. Rather it finds that the structures of the rape shield itself require reform.

6. Section 3 applications are often being made with little notice, close to the start or on the first day of the trial. Although they should be heard at the preliminary hearing stage, problems of late disclosure and workload are creating systemic issues that mean that applications cannot be made earlier. Late notice places the Legal Aid Board under considerable pressure to find a Separate Legal Representative for the complainant and brief them. **Most importantly, late notice impacts the complainant's ability to fully engage with the application.**

7. The quality of Separate Legal Representatives (SLRs) varies considerably. Some SLRs do not have the necessary experience of sexual offences trials to effectively represent the complainant's interests. This goes to the heart of section 3's effectiveness, because the SLR submissions will be the primary counter to the defence's application.

Recommendations

The findings of this report strongly indicate that reform of the rape shield is needed in order to better ensure that evidence of the complainant's other sexual experience(s) is restricted from entering the rape trial. The following recommendations are made with the intention of provoking further consideration and discussion about how best to go about reform. They aim to balance the need to prevent unnecessary and irrelevant prejudicial evidence being admitted and the complainant being subjected to unnecessary harm, while also allowing evidence to be admitted where it is substantially probative and relevant to a fact in issue. The first two recommendations are the most important and involve repeal and reform of the rape shield and the notice and SLR provisions.¹ Any new provisions should be supported by judicial and practitioner education and training. Adequate resources are essential to ensure the feasibility of the legislative and training proposals.

Proposals for legislative reform:

1: Section 3 of the Criminal Law (Rape) Act 1981 should be repealed and a new legislative provision introduced to replace it.

The text of the new section 3 should include the following key elements: an opening statement reflecting the rape shield's objective; a new admissibility test and provisions regarding the shield's scope.

- An opening statement that reflects the objective of the rape shield:

Evidence of the complainant's other sexual experience(s) is not admissible to support an inference that the complainant:

- (a) is more likely to have consented to the sexual act(s) that form(s) the subject-matter of the charge; or
- (b) is less worthy of belief.

Admissibility test:

- The complainant must not be cross-examined and no evidence may be adduced as to their sexual experiences, other than those to which the charge relates, without the leave of the judge.
- The judge shall not give leave for any evidence or question except on an application made to him, in the absence of the jury.

¹ Some of these proposals are inspired by the Australian Law Reform Commission's Report *Family Violence – A National Legal Response* (ALRC Report 114) (210) at Chapter Two and *Safe Informed, Supported: Reforming Justice Responses to Sexual Violence* (ALRC Report 143) (2025). It also draws on Law Commission, *Evidence in Sexual Offences Prosecutions: A Final Report* (2025) <<https://lawcom.gov.uk/publication/evidence-in-sexual-offences-prosecutions-a-final-report/at> [2.36] and s103ZN *Evidence Act (Qld)* (Australia) and s276(1) of the Canadian Criminal Code.

- The judge shall give leave if, and only if, he is satisfied that the evidence has substantial probative value and that it is in the interests of justice to allow the cross-examination or to admit the evidence after taking into account:
 - (a) the risk of introducing or perpetuating myths or misconceptions in the trial;
 - (b) the need to respect the complainant's personal privacy and dignity;
 - (c) the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the complainant's age and the number and nature of the questions that the complainant is likely to be asked;
 - (d) the accused person's right to a trial in due course of law;
 - (e) society's interest in encouraging victims to report and provide evidence for prosecution of sexual offences;and
 - (f) any other relevant matter.

The legislation should also provide that:

- 'other sexual experience(s)' should be defined broadly to include references to contraception; abortion; miscarriage; pregnancy; sexually transmitted infections; communications with anyone (including the defendant and third parties) about sexual matters including photographs, videos, weblinks or animations; other allegations of abuse; other experiences of sexual violence; and lack of sexual experience.
- the provisions should apply to evidence sought to be adduced by the prosecution and by the defence.
- *substantial probative value* must be in relation to a matter in issue in the trial that is of substantial importance in the context of the case as a whole.
- evidence of sexual experience is not of substantial probative value only because of any inference it may raise as to the general character of the complainant at the time of the act(s) charged or generally.
- sexual experience evidence is not of substantial probative value simply because it provides context.
- evidence of sexual experience is not to be regarded as being a proper matter for cross-examination as to credit unless, because of specified circumstances, it would be likely to materially impair confidence in the reliability of the complainant's evidence.
- if the defence wishes to say that a previous allegation of rape or childhood abuse was false, they must have an evidential basis for their claim. The legislation could clarify certain factors that would

not be an evidential basis for asserting falsity.² Alternatively, consideration should be given to using the approach adopted in Michigan; that the impugned allegation must be ‘demonstrably untrue’.³

- consideration should be given to whether counsel should be allowed to argue admissibility based on similarity.⁴

2: Section 4A of the Criminal Law (Rape) Act 1981 should be amended to incorporate the following important procedural reforms:

- **The notice application should be made in writing and the arguments for admissibility should be stated clearly**, along with the themes and scope of the questions sought to be asked. If evidence of sexual experience is sought to be adduced in rebuttal of part of the prosecution case, the defence must clarify exactly how the prosecution made the point that they are seeking to rebut, and why it is necessary to rebut it. This is particularly important where the defence claims the prosecution has asserted the complainant’s prior virginity.
- **Complainants, through their separate legal representatives (SLRs), should have the right to the application, the indictment and a right to request the evidence on which the application is being made.**
- **The court should be required to give written reasons for its decision whether or not to grant leave, and, if leave is granted, to state the nature and scope of the admissible evidence.** This should be made available to researchers.
- **An SLR to represent the complainant’s interests in any appeal against conviction, where that appeal concerns the admissibility of sexual experience evidence or the cross-examination on the issue of sexual experience evidence.**

Separate Legal Representative Reform

3: The Legal Aid Board should create a dedicated panel of barristers to undertake the role of the Separate Legal Representative. There should be a requirement of at least three years’ experience of acting in criminal prosecutions with at least two years’ experience of acting in sexual offences prosecutions.

4: Separate Legal Representatives should be required to undertake regular professional development in the area of section 3 applications and section 19A applications. The training developed should include topics such as: the admissibility threshold in the rape shield; the role of rape myths in admissibility arguments; strategies for engaging effectively with the complainant; boundaries

² These could include: the complainant did not report the incident to the police; the complainant did not support a prosecution following a report; the police or DPP closed the case without charge; the case was prosecuted and the accused acquitted (in this situation the jury could have concluded that he was probably guilty, but they could not be sure, so the criminal standard was not reached).

³ See Clare McGlynn, ‘Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence’ (2017) 81 The Journal of Criminal Law 367.

⁴ Other jurisdictions have chosen to restrict this route, including New South Wales in Australia which does not allow a similarity argument because it is too difficult to establish when the circumstances become sufficiently similar. In Canada similarity evidence is not allowed to ground an argument of consent. More radical reform could also be considered; for example Michigan restricts all third party sexual history evidence unless it is to show the origins of semen, disease or pregnancy.

to be observed in discussing the case with the complainant; effective strategies for advocacy prior to the hearing and during the hearing; trauma-informed lawyering and advocacy regarding the court's obligations in respect of section 21 of the Criminal Justice (Victims of Crime Act) 2017.

Criminal Process Reform

1. Disclosure of Counselling Records

The findings of this report should inform discussions and monitoring of the new regime on disclosure of counselling records. The newly-introduced test for disclosure presumes non-disclosure but allows for disclosure based on relevance, and a real risk of an unfair trial without disclosure.⁵ It also provides for an additional interests of justice ground. The disclosure decision is shaped by section 19A(10) Criminal Evidence Act 1992 which provides a list of factors the court must take into account. Essentially the issue of relevance is the central consideration just as with section 3. **Training should also be provided on advocacy in the context of section 19A disclosure applications, including on identifying and countering arguments about the likely future relevance of the record that rely on rape myths. In addition there should be ongoing monitoring of decisions in section 19A applications, with a centralised record maintained of these decisions and the reasons given to allow researchers and lawyers to better understand and monitor how the law is being applied by courts.**

The resourcing and streamlining of data-sharing between third parties and the Office of the DPP is critical given the delay caused by all forms of prosecutorial disclosure.

2. Jury Directions

In addition to a clear direction that sexual experience evidence is not evidence of consent, trial judges could also remind jurors about the dangers of relying on myths and stereotypes when reasoning about sexual experience evidence. The Supreme Court has noted that if counsel relies on myths and stereotypes, the judge may “instruct the jury with a view to assisting them in reaching a proper verdict, as to the experience of the courts which runs counter to those myths and stereotypes.”⁶ Consideration should be given to providing this rape myth information early on in a trial to the jury and reminding them of the same key messages in summing up.⁷ However, a better way of protecting the jury from irrelevant information is to exclude it in the first place.

⁵ Section 19A(11) Criminal Evidence Act 1992 as amended by section 23, Criminal Law and Civil Law (Miscellaneous Provisions) Act 2026.

⁶ *People (DPP) v M.S.* [2025] IESC 4, [114] per Donnelly J. See Lara Flynn Hudspith and others, 'The Impact of Rape Myth Education on Jury Decision-Making: A Systematic Review' (2024) 25 Trauma, Violence and Abuse 4062.

⁷ Rape myths are often subtly deployed and are not recognisable when cast against the plainly worded myths in judicial directions. Ellen Daly, *Rape, Gender and Class: Intersections in Courtroom Narratives* (Springer International Publishing AG 2022); Louise Ellison, 'Credibility in Context: Jury Education and Intimate Partner Rape' (2019) International Journal of Evidence and Proof 23.

3. Appellate Level Guidance

More guidance from the appellate courts would be helpful to clarify the law in this area. The leading case, *G.K.*, is now two decades old and centred on a prosecution assertion of virginity that was connected to medical evidence of virginity.⁸ However, *G.K.* does not deal with the arguably now much more common situation, where the prosecution is not making any explicit claim in respect of virginity, but the defence argues that the jury will assume simply by reason of the complainant's age, that the complainant is sexually inexperienced and will place weight upon that perception. Such arguments should be closely interrogated for appeals to myths and if there is nothing else to flesh out the argument and connect it to a particular assertion, then it should be excluded.

4. Resources

There is an urgent need to address what Keenan and Healy describe in their review of the processing of sexual offences as the “[s]ubstantial under-investment [...] in every part of the criminal justice system”.⁹ Increased resources are needed to address the issues of systemic delay, overstretched defence practitioners and increasingly complex disclosure.

**There is an urgent need to address ... the
‘[s]ubstantial under-investment [...] in
every part of the criminal justice system’**

⁸ *People (DPP) v G.K.* [2007] 2 I.R. 92. As RCNI noted in 2012: “The particular context of this case, though, is quite unusual, in that three factors, the medical evidence itself, the absence of any alternative explanation for the medical evidence in such a young girl, and the defence of no sexual contact at all converged to give the jury only one plausible explanation for the facts presented to them, namely that the accused was indeed guilty of rape.” Rape Crisis Network Ireland, ‘Previous Sexual History Evidence and Separate Legal Representation: RCNI Position Paper’ (RCNI: Dublin, 2012) at 4.

⁹ Marie Keenan, Deirdre Healy, Kate Keenan and Gemma McLoughlin-Burke, *A Review of the Processing of Sexual Offences in Ireland: Stakeholder Experiences* (Department of Justice 2024) <https://www.gov.ie/en/department-of-justice-home-affairs-and-migration/publications/a-review-of-the-processing-of-sexual-offences-in-ireland-stakeholder-experiences/> at 241.

Future research

Key areas in urgent need of examination include:

- A large-scale trial observation study of rape and sexual assault trials across multiple courts and multiple trials. This would examine how section 3 applications are being argued in court, how judges are deciding them, how complainants are being cross-examined in court, and how SLRs are representing complainants' interests. It would make sense to make this part of a larger project examining rape trials and including other research questions relating to the role of rape myths, the role of the judge, and the use of special measures.
- This report has shown the importance of understanding the role of rape myths in the use of sexual experience evidence in rape trials. A jury simulation project focussing on rape myths and sexual experience evidence is needed.¹⁰
- A case file analysis to establish whether a correlation exists between the inclusion of sexual experience evidence at trial and conviction rates. Data tracking of both section 19A and section 3 applications by the Legal Aid Board is critical.
- Further socio-legal research examining the uses of digital evidence and the meanings that can rationally be attributed to digital evidence. This should be intersectional and periodic, exploring both the meanings generated by the various cohorts themselves of digital content and behaviour and the meanings ascribed by lawyers in making arguments in court.
- A qualitative study of complainants' experiences of section 3 applications, and the cross-examination and how they were represented by the SLR.
- A survey of criminal law practitioners (solicitors and barristers) to identify the key skills needed for a separate legal representative, which could then inform the development of training for SLRs.
- A survey of the training and continuing professional development opportunities provided to gardaí in respect of taking statements from young complainants in particular in sexual offences cases.

¹⁰ See for example Olivia Smith, *Rape Trials in England and Wales: Observing Justice and Rethinking Rape Myths* (Springer International Publishing 2018).

INTRODUCTION

Crimes of sexual violence affect at least 52% of women and 28% of men.¹¹ Despite its prevalence, sexual violence is often not spoken about. Fewer than half of all those who have endured sexual violence tell another person at any point in their lives.¹² People who experience sexual violence in a relationship are particularly unlikely to do so (16% versus an overall rate of 47%).¹³ Men who suffered childhood sexual abuse, are also far less likely to tell anyone (23%).¹⁴ Of those who do speak about their experiences, a tiny minority seek justice through the criminal process: only 5% of rape survivors and 12% of child sexual abuse survivors disclose to An Garda Síochána (AGS).¹⁵ Around a fifth of sexual violence incidents reported to AGS result in criminal proceedings.¹⁶

Given this stark reality, it is imperative that once a prosecution reaches the courtroom, every effort is made to ensure that the law and procedure are working to the highest possible standards. Although many reforms have pursued this objective,¹⁷ victim-survivors and their supporters continue to identify the trial, particularly the cross-examination,¹⁸ as a cause of harm¹⁹ and a site of injustice.²⁰

¹¹ These figures are prevalence rates across the person's lifetime. CSO, 'CSO Sexual Violence Survey' (Central Statistics Office 2023) <<https://www.cso.ie/en/statistics/crimeandjustice/sexualviolencesurvey/>>.

People with disabilities face a disproportionately higher risk of sexual violence throughout their lives: 45% of people with a disability compared to 39% of those without a disability. Table SVS179. All tables are available at <https://data.cso.ie>.

¹² Table 3.2.

¹³ Table SVS16.

¹⁴ Table SVS14. This figure excludes men who experienced sexual violence as a child and as an adult. The figure for this is much higher at 49%.

¹⁵ 5% of those who experience sexual violence as an adult and disclosed to others disclosed to the police. 12% of people who experienced sexual violence as a child and disclosed to others, disclosed to the police. CSO above n.11 at Tables 5.1 and 8.1.

¹⁶ CSO, 'Key Findings Recorded Crime Detection 2024' (Central Statistics Office 2025) <<https://www.cso.ie/en/releasesandpublications/ep/p-rcd/recordedcrimedetection2024/keyfindings/>> at Table 4.1.

¹⁷ Such as the introduction of the definition of sexual consent; the abolition of the mandatory corroboration warning and the introduction of special measures for vulnerable witnesses.

¹⁸ In *People (DPP) v NR* [2021] IECA 121 the 12 year old complainant was cross-examined for six days.

¹⁹ "The cross-examination can have a long-lasting effect on victim that far outlasts the trial process. It only serves to re-traumatise the victim and play on any myths that exist for juries in relation to victims of sexual violence.": Dublin Rape Crisis Centre (2021) 'Submission Joint Committee on Justice on the topic of Victim's Testimony in Cases of Rape and Sexual Assault 26 February 2021', available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2021/2021-06-11_report-on-victim-s-testimony-in-cases-of-rape-and-sexual-assault_en.pdf. See also Julie, Brown, Damien McKenna, Edel O'Kennedy, Only a Witness. The experiences of clients of One in Four in the Criminal Justice System (One in Four, 2016) and Naomi Gould, The Victim Experience in Focus, (One in Four 2022) available at <https://oneinfour.ie/resources/research/>.

²⁰ See, for example, comments by Ciara Mangan in A. Murphy, "Rape victim's dress was shown during Limerick rape trial in 'blatant form of victim-blaming' *Irish Examiner* 5 August 2026. See submissions to Oireachtas Joint Committee on Justice, *Joint Report on Victims' Testimony in cases of rape and sexual assault. June 2021*, available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2021/2021-06-11_report-on-victim-s-testimony-in-cases-of-rape-and-sexual-assault_en.pdf.

In recent years, controversies involving high profile rape trials have prompted widespread public discussion of sexual offences trials.²¹ This, in turn, has generated important reviews²² and significant legislative changes to aspects of rape law.²³ However, despite this attention, there is a dearth of research into what actually happens in Irish rape trials. This is partly due to the lack of statistics regarding trials, as well as the fact that many complainants do not speak publicly about their experiences of the prosecution and trial.²⁴ The legal provisions protecting complainant and defendant anonymity,²⁵ the lack of clarity about the legality of research with juries,²⁶ and the financial and legal barriers to accessing transcripts for rape trials²⁷ mean that it is extremely difficult to conduct research into rape trials.

This report seeks to begin to address the gaping hole in our collective knowledge about Irish rape trials by focussing on the admissibility of questions about, or evidence relating to, the complainant's sexual experiences other than the experience of the event(s) charged. The elicitation and use of sexual experience evidence (or sexual history evidence as it is often incorrectly termed²⁸) is highly contentious. The Law Commission of England and Wales has described it as "inherently problematic and at risk of leading jurors into error."²⁹ Controversy centres on the relevance of such evidence to the core issue of whether the defendant is guilty or not. Sexual experience evidence may be used by counsel to invite the jury to make inferences about consent and the complainant's credibility that resonate with deeply engrained but inaccurate beliefs about rape, rape victims and rapists. In other words, sexual

²¹ The most controversial case was *R v Jackson and Others* (2018) Belfast Crown Court and see [2018] NICC 20. The Ireland rugby player Paddy Jackson was charged with rape and assault. His teammate Stuart Olding was charged with rape and their friend Blane McIlroy was charged with exposure. Rory Harrison, another friend, was charged with concealing evidence and attempting to pervert the course of justice. The complainant was cross-examined by four barristers over a period of eight days. They defendants were acquitted of all charges. The media coverage of the trial prompted a number of protests across the country. 1,000 people attended a rally in Dublin, there were smaller ones across the country and in London at the Irish embassy. Elaine Edwards, 'Large Crowd Turns Out in Dublin for #IBelieveHer Rally', *The Irish Times* (29 March 2018); Rosie Cowan, '(Un)Reasonable Beliefs: How Rape Myth Beliefs Impact (Mock) Juror Decision-Making in Northern Ireland and How Potential Bias Might Be Lessened' in Nicola Monaghan (ed), *Contemporary Challenges in the Jury System: a Comparative Perspective* (Routledge 2025). See also the coverage of the so-called "Cork Rape Trial" in which the complainant's underwear was the subject of defence barrister's closing argument: Irish outcry over teenager's underwear used in rape trial. BBC News 14 November 2018 available at <https://www.bbc.com/news/world-europe-46207304>.

²² Tom O'Malley, *Review of Protections for Vulnerable Witnesses in the Investigation and Prosecution of Sexual Offences* (O'Malley) (Department of Justice, Home Affairs and Migration 2020) <<https://www.gov.ie/en/department-of-justice-home-affairs-and-migration/publications/review-of-protections-for-vulnerable-witnesses-in-the-investigation-and-prosecution-of-sexual-offences-omalley/>>. In Northern Ireland, a review authored by former Lord Justice of Appeal Sir John Gillen in 2019 made important recommendations for changes to the way the legal system tries serious sexual offences: John Gillen, *Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland* (Department of Justice 2019).

²³ Including s23, Criminal Law and Civil Law and Defence (Miscellaneous Provisions) Act 2026, which introduced changes to the disclosure regime around the complainant's counselling records; s.14 Criminal Law (Sexual Offences and Human Trafficking Act) 2024 which requires character evidence in sentencing hearings for sexual crimes to be delivered on oath or via affidavit.

²⁴ This is changing. See, for example, Sarah Grace, *Ash + Salt: From Survival to Empowerment after Sexual Assault* (The O'Brien Press 2022).

²⁵ Section 8 of the Criminal Law (Rape) Act 1981.

²⁶ But see Mark Coen and Niamh Howlin, *Judges and Juries in Ireland: An Empirical Study* (University College Dublin 2020).

²⁷ Researchers must pay for transcripts and must obtain the permission of the trial judge in order to access a transcript. If a matter is the subject of an appeal, this permission is (understandably) unlikely to be forthcoming.

²⁸ The evidence may relate to an event post the alleged sexual offence which is the subject of the trial. Section 3 of the Criminal Law (Rape) Act 1981 does not include any temporal limitation.

²⁹ Law Commission, above n.1 at [2.36].

experience evidence may threaten the accuracy of the jury's fact finding process. In addition the prospect of being cross-examined about other sexual experiences can cause victim withdrawal.³⁰ Although it is often misleading, such evidence can make the difference between guilt and innocence. Individuals presented with a complainant's prior sexual history perceive the complainant as less credible, more blameworthy, and are more likely to believe that the complainant consented to the sexual activity in question, than individuals who are not presented with this evidence.³¹

Rape shields are general legislative prohibitions on the use of sexual experience evidence in rape trials, with prescribed exceptions in certain circumstances. First introduced in 1974 in Michigan, United States,³² rape shield provisions are now common across the common law world.³³ The primary purpose of the rape shield is to ensure that a jury in a rape trial only hears evidence that is probative, that goes to a fact in issue and which does not distort the trial's fact-finding objective.

In Ireland, the rape shield is located in section 3 of the Criminal Law (Rape) Act 1981.³⁴ Recognising the impact of such evidence on the trial process and the complainant, independent legal representation is provided through the Legal Aid Board for complainants in relation to the section 3 application³⁵ itself and, more recently, any evidence or question asked in cross-examination about the complainant's sexual experience.³⁶

International research shows that sexual experience evidence is routinely used in rape trials despite the restrictions, often in ways that contravene the formal legal rules.³⁷ In Ireland, a similar picture is suggested by the limited available research. The 2009 *Rape and Justice in Ireland* study highlighted the wide range of 'apparent bases' for granting section 3 applications, including significant

³⁰ Intrusive questioning about the most private aspects of a complainant's life can be experienced as intrusive, distressing and even retraumatising. Judith Lewis Herman, 'Justice from the Victim's Perspective' (2005) 11 *Violence Against Women* 571. The introduction of sexual experience evidence also engages the right to privacy Article 40.3, Irish Constitution; Article 8 ECHR; Article 21 EU Victims' Rights Directive; *W.C. v DPP v [2024] IESC 48*.

³¹ Bailey M Fraser, Emily Pica and Joanna D Pozzulo, 'Admissibility of Prior Sexual History Evidence: Examining Its Impact on Mock-Jurors' Judgments When Gender and Race Are Considered' (2026) 44 *Behavioral Sciences and the Law* 20. Charlotte Herriott, *Sexual History Evidence in Rape Trials: Is the Jury Out?* (Taylor and Francis 2023); Candice M Monson, Jennifer Langhinrichsen-Rohling and Tisha Binderup, 'Does "No" Really Mean "No" After You Say "Yes"?': Attributions About Date and Marital Rape' (2000) 15 *Journal of Interpersonal Violence* 1156; Regina A Schuller and Patricia A Hastings, 'Complainant Sexual History Evidence: Its Impact on Mock Jurors' Decisions' (2002) 26 *Psychology of Women Quarterly* 252.

³² Criminal Sexual Conduct Act 1974 (Michigan).

³³ Including Criminal Code (RSC, 1985, c C-46) (Canada); S41, Youth Justice and Criminal Evidence Act 1999 (England and Wales); Criminal Procedure (Scotland) Act 1995, ss 274; Criminal Procedure Act 1986 (New South Wales, Australia).

³⁴ As amended.

³⁵ Section 34, Sex Offenders Act 2001.

³⁶ Section 7(b) Criminal Law (Sexual Offences and Human Trafficking) Act 2024.

³⁷ Smith above n.10; Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (McGill-Queen's Press 2018); Elisabeth McDonald, *Rape Myths as Barriers to Fair Trial Process* (Canterbury University Press 2020) ch 5; Liz Kelly, Jennifer Temkin and Sue Griffiths, 'Section 41: An Evaluation Of New Legislation Limiting Sexual History Evidence In Rape Trials' (Home Office Online 2006) Report 20/06 at 8; Sharon Cowan, Eamon P.H. Keane and Vanessa E. Munro, 'The Use of Sexual History Evidence and "Sensitive Private Data" in Scottish Rape and Attempted Rape Trials' (The University of Edinburgh 2024). See also Chloe Templeton, *A Critical Evaluation of the Admission of Sexual History Evidence in Northern Ireland Trials: Prevalence, Impact and Reform*, PhD Thesis, Queen's University Belfast, July 2026.

discrepancies among judges in how they decided section 3 applications.³⁸ Ivana Bacik's 2010 study found that applications were routinely granted,³⁹ and that section 3 applications were used as a tactic to intimidate complainants.⁴⁰

These studies, though valuable, pre-date several important changes to how the criminal process treats sexual offences. The introduction of a statutory definition of consent based on a communicative consent model could mean that arguments about the relevance of sexual experience have changed.⁴¹ Preliminary trial hearings now allow for admissibility questions to be aired in advance of the trial.⁴² Judges now have a duty to protect a victim from repeat victimisation and regulate any evidence or questioning about their private life.⁴³

In Susan Leahy's 2021 study of lawyers' and court accompaniment workers' perspectives on rape trials, most lawyers believed sexual experience evidence was only being admitted where relevant.⁴⁴ It was beyond that project's scope to interrogate arguments about admissibility, but the participants' apparent complacency (as I read it) regarding the shield's effectiveness was striking.

This research project was developed in partnership with Caroline Counihan BL, Legal Policy Director at Rape Crisis Network Ireland,⁴⁵ and her successor, Donna von Alleman. It sought to address the knowledge gap around current legal practice in respect of the Irish rape shield. It focussed on lawyers' and other key stakeholders' perspectives about the rape shield and the ways in which sexual experience evidence is/is not used in rape trials. The research centred on the following overarching questions:

- What is the rationale and purpose of section 3?
- What kinds of evidence are the subject of section 3 applications?
- What arguments are being made in section 3 applications about the admissibility of sexual experience evidence?
- How well is the section 3 regime working?
- How well is the system of separate legal representation for complainants working?

³⁸ Conor Hanly and others, *Rape and Justice in Ireland: A National Study of Survivor, Prosecutor and Court Responses to Rape* (The Liffey Press 2009); Ivana Bacik, Ciara Hanley, Jane Murphy and Aoife O'Driscoll, presentation made at "Rape Law: Victims on Trial?" Conference, 16th January 2010, cited in RCNI above n. 8. See also Conor Gallagher, "Many rape victims still face court questioning on sexual history" *The Irish Times* March 27, 2017.

³⁹ Between 2003 and 2009, 70% of applications to allow prior sexual history evidence were granted by the Central Criminal Court across a sample of 59 cases of rape and/or aggravated sexual assault: *Ibid.*

⁴⁰ In some trials, sexual experience evidence was adduced without any application, Bacik and others above n. 38 at 12.

⁴¹ Section 48 Criminal Law (Sexual Offences) Act 2017 which substitutes a new section 9 of the Criminal Law (Rape) (Amendment) Act 1990.

⁴² Criminal Procedure Act 2021, section 6.

⁴³ Section 21, Criminal Justice (Victims of Crime) Act 2017. Section 21 states that where the court is satisfied that there is a need to protect the victim (of any crime) from further victimisation and it would not be contrary to justice to do so, the court may give directions regarding the questions asked in cross-examination about the victim's private life. This is a potentially powerful provision that could have significant impact on the cross-examination of rape complainants. Other recent changes include the extension of SLR to the cross-examination and the applicability of section 3 to sexual assault trials. See Chapter Three below

⁴⁴ Susan Leahy, *The Realities of Rape Trials. Perspectives from Practice* (Dublin Rape Crisis Centre 2021). Concerns were raised about the separate legal representative regime, at 24.

⁴⁵ Now Rape Crisis Ireland.

As well as creating new insights into the operation and effectiveness of the rape shield, the research aimed to shed light on rape trials more generally. Exploring how sexual experience evidence is said to be relevant (or not) is a valuable way of examining the narratives constructed by defence counsel in relation to the complainant, and to the facts in issue.

Research Design and Methodology

The project employed a two-pronged research design: a literature review and qualitative interviews. The literature review,⁴⁶ focused on academic commentary in Ireland, and England and Wales and Scotland, and Irish case law concerning the admission of sexual experience evidence in criminal trials.

A qualitative methodology was chosen for this exploratory study, to achieve rich and multifaceted perspectives on this complex topic. In-depth semi-structured interviews were selected to gain deep insights into how section 3 is working. Each participant's answers while subjective were grounded in their considerable experience and expertise in this highly specialised context. The lawyer participants were elite participants, with an average of 18.5 years' experience in practice. The time generously donated by participants allowed for in-depth discussion⁴⁷ and yielded a rich data set.

Sinéad Ring successfully applied for funding from Research Ireland, under its New Foundations Scheme.⁴⁸ The application included Rape Crisis Network Ireland, now Rape Crisis Ireland (RCI) as a partner. RCI's role was to help with recruitment of rape crisis counsellors and court accompaniment support workers. However, the socio-legal and doctrinal research, and all qualitative research and analysis was conducted by Sinéad Ring entirely independently of RCI.

Sampling and participant recruitment

The project focussed on participants with experience of the Central Criminal Court and the Circuit Court. Rape, section 4 rape and aggravated sexual assault are tried in the Central Criminal Court.⁴⁹ The Court's work is predominantly sexual offences. In 2025, these accounted for 93% of all offences resolved by trial in the Central Criminal Court.⁵⁰ This is a very crude estimate because only one offence may be charged in a murder case, whereas multiple sexual offences may be charged in a single case. However it indicates the predominance of sexual offences in the Court's business. The Review of the Processing of Sexual Offences published in 2023 states that 80% of cases in the Central Criminal Court are sexual offences.⁵¹

The Central Criminal Court is located in the Criminal Courts of Justice in Parkgate Street, Dublin 8, and in Anglesea Street, Cork City. It also sits in other locations such as Limerick, Waterford and

⁴⁶ Conducted by Sinéad Ring with research assistance from Kim McLoughlin and Lauren Kane, doctoral researchers at the School of Law and Criminology.

⁴⁷ See next section.

⁴⁸ Project start December 2022. Funded Application: *On Relevance and Consent: Interrogating The Uses of the Victim's Previous Sexual History in Serious Sexual Offences Trials*.

⁴⁹ The Central Criminal Court is the High Court exercising its criminal jurisdiction.

⁵⁰ See Courts Service, *Annual Report 2025* (2026) at 108: 1,075 offences (580 offences of rape/attempted rape and 495 'sexual offences') resolved by trial out of a total 1,149 offences. These figures exclude guilty pleas, nolle prosequis, offences taken into consideration and cases where the defendant died.

⁵¹ Above n.9 at 210.

Kilkenny. 12 judges are assigned to the Court. Trials are conducted by a single judge sitting with a jury of twelve people.

The Circuit Court also deals with sexual offences, including sexual assault,⁵² and sexual offences against children.⁵³ It also hears section 3 applications. Sexual offences accounted for 45% of all offences resolved by trial in the Circuit Court in 2025.⁵⁴

Following ethical approval from Maynooth University’s Social Sciences Research Ethics Committee,⁵⁵ a purposive sampling method was adopted to identify suitable participants for the interviews. Participants were recruited for their expertise in relation to sexual offences trials generally and section 3 applications specifically.

Each participant occupied one of four roles: court accompaniment workers; policy specialists; practising lawyers; and legal aid clerks.

Lawyers were recruited using posters in the Four Courts complex, the Law Library and the Distillery Building, Dublin 7, where many barristers have offices. A few barristers were contacted directly by email by Sinéad Ring. Some barristers contacted Dr Ring after hearing about the research through word of mouth. The recruitment process for lawyers was slow due to the demands of practice and the need to build up trust with participants.

The non-lawyer participants were recruited from four established national organisations working with victims of sexual violence.⁵⁶

Profiles of Participants⁵⁷

Participant Role	Number of participants
Practising lawyers	13
Court Accompaniment Support Workers	3
Policy Specialists	3
Legal Aid Clerks	2
Total	21

⁵² Or indecent assault if the offences are non-recent. Aggravated sexual assault is dealt with by the Central Criminal Court only.

⁵³ E.g. offences under the Criminal Law (Sexual Offences) Act 2017 and the Criminal Law (Sexual Offences) (Amendment) Act 2019.

⁵⁴ Courts Service above n.50 at 104. 743 sexual offences resolved by trial out of a total of 1,639 offences resolved by trial. This excludes nolle prosequis, cases where other offences were taking into consideration, and where the defendant had died.

⁵⁵ Maynooth University Social Research Ethics Sub-Committee approval reference number 37228.

⁵⁶ Rape Crisis Ireland, Dublin Rape Crisis Centre, One in Four, and Victim Support at Court.

⁵⁷ Supplementary information was obtained from the Legal Aid Board’s Research and Information Service, individual lawyers and judges.

Practising lawyers: This cohort comprised 11 barristers and two solicitors. All participants specialised in sexual offences.⁵⁸ The wealth of experience of this cohort is a distinct strength of this project. The average number of years of professional experience was 18.5 years.⁵⁹ The shortest time in practice was five years, and the longest was 46 years. Of the 13 lawyers interviewed, three were long-standing senior counsels. Since the conclusion of data collection, one interviewee has become a senior counsel.

Most (seven) barristers were engaged in a mix of criminal prosecution and criminal defence work. Four lawyers worked exclusively as prosecutors, either as employees of the Office of the Director of Public Prosecutions⁶⁰ or as independent barristers. They were selected for their experience of receiving and dealing with section 3 applications in sexual offences trials. These lawyers had observed the practices of a broad sample of lawyers acting for the defence. One barrister worked solely in criminal defence and one barrister's practice was primarily criminal defence.

Most lawyer participants were based in Dublin and practised in the Central Criminal Court or Dublin Circuit Court, as well as on Circuit or in the Central Criminal Court sitting outside of Dublin. Three lawyers were based in the south-east, west and south of the country, and also practised in Dublin.

Court Accompaniment Support Workers: These were volunteers providing court accompaniment support to complainants in serious sexual offences trials. They attend trials with complainants and supported them through the process.

This group was chosen for their expertise and experience of working with complainants during rape trials. Court accompaniment workers were recruited through Victim Support at Court and Dublin Rape Crisis Centre. These organisations were chosen because they offer accompaniment services in the Central Criminal Court where rape is tried. Each organisation advertised the research by email, and prospective participants contacted Sinéad Ring.

Policy Specialists: This group included three professionals working in the area of policy for three different NGOs each of which specialises in working with people who have experienced sexual violence: Dublin Rape Crisis Centre, Rape Crisis Ireland and One in Four. These participants were contacted directly by email by Sinéad Ring and asked to participate.

Legal Aid Clerks: This group was chosen to gain insights into the Legal Aid Board's practice around section 3 applications. Legal Aid Clerks receive requests for separate legal representation for the complainant from the Serious and Sexual Offences Unit of the Office of the DPP and arrange for a barrister to act in this role. They also provide paralegal services to barristers acting as a complainant's separate legal representative in section 3 applications. Two clerks participated in the research.

An indicative sample interview schedules for semi-structured interviews with lawyers is included in Appendix A. There was a formal informed consent process, and all participants were guaranteed anonymity. Interviews were conducted over a 12 month period 2024 period from January to December 2024. Prior to the interview, all participants were provided with an information sheet setting out the project objectives and the uses to which their information would be put. All participants took part on a voluntary basis and received no remuneration. Participants could request a copy of the interview

⁵⁸ One participant had changed their practice to move away from sexual offences, because of the lack of available training. This is discussed in Chapter Three.

⁵⁹ The median was 17 years.

⁶⁰ In the Serious and Sexual Offences Unit.

schedule in advance. Only one person did so. Participants were given a copy of their transcript for review and could advise on edits or clarifications before finalisation of the transcript. Most did not make any changes. As was their right, one participant declined to consent to quotes from their anonymised data.

Interviews and coding process

21 in-depth semi-structured interviews were conducted by Sinéad Ring with participants. Interviews were conducted online and recorded, apart from one which was held in a participant's office. Interviews were audio or audio-visually recorded, transcribed and anonymised.

Participants engaged with general and focused questions, allowing an exploration of this complex topic. There was time in the interview for additional comments by the participants on matters not already covered in the interview. The interviews were generally very in-depth. The longest interview lasted 2 hours 40 minutes and the shortest was 40 minutes. The average length of an interview was 1 hour and 20 minutes. The data obtained was rich in detail and nuance, reflecting the complexity of sexual offences prosecutions and the careful consideration given to each question by interviewees.

Following anonymisation and transcription, the interview data was imported into a qualitative data analysis software programme.⁶¹ The data was coded inductively by Sinéad Ring and Ashleigh Pillay,⁶² using a two-stage coding process to identify descriptive labels and then develop categories and themes for analysis.⁶³ Sinéad Ring conducted the analysis and wrote the discussion and made findings based on the analysis and discussion. The findings are presented across Chapters Four to Seven.

Limitations

The main limitation is the absence of complainants. The decision not to recruit complainants was taken to avoid causing additional distress and possible re-traumatisation. However, an insight from doing this work is that such an approach may be unnecessarily over-protective. Indeed, interviews may be experienced as a form of empowerment by some people. Any future research in this area should include people who have been complainants in rape trials.

Counsellors were not interviewed. The original research design included counsellors. RCI facilitated calls for participants, however no counsellors chose to engage. It may be that this was down to a lack of trust in speaking to an academic lawyers about sensitive clinical matters. Future work on disclosure of counselling records should take account of this consideration and include measures to enhance trust.

Defence solicitors were contacted and while some expressed interest and met with Sinéad Ring, unfortunately none participated due to workload. This is regrettable but understandable given the

⁶¹ MaxQDA.

⁶² MA, doctoral research student at Maynooth University.

⁶³ The study employed a realist method, reporting the meanings, realities and experiences of participants. An inductive approach to the analysis was adopted, so that the themes were closely linked to the data. See Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77. No AI was used in coding.

pressures of practice. However, their absence is not a serious problem in terms of the research findings because barristers take the crucial decisions regarding section 3 applications.

No participants came from organisations working exclusively with children. This was because the focus of the study was on adults. However, as explained in Chapter Six, many of the findings relate to children and young people. Further research with workers specialising in advocacy or support for child and adolescent complainants⁶⁴ would provide invaluable insights and knowledge.

Judges were not interviewed for this study. The focus was on the interpretation by lawyers of the test. Participants also spoke to matters such as the likelihood of admission of certain forms of sexual experience evidence. However, the judicial perspective is an important aspect of this area that needs to be explored further in future research.

The research is not triangulated with court observation data. This would provide additional evidence from which to understand the operation of the rape shield in Ireland. While the study analyses the words of the participants, there are important gaps in our understanding in relation to how cross-examination is conducted in trials, and specifically how sexual experience evidence is actually used in cross-examination, including how questions that have no prospect of being allowed may be used as a tactic to unsettle the complainant.

This study is small in scale, but as detailed above under Participants' Profiles, this was a deliberate choice. The methodology is qualitative in nature, seeking to derive deep, rich insights into the operation and effectiveness of section 3. The expert status of the lawyer participants and policy specialists, and the in-depth nature of the interviews, underline the significance of the findings.

This report offers groundbreaking insights into the operation of the rape shield in Ireland. It blends detailed socio-legal contextualisation of legal doctrine with in-depth analysis of extensive qualitative data from lengthy in-depth interviews.

The Structure of this Report

Chapter Two explains the rationale for rape shields, explaining their importance in terms of protecting the jury from irrelevant and highly prejudicial evidence. The chapter investigates the impermissible inferences targeted by the rape shield: that a person's prior consent is probative of their later consent to the act charged; and that promiscuity is suggestive of weakened credibility. It also shows how such inferences are grounded in rape myths, and how sexual experience evidence can be used to mobilise and amplify rape myths especially the 'real rape' myth and the myth of the lying rape complainant.

Chapters Four to Seven present the research findings. Although the findings are split into the four chapters, they should be read in conjunction with each other, as themes and ideas recur across the chapters. Chapter Four examines the operation of section 3 and how well it is serving its purpose. Chapter Five explores the issue of admissibility of evidence of adult complainants' sexual experience. In Chapter Six the focus is on the sexual experiences of child and adolescent complainants. In Chapter Seven the report examines the issue of late notice of section 3 applications and the role of the separate legal representative. For ease of reference the recommendations are placed at the start of the report along with the executive summary.

⁶⁴ Such as Accompaniment Support Services for Children.

When discussing the themes that emerged during the analysis of the data, the report quotes extracts from interviews. A decision was taken to include many of these quotes, and to quote some interviews at length. This was done to provide as much detail and context to a quote as possible, for the reader to appreciate the dynamics of the conversation and the point being made in analysis. For space reasons it was not possible to include every quote that illustrated a point, so a balance had to be struck.

Finally, a note on language in this report. The term ‘complainant’ is used throughout, instead of ‘victim’ or ‘survivor’. This is to reflect the position of the person who is the main prosecution witness in a rape trial, along with the contested nature of the allegations and the accused person’s entitlement to the presumption of innocence in the trial.⁶⁵ Although gender neutral pronouns are often used, where appropriate the male pronoun is used for the defendant and the female pronoun is used for the complainant, in order to capture the gendered nature of the offending and the gendered nature of the law on rape.⁶⁶ However, the report notes that people of all genders are victims of sexual violence.

The next chapter examines the intersection of rape myths with the rape shield.

⁶⁵ Article 38 Bunreacht na hÉireann; *Hardy v Ireland* [1994] 2 IR 550; *O’Leary v Attorney General* [1995] 1 IR 454.

⁶⁶ Section 2(1) of the Criminal Law (Rape) Act 1981 defines rape: “2(1) A man commits rape if—
(a) he has sexual intercourse with a woman who at the time of the intercourse does not consent to it, and
(b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she does or does not consent to it [...]”. Rape under section 4 can be committed by a woman on another woman or by a man on another man. Rape under Section 4 of the Criminal Law (Rape) (Amendment) Act 1990 is defined as, “a sexual assault that includes—
(a) penetration (however slight) of the anus or mouth by the penis, or (b) penetration (however slight) of the vagina by any object held or manipulated by another person.”

RAPE MYTHS AND THE RAPE SHIELD

Introduction

Rape shields are intended to restrict the admission of evidence of sexual experience or questions about such experience. They are a significant limit on the scope of the cross-examination of a rape complainant by counsel for the defendant. As noted in Chapter One, rape shields are an important protection for complainants from distress caused by intrusive questioning. However their core justification is to protect the integrity of the evidence provided to the fact finder (the jury) and the integrity and legitimacy of the court's process. Like its international equivalents, the Irish rape shield reflects a concern that the complainant's prior consent to sex or sexual behaviour are not logically or legally connected to the key issues (usually consent, belief in consent) and have a prejudicial and distracting impact on the jury, and can influence juries (and possibly judges), to incorporate erroneous assumptions into their reasoning. The particular prohibited inferences targeted by rape shields are: that sexually active women are less credible and are more likely to consent to sex.⁶⁷ These are often referred to as the 'twin myths'. This chapter shows how such assumptions themselves are based on a bedrock of rape myths and a broader context in which untrue and discriminatory generalisations about rape victims circulate in culture, society and in courtrooms. Indeed, the impermissible inferences only make sense when understood against the backdrop of two key rape myths: the myth of the lying complainant and the myth of the real rape.

In Section 1 the chapter draws on international feminist socio-legal scholarship to explain the key rape myths. Section 2 explains how rape shields are designed to target the mobilisation of 'rape myths' including through the two impermissible inferences. Section 3 examines arguments commonly offered in favour of the admissibility of sexual experience evidence.

1. Myths about rape and rape victims

Rape myths are widely-held but false attitudes and beliefs about rape, rape victims and rapists.⁶⁸ They are bound up with ideas about gender, autonomy, and sex that people learn from their social environments. People from all walks of life, including the highly educated, believe in rape myths.⁶⁹

Rape myths function not necessarily as consciously held views by individuals, but more as culturally prevalent tropes, images and expectations upon which people, including those working in the criminal process, draw when exercising judgement.⁷⁰ A substantial body of literature, including mock jury

⁶⁷ *R v Seaboyer* [1991] 2 SCR 577. The shield may be framed in general terms, as in Ireland, or using categorical exceptions to a general exclusionary rule as in England and Wales: Section 41 Youth Justice and Criminal Evidence Act 1999.

⁶⁸ Kimberly A Lonsway and Louise F Fitzgerald, 'Rape Myths. In Review' (1994) 18 *Psychology of Women Quarterly* 133 at 135.

⁶⁹ Cowan 2025 above n.21 at 159.

studies and attitudinal surveys, demonstrates that individuals who believe rape myths tend to doubt the complainant's account and believe or excuse the defendant.⁷¹

Rape myths emerge from a wider culture, within which taken for granted discourses and norms of heterosexuality "legitimate particular forms and circumstances of sex ... and delegitimate others."⁷² According to Nicola Gavey, the societal building blocks that both enable rape and excuse it, are located in the "sharply gendered binary dynamic of heterosexual sex (masculine-feminine, active-passive, dominant-submissive, desiring-desired)."⁷³ Gavey does not mean that all heterosexual sex is inherently coercive, but rather that it "exists as a cultural pattern, as a reference point for what is normal and/or acceptable, not that it is the (statistical) norm of what is actually practised."⁷⁴ Gavey's work draws attention to the need for a socio-cultural understanding of rape myths when considering their role in rape trials, including in applications to adduce sexual experience evidence. Indeed, Ellison and Munro's extensive research on juror deliberations in non-stranger rape cases (the majority of rape cases) indicates that there are myriad factors at play, including how myths are "deployed, reinforced and even challenged" through the criminal justice process that influence which narratives and understandings juries latch onto during a trial and use in their decision-making.⁷⁵ They found that jurors found it difficult to convict in these cases, not because of a commitment to an outdated conception of what a 'real rape' looks like, but because of engrained expectations regarding resistance and sexual miscommunication, which often interacted in heightened and specific ways with the fact of a previous sexual relationship.⁷⁶

The two foundational rape myths are the myth that women and children lie about rape, and the real rape myth. Their effect is to cast suspicion on all complainants of sexual offences; and to construct a vision of rape, victims and rapists as exceptional. Both have considerable influence in how arguments

⁷⁰ Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008); Gerd Bohner and others, 'Rape Myth Acceptance: Cognitive, Affective and Behavioural Effects of Beliefs That Blame the Victim and Exonerate the Perpetrator' in Miranda AH Horvath and Jennifer M Brown (eds) (Willan Publishing 2009); Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 *British Journal of Criminology* 202; and Louise Ellison and Vanessa E Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 *The International Journal of Evidence and Proof* 299. See Joanne Conaghan and Yvette Russell, *Sexual History Evidence and the Rape Trial* (Bristol University Press 2023) at Chapter Five for a through exploration of recent research on rape myths, schematic processing and socio-sexual scripts.

⁷¹ Vanessa E. Munro, 'Judging Juries: The "Common Sense" Conundrums of Prosecuting Violence against Women' (2019) 3 *New Zealand Women's Law Journal* 13. That research involved four mock trial studies, including three live simulation studies and more than 1000 individual mock jurors across more than 100 deliberating jury groups. Siobhan Headd and Dominic Willmott, 'Do Pre-Trial Juror Attitudes Predict Rape Trial Verdict Decisions? Investigating the Role of Rape Myth Beliefs, Contemporary Sexist Attitudes and Sexual Victimization Experiences on Juror Decision-Making' [2025] *The British Journal of Criminology* 1 <<https://doi.org/10.1093/bjc/azaf099>; Caroline Lilley, Dominic Willmott and Dara Mojtahedi, 'Juror Characteristics on Trial: Investigating How Psychopathic Traits, Rape Attitudes, Victimization Experiences, and Juror Demographics Influence Decision-Making in an Intimate Partner Rape Trial' (2022) 13 *Frontiers in Psychiatry* 1086026. Louise Ellison and Vanessa E Munro, 'Getting to (Not) Guilty: Examining Jurors' Deliberative Processes in, and beyond, the Context of a Mock Rape Trial' (2010) 30 *Legal Studies* 74; Sokratis Dinos and others, 'A Systematic Review of Juries' Assessment of Rape Victims: Do Rape Myths Impact on Juror Decision-Making?' (2015) 43 *International Journal of Law, Crime and Justice* 36.

⁷² Nicola Gavey, *The Cultural Scaffolding of Sex* (Taylor and Francis 2nd edn 2018) at 131.

⁷³ *Ibid*, 218.

⁷⁴ *Ibid*, 222, note 30.

⁷⁵ Ellison and Munro (2010) above n.71 at 784-5; Kirsty Duncanson and Emma Henderson, 'Narrative, Theatre, and the Disruptive Potential of Jury Directions in Rape Trials' (2014) 22 *Feminist Legal Studies* 155.

⁷⁶ *Ibid*, 303.

about the relevance of sexual experience evidence in a rape trial are constructed. They are considered next.

Rape Myth One: Women and children lie about sexual violence

The rape myth of the lying woman or child has a long history.⁷⁷ The previous common law rule that allowed for the unrestricted admission of sexual history evidence is one of a number of rules requiring special treatment of women (and child) complainants as a class of witnesses. Others include the formerly mandatory corroboration warning⁷⁸ and the former rule that children were not competent witnesses.⁷⁹ The assumption underpinning these rules was that women and children as a class are untrustworthy because they lie about sexual violence. Although rates of false reports are in fact very low,⁸⁰ belief in this myth is remarkably tenacious. In 2022 the CSO found that 8% of survey respondents agreed that “women often make up or exaggerate reports of rape”.⁸¹ Related to the idea that women and children make false allegations is the myth of the ‘real rape’.

Rape Myth 2: The ‘real rape’ myth

According to this myth, rape is a rare single act of violent, forcible sexual penetration by a male stranger in a public, deserted place, while the victim is a respectable, morally upstanding heterosexual white adult cis-woman who sustains physical and psychological injury and who reports the crime immediately.⁸² The real rape myth also exists for sexual violence against children. Child sexual abuse is stereotypically seen as rare, and committed by monstrous men from outside of the family.⁸³ Expectations of virginity and purity and compliance with authority heavily shape who is seen as a legitimate victim of sexual violence.

⁷⁷ Susan Estrich, *Real Rape* (Harvard University Press 1987).

⁷⁸ Susan Easton, ‘The Use of Sexual History Evidence in Rape Trials’ *Feminist Perspectives on Evidence* (Routledge-Cavendish 2000); M. Hale, *Pleas of the Crown: or, A Methodical Summary of the principal matters relating to that Subject Vol I* (London: Richard Atkyns and Edward Atkyns, 1678) at 663; *R v Baskerville* [1916] 2 KB 658. Corroboration is evidence independent of the evidence requiring corroboration and which also implicates the accused in a material particular. The judge had to identify for the jury any item of evidence which could serve as corroboration of the allegation, or, if there was nothing which could be regarded as potentially corroborative in law explain that this was the case. Although the corroboration warning requirement in sexual offences cases has been abolished trial judges in rape cases retain a discretion to administer a warning where appropriate on the facts: s7 Criminal Law (Rape) (Amendment) Act 1990.

⁷⁹ *DPP v Kilbourne* [1973] AC 729, 748 per Lord Hailsham. See also Sue Lees, *Carnal Knowledge: Rape on Trial* (Hamish Hamilton, 1996).

⁸⁰ Rachel E Lovell and Lacey Caporale, ‘Decoding Disbelief (Part II): Content Analysis of 24 Years of Unfounded Rape Report Narratives and False Reporting Prevalence’ [2026] *Journal of Criminal Psychology* 1 <<https://doi.org/10.1108/JCP-02-2026-0028>>; Ferguson CE and Malouff JM, ‘Assessing Police Classifications of Sexual Assault Reports: A Meta-Analysis of False Reporting Rates’ (2016) 45 *Archives of Sexual Behavior* 1185; See also Liz Kelly, ‘The (In)Credible Words of Women: False Allegations in European Rape Research’ (2010) 16 *Violence Against Women* 1345.

⁸¹ 7% of women and 9% of men agreed with the statement. The respondents were adults who did not experience sexual violence in their lifetime or sexual harassment in the last 12 months. CSO above n.11 at Table SVS271.

⁸² Heather Littleton and Daniel Axsom, ‘Rape and seduction scripts of university students: Implications for rape attributions and unacknowledged rape’ (2003) 49(9) *Sex Roles* 465.

⁸³ Lisa DeMarni Cromer, and Rachel Goldsmith ‘Child Sexual Abuse Myths: Attitudes, Beliefs, and Individual Differences’ (2010) 19(6) *Journal of Child Sexual Abuse* 618; Ailise Bulfin, ‘“Monster, Give Me My Child”: How the Myth of the Paedophile as a Monstrous Stranger Took Shape in Emerging Discourses on Child Sexual Abuse in Late Nineteenth-Century Britain’ (2021) 43 *Nineteenth-Century Contexts* 221.

The real rape myth has been discredited by academic research,⁸⁴ national surveys,⁸⁵ and official statistics of recorded crime.⁸⁶ The CSO Sexual Violence Survey published in 2023 is the most reliable source of information in this respect. It shows that sexual violence is not rare; it is experienced by at least⁸⁷ 52% of women and 28% of men.⁸⁸ At least 13% of women and 2% of men have experienced rape by a partner as an adult, and at least 10% of women and 2% of men have experienced rape by a non-partner as an adult. 26% of women and 12% of men reported contact sexual violence as a child.⁸⁹ Sexual violence can be repeated and ongoing over years, most commonly if the perpetrator is a family member or intimate partner.⁹⁰

The image of the stereotypical rape victim has been thoroughly discredited. A victim of sexual violence is more likely to be a child than an adult.⁹¹ They may have a disability.⁹² Regardless of age at time of victimisation, they are likely to know their attacker, either as a family member, an intimate partner or ex-partner or an acquaintance.⁹³ This presents particular challenges when thinking about the relevance of previous sexual experience with the defendant in non-stranger cases.⁹⁴ A victim of sexual violence is likely not have offered any resistance whatsoever, because they froze in terror or because they wished to avoid compounding injuries or death.⁹⁵ They usually do not report at all, and if they do, they will typically take some time before doing so. Furthermore, it is well-established that men,⁹⁶ people who

⁸⁴ See Hanly and others above n.38; Temkin and Krahé above n.70; Miranda Horvath and Jennifer Brown, *Rape: Challenging Contemporary Thinking - 10 Years On* (Second edition, Routledge 2023) Fiona Leverick and others, 'Rape Myths and Jury Decision Making: An Evidence Review' (University of Glasgow 2025). Available at <https://eprints.gla.ac.uk/352705/1/352705.pdf>.

⁸⁵ CSO above n.11; Hannah Mc Gee and Others, *The SAVI report: sexual abuse and violence in Ireland* (Royal College of Surgeons in Ireland 2002). Available at <https://doi.org/10.25419/rcsi.10770797.v2>.

⁸⁶ See CSO 2023 above n.11.

⁸⁷ However, sexual violence is under-reported: see CSO above n.11

⁸⁸ These figures are prevalence rates across the person's lifetime. Ibid.

⁸⁹ Ibid.

⁹⁰ The 2022 CSO survey found that 52% of adults who experienced sexual violence as an adult with a partner reported that it happened more than once. CSO above n. 11 at Table 5.1. See also Rape Crisis Ireland, 'Learning from Survivors of Rape and Sexual Violence – Rape Crisis Statistics 2025' (RCI 2026) at 48-49 and Eurostat, EU-GBV survey, wave 2021, data collection coordinated by Eurostat, FRA and EIGE. Eurostat online data code: *gbv_npv_type*.

⁹¹ See prevalence rates above.

⁹² People with disabilities face a disproportionately higher risk of sexual violence throughout their lives: 45% of people with a disability compared to 39% of those without a disability (CSO Table SVS179, <https://data.cso.ie>). See Susan Flynn and others, 'Disabled Women's Experiences of Intimate Partner Abuse in Ireland: Research Project Report' (Ireland: Women's Aid and Trinity College Dublin 2024) <<https://doi.org/10.25546/110219>>.

⁹³ RCI above n.90 at 53. According to the CSO the suspected offender was known to the victim in seven out of every ten recorded sexual crimes in 2023 that had been detected by 2025. <https://www.cso.ie/en/releasesandpublications/ep/p-rcvo/recordedcrimevictims2024andsuspectedoffenders2023/keyfindings/>.

⁹⁴ Louise Ellison and Vanessa E Munro, 'Better the Devil You Know? "Real Rape" Stereotypes and the Relevance of a Previous Relationship in (Mock) Juror Deliberations' (2013) 17 *The International Journal of Evidence and Proof* 299.

⁹⁵ Kasia Kozłowska and others, 'Fear and the Defense Cascade: Clinical Implications and Management' (2015) 23 *Harvard Review of Psychiatry* 263. Even when injuries are present, however, does not mean that the jury will consider the intercourse to be non-consensual, nor that the defendant should be accountable for rape. Melanie Randall, 'Sexual Assault law, credibility and ideal victims: consent, resistance, and victim blaming' (2010) *Canadian Journal of Women and Law* 397.

⁹⁶ Vita Pilkington and others, 'Barriers and Facilitators for Sexual Trauma Disclosure in Boys and Men: A Systematic Review' (2026) 27 *Trauma, Violence, and Abuse* 830. Male victims of child sexual abuse and victims of intimate partner sexual violence take the longest time to seek justice. CSO above n.11 at Table 7.3.

identify as gay, lesbian bisexual or trans/gender variant,⁹⁷ racialised people, and people living in Direct Provision,⁹⁸ all experience sexual violence,⁹⁹ and that the real rape myth plays out in nuanced and specific ways in relation to these groups.¹⁰⁰

The stereotype of the real rape also matters for understandings of a typical rapist. According to the real rape stereotype, the figure of the rapist is of a terrifying, strange man who uses physical violence against randomly chosen victims. However, most rapists and child sexual abusers are not social outcasts, they are ordinary men,¹⁰¹ or sometimes men with high social status.¹⁰² Often they are pillars of the community. The typical rapist targets their own children or stepchildren, grandchildren, nieces or nephews, their intimate partner or ex-partner or an acquaintance.¹⁰³ They are mostly likely to attack in their own home or in the victim's home, not a public place.¹⁰⁴ Regardless of whether they know their victim, most rapists use coercion and manipulation rather than overt force.¹⁰⁵

⁹⁷ Courtney McLellan, Ping Teresa Yeh and others, 'Global Burden of Violence Against Transgender and Gender-Diverse Adults: A Systematic Review and Meta-Analysis' (2026) JAMA Network Open 9(1):e2552953. doi:10.1001/jamanetworkopen.2025.52953.

⁹⁸ RCI above n.90.

⁹⁹ CSO above n.11. A third of survivors who engaged with Rape Crisis Centres in 2025 disclosed one or more of the following characteristics: disability; sexual orientation; gender identity or expression and ethnic and cultural identity and people seeking international protection. Including people seeking asylum or those granted refugee status. RCI above n.90 at 34-40.

¹⁰⁰ Olivia N Grella and others, 'Modern Rape Myths? An Examination of Rape Myth Acceptance and Legal Implications Across Time' in Monica K Miller, Brian H Bornstein and David DeMatteo (eds), *Advances in Psychology and Law*, vol 7 (Springer Nature Switzerland 2025) 279. Catherine Donovan and Rebecca Barnes, 'Being "Ideal" or Falling Short? The Legitimacy of Lesbian, Gay, Bisexual and/or Transgender Victims of Domestic Violence and Hate Crime' in Marian Duggan (ed), *Revisiting the 'Ideal Victim': Developments in Critical Victimology* (Bristol University Press 2018); Cossins A, *Closing the Justice Gap for Adult and Child Sexual Assault: Rethinking the Adversarial Trial* (Palgrave Macmillan UK 2020). Mary M Levi and others, 'Perceptions of Male-Perpetrated Sexual Assault: The Impact of Victim Gender and Perceived Sexual Orientation' (2025) 12 Psychology of Sexual Orientation and Gender Diversity 657. Ngosa Kambashi and others, 'Adult Male Rape Myths in England since 1994: A Systemic Mixed Methods Review' (2023) 29 Psychology, Public Policy, and Law 497; Dominic Willmott and B Kennath Widanaralalage, 'Male Rape Myths: Examining the Role of Victim Empathy and Socio-Demographics in a Cross-Sectional Sample of UK Adults' (2024) 76 International Journal of Law, Crime and Justice 100645; Millar M, Weara S and Willmott D, 'Mock Jurors' Determinations of Guilt in Sexual Offences Involving Male Victims: A Systematic Review' [2025] Trauma, Violence, and Abuse 15248380251366264 Gianni Ribeiro and Faye T Nitschke, 'Jurors' Perceptions of Transgender Victims of Sexual Assault: A Literature Review of Empirical Research and Policy Review of Judicial Instructions' (2025) 43 Behavioral Sciences and the Law 7.

¹⁰¹ RCI 2026 above n.90 at 51 and 53, Graph 34; CSO above n.11 fig 6.5.

¹⁰² Sinéad Ring, 'The Victim of Historical Child Sexual Abuse in the Irish Courts 1999–2006' (2017) 26 Social and Legal Studies 562.

¹⁰³ Janine Benedet and Isabel Grant, "Breaking the Silence on Father-Daughter Sexual Abuse of Adolescent Girls: A Case Law Study" (2020) 32:2 Canadian Journal of Women and the Law 239; McGee and others above n.77. The CSO survey indicated that there is a growing problem with perpetration by children, with 69% of those aged 18-24 years reported that the perpetrator was an adolescent. CSO above n.11 at Table 7.3.

¹⁰⁴ Sexual violence is predominantly perpetrated in either the survivor's or perpetrator's home, with only a fifth of incidents taking place in public locations. RCI above n.90 at 49. The CSO statistics indicate that there is an internationally unusual high rate of perpetration in nightclubs and pubs in Ireland: above n.11.

¹⁰⁵ Lucia F. O'Sullivan and Scott T. Ronis, 'Isolate, Inebriate, Intimidate, Repeat: High Rates of Sexual Force Against Women Are Reported When Young Men Given Anonymous Surveys' [2026] Journal of Interpersonal Violence 08862605261432630 Ciara Mahon and others, 'Socioecological Risk and Protective Factors for Sexual Victimization in Post-Secondary Students in Ireland: A Brief Report' (2024) 39 Journal of Interpersonal Violence 4356; Janice Du Mont and Deborah White, 'The Uses and Impacts of Medico-Legal Evidence in Sexual Assault Cases: A Global Review' (World Health Organisation, Geneva 2007).

There is a body of empirical international evidence that demonstrates the continuing prevalence of rape myths in criminal trials and how they continue to frustrate the trial's fact finding function.¹⁰⁶ Defence strategy often centres around contrasting the ordinary defendant who makes an (easy) mistake about consent with the mythical monstrous real rapist. Another key strategy is to focus on the complainant's behaviour and character in order to distinguish the complainant from the putative victim of a 'real rape'.¹⁰⁷ This might include adducing evidence of drinking alcohol,¹⁰⁸ lack of physical resistance during the alleged rape, and absence of visible distress afterwards.¹⁰⁹ Evidence of the complainant's sexual experiences can also be used by defence counsel to mobilise rape myths.¹¹⁰ Prosecutors too may structure their case around rape myths.¹¹¹ Judges may also reinforce rape mythology through admissibility decisions (especially regarding sexual experience evidence), lack of intervention during defence or prosecution questions, or through the language used in their directions to the jury. Importantly, this is not necessarily conscious: as Joanne Conaghan points out, the influence of the real rape stereotype is not dependent on explicit endorsement – rather the problem is that “stereotypes too often influence *unconsciously*, to instil implicit biases that inform evaluative judgments”.¹¹² The rarefied context of the courtroom is also important, within which:

...specific moral values, and expectations of behaviour can be hot-housed to flourish and overwhelm, even as they contradict the values and expectations that are more progressively and extensively accepted beyond the confines of the legal space.¹¹³

Rape shields are a key way of addressing the problem of rape myths. They target the use of sexual experience evidence to invite jurors to consider information based on unfounded assumptions about the complainant's credibility, consent and moral worthiness.¹¹⁴ The concern is that such evidence may be used to exploit culturally potent notions of rape complainants as inherently suspicious, to bring their experience within the category of 'just sex'¹¹⁵ or to cast them as outside the scope of ideal victims of rape. The ways in which rape myths or culturally dominant ideas about (hetero)sex and consent intersect with the rape shield are explored next.

¹⁰⁶ Including Julia Quilter and Luke McNamara *Reforming Rape Trials The Impact of Law Reform on Criminal Trials in Australia* (Oxford University Press 2026), McDonald above n.37; Daly above n.7; Yvette Tinsley, Claire Baylis and Warren Young, “‘I Think She’s Learnt Her Lesson’: Juror Use of Cultural Misconceptions in Sexual Violence Trials’ (2021) 52 Victoria University of Wellington Law Review 463.

¹⁰⁷ Smith above n.10; Cowan above n. 15 at 153. Olivia Smith and Tina Skinner, ‘Observing court responses to victims of rape and sexual assault’ (2012) *Feminist Criminology*, 7, 298. J. Temkin, J. Gray and J. Barrett, ‘Different Functions of Rape Myth Use in Court: Findings from a Trial Observation’ (2018) 13(2) *Feminist Criminology* 205-226; Nina Westera and others, ‘Sexual Assault Complainants on the Stand: A Historical Comparison of Courtroom Questioning’ (2017) 23 *Psychology, Crime and Law* 15; Sarah Zydervelt and others, ‘Lawyers’ Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?’ [2017] 57 3(1) *British Journal of Criminology* 551.

¹⁰⁸ Cowan above n.21 at 155.

¹⁰⁹ Smith above n.10.

¹¹⁰ Smith above n.10.

¹¹¹ McDonald above n.37 at 48, and chapters 5,8 and 9; Cassia Spohn and Katharine Tellis, ‘Sexual Assault Case Outcomes: Disentangling the Overlapping Decisions of Police and Prosecutors’ (2019) 36 *Justice Quarterly* 383.

¹¹² Joanne Conaghan, ‘The Essence of Rape’ (2019) 39 *Oxford Journal of Legal Studies* 151.

¹¹³ Duncan and Henderson above n.75 at 169.

¹¹⁴ The shield may be framed in general terms, as in Ireland, or using categorical exceptions to a general exclusionary rule as in England and Wales: Section 41 Youth Justice and Criminal Evidence Act 1999.

¹¹⁵ Gavey above n.72.

2. Relevance and the “Twin Myths’ targeted by the Rape Shield

The primary justification for rape shields is connected to the fact-finding function of the trial. As Lord Coleridge noted in 1887, sexual history evidence relating to the complainant’s activities with men other than the accused, should be excluded “not only on the ground that to admit it would be unfair and a hardship to the woman, but also on the general principle that it is not evidence which goes directly to the point in issue at the trial.”¹¹⁶ However Coleridge’s dicta is in contrast to a generally permissive judicial approach to sexual history evidence throughout the early and mid-20th century in Ireland and in England.¹¹⁷ This permissive approach stood in contrast to the stricter rules around the exclusion of the defendant’s past misconduct, which are justified by a concern that the defendant will be unfairly convicted on the basis of past rather than present conduct and that the evidence of bad character would divert the jury’s attention from the particular case under consideration.¹¹⁸

Following years of feminist activism, legislators across the common law world introduced rape shields to limit the admission of sexual experience evidence. As the Law Commission of England and Wales has recently noted, such evidence evokes myths about credibility, propensity to consent and moral worthiness.¹¹⁹ Rape shields target the use by defence counsel of evidence of the complainant’s sexual experience to invite jurors to draw certain inferences about consent and the complainant’s credibility. The Australian Law Reform Commission has described rape shields as having three broad aims: to prohibit the admission of evidence of a complainant’s sexual reputation; to prevent the use of sexual history evidence to establish the complainant as a ‘type’ of person who is more likely to consent to sexual activity; and to exclude the use of a complainant’s sexual history as an indicator of the complainant’s truthfulness.¹²⁰ In a landmark judgment, Canadian Supreme Court Justice McLachlin identified the faulty logic underpinning the use of sexual experience evidence as follows:¹²¹

These inferences (sought to be made about sexual experience evidence) were based not on facts, but on the myths that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief. These twin myths are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar.

The twin myths or impermissible inferences identified by McLachlin J – that sexually active women are more likely to consent and that they are of dubious credibility – only make sense in the context of the real rape myth and the myth of the lying rape complainant. They draw their power from a bedrock of rape mythology, specifically the foundational myths of the real rape and the lying rape complainant.

In 2019 the Supreme Court of Canada reiterated its rejection of the first myth:

Consider the first myth: that a complainant’s prior sexual activity may support an inference of consent in a particular instance. Rejection of this myth – and its link to relationships – is intimately connected to the modern understanding of consent ... Today an accused may no longer argue that

¹¹⁶ *R v Riley* (1887) 18 QBD 481, at 583-3, Lord Pollock and Mathew J concurring.

¹¹⁷ McGlynn above n.3.

¹¹⁸ Section 1(f), Criminal Justice Act 1924; *DPP v McGrail* [1990] 2 I.R. 38

¹¹⁹ Law Commission, *Evidence in Sexual Offences Prosecutions* (Consultation Paper No 259, 2023) at [4.1] and [4.99].

¹²⁰ Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law* (Report No 102, 2005) at [27.23].

¹²¹ *R v Seaboyer* [1991] 2 SCR 577.

consent was implied by a relationship: contemporaneous, affirmatively communicated consent must be given for each and every sexual act. Today, not only does no mean no, but only yes means yes. Nothing less than positive affirmation is required.¹²²

Irish law does not have a requirement of positive affirmation but it does state that a person only consents to an act when s/he “freely and voluntarily agrees to engage in that act”.¹²³ Clearly, consent is situation and person and time specific. Episodes of previous sexual activity are irrelevant to the consent issue; the section 3 rape shield reflects this and the power of sexual experience evidence to invoke and mobilise discriminatory assumptions about rape complainants.

However, rape shields are not blanket bans on sexual experience evidence. Instead their exclusionary effects are mitigated by statutory routes to inclusion. These may be via a statutorily-defined gateway, as in England and Wales¹²⁴ and Northern Ireland,¹²⁵ or, structured judicial discretion prescribed by statute as in Canada,¹²⁶ most Australian states and in Ireland.¹²⁷ In all jurisdictions, irrespective of the statutory regime, the rape shield’s ability to shield the jury from irrelevant and unhelpful evidence hinges on the judge’s decision as to admissibility. In Ireland the test is essentially one of enhanced relevance. But relevance is not a neutral concept; arguments for relevance may make logical leaps that implicitly rely on impermissible inferences and on the rape myth of the lying complainant and the real rape myth. As noted by Canadian Supreme Court Justice L’Heureux-Dubé:

Regardless of the definition used, the content of any relevancy decision will be filled by the particular judge’s experience, common sense and/or logic. There are certain areas of enquiry where experience, common sense and logic are informed by stereotype and myth ... This area of the law has been particularly prone to the utilization of stereotype in the determination of relevance.¹²⁸

The admissibility decision is vulnerable to the influence of stereotypical assumptions and unfounded generalisations about rape, how it happens who it happens to and who commits it. A key question for this research is: **Are arguments about relevance in section 3 applications connected to impermissible inferences about consent and credibility, and to rape myths of the lying complainant and the real rape myth?**

¹²² *R v Goldfinch* [2019] 3 S.C.R. 3. The Court also rejected the second twin myth.

¹²³ Section 9 Criminal Law (Rape)(Amendment) Act 1990 as amended.

¹²⁴ Section 41 Youth Justice and Criminal Evidence Act 1999. The ‘gateways’ for admissibility are:

- That the issue at trial is not one of consent 41(3)(a)(e.g. Defence argues mistaken belief in consent)
- If it is an issue of consent that the sexual behaviour of the C to which the evidence or q relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused 41(3)(b)
- The sexual behaviour of the complainant to which the evidence or question relates is so similar to the sexual behaviour of the complainant which took place as part of the alleged crime, or at about the same time as that event, that the similarity cannot reasonably be explained as a coincidence 41(3)(c)
- If the evidence or question goes no further than is necessary to allow the evidence adduced by the prosecution to be rebutted or explained. s41(5)

¹²⁵ Articles 28 and 29 Criminal Evidence (Northern Ireland) Order 1999.

¹²⁶ Criminal Code (R.S.C., 1985, c. C-46), s276.

¹²⁷ The extent to which the judge’s discretion is structured differs from jurisdiction to jurisdiction. See e.g. Crimes Act 1914 (Cth) ss15YB, 15YC, Evidence (Miscellaneous Provisions) Act 1991 ss75, 75. New South Wales has an exclusionary model which sets out a discrete set of exceptions to a general prohibition. Australian Law Reform Commission (2025) above n.1 at ch 12.

¹²⁸ *R v Seaboyer* [1991] 2 SCR 577, 228.

The next section considers the grounds on which relevance of sexual experience evidence are generally claimed, along with the main logical and legal counterarguments.

Arguments for admission of sexual experience evidence

Broadly speaking, defence counsel seeking to have sexual experience evidence admitted will argue that the evidence goes to one of the following facts in issue:

- The fact of consent
- The defendant's putative belief in consent¹²⁹
- The general credibility of the complainant's account

Alternatively the defence may say that the evidence is necessary to rebut the prosecution evidence (this is one of the most common arguments) or to show a motive to lie, or to show another person other than the defendant is responsible.

In all of these scenarios, the defence is saying that the degree of relevance is such that a refusal to admit the evidence will cause the trial to be unfair.

(i) Consent

Sexual experience with third parties

Adducing sexual history to support an inference of consent relies on the fallacy that previous consent is indicative of consent on the occasion in question. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. The only way in which prior consent to intercourse could *possibly* logically increase the logical probability of consent on the occasion in question is if the complainant is compared with someone who would be wholly unlikely to consent to the accused – a sexually inactive woman. In that scenario, it could perhaps be said that the complainant would be more likely to have consented to sex with the defendant than a sexually inactive woman.¹³⁰ However, that is not a useful comparison to make, since most Irish adults are sexually active.¹³¹ The class to which sexually active complainants belong is too large to draw any meaningful inference.

Implying (and inferring) consent from a prior occasion to the one at hand is incompatible with modern legal conceptions of consent. It fundamentally undermines the understanding of rape as a violation of

¹²⁹ See The Bar of Ireland, *Victim's Testimony in Cases of Rape and Sexual Assault* (The Bar of Ireland 2021) <<https://www.lawlibrary.ie/app/uploads/securepdfs/2021/05/Submission-to-Justice-Committee-on-Victim-testimony-Feb-21.pdf>.

¹³⁰ This is often defined as someone who has not had sex in the past 12 months.

¹³¹ Apart from the fact that there is no up-to-date reliable data available on the rates of sexual activity in Irish adults the most recent study, from 2006 found that over 80% of Irish adults across all age groups had vaginal sex in the last year. Richard Layte and others, *The Irish Study of Sexual Health and Relationships* (Crisis Pregnancy Agency and the Department of Health and Children 2006) at [8.6]. This statistic is from 2006; it is likely that the figure is much higher now. A survey of 12,000 adults for a newspaper found that 93% of adults (excluding virgins) were sexually active. *Irish Times* 29 June 2015. <https://www.irishtimes.com/life-and-style/health-family/sex-survey/the-sex-survey-how-you-answered-our-big-questions-1.2265942>.

sexual autonomy, understood as each person's right to choose whether, with whom, when, how and in what circumstances to have sex. Senior UK judge Baroness Hale put it clearly:

[I]t is difficult to think of an activity which is more person and situation specific than sexual relations. One does not consent to sex in general. One consents to this act of sex with this person at this time and in this place.¹³²

The right to sexual autonomy is part of the constitutional right to bodily integrity¹³³ and finds statutory expression in the legislative definition of consent,¹³⁴ according to which consent to sex is specific to each sexual partner, each situation, and each sexual act.

Sexual experience with the defendant

Alternatively, defence counsel may seek to use adduce prior sexual experience between the defendant and the complainant to support an implication of consent. The claim that such evidence is relevant was articulated by UK House of Lords judge Lord Steyn in *R v A*:¹³⁵

As a matter of *common sense*, a prior sexual relationship between the complainant and the accused may, depending on the circumstances be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind.¹³⁶

As many commentators have noted, this is a deeply illogical approach¹³⁷ that seeks to draw an indefensible link between the complainant's general disposition towards the defendant, and her choice as to whether or not to consent to sex with him on the occasion in question:

[E]stablishing that the complainant is more likely to consent to sex with the defendant than women who are not in a relationship with him and/or establishing that the complainant is more likely to consent to sex with the defendant than with other men does not tell us anything about her sexual inclinations towards the defendant at any particular moment. [...] what is important for the criminal enquiry is the immediate context surrounding the disputed sexual encounter.¹³⁸

This is the core point: the criminal law, and therefore the trial, are only concerned with whether there was consent to the sexual activity that forms the basis of the charge(s), and the fact of other sexual experiences with the defendant does not reveal anything about the complainant's consent on the occasion in question. To assume it does means women in a relationship do not have any choice to make about consent to sex with their partner.

For the jury to infer, as the defence will be hoping they will, that the prior sexual experience makes consent more likely, also ignores the prevalence of sexual violence in intimate relationships generally.¹³⁹ The current rules on expert evidence mean that information about the prevalence of such

¹³² *R v C* [2009] UKHL 42, para 27. Per Hale LJ

¹³³ Article 40.3 of the Constitution; *The People (DPP) v V.E.* [2021] IECA 122 per Ní Raifeartaigh J.

¹³⁴ Section 9 of the Criminal Law (Rape)(Amendment) Act 1990 as amended.

¹³⁵ See *R v A (No 2)* [2001] UKHL 25. Lord Hutton stated that "*evidence of [a recent close and affectionate relationship] will show the complainant's specific mindset towards the defendant, namely her affection for him*", at [152].

¹³⁶ [31], emphasis added.

¹³⁷ See Conaghan and Russell above n.70 at ch 6.

¹³⁸ *Ibid* at 153.

¹³⁹ CSO 2023 above n.11.

violence will not be presented to the jury. So they will be asked to reason about the fact of sexual experience without that important reality as context. Furthermore notwithstanding any abuse in the relationship, there is the reality that “having once engaged in sexual activity with the accused, he may become the person to which the complainant is least likely to consent in future” precisely *because* of that previous experience.¹⁴⁰

Defence of belief in consent

In cases involving sexual experience with third parties and those involving sexual experience evidence with the defendant, arguments about the defendant’s alleged belief in consent are similarly problematic.

In England and Wales, Professor Louise Ellison and Professor Vanessa Munro’s research on mock jurors deliberations illustrates this point. In a case involving an allegation of rape against an ex-partner, jurors scrutinised the woman’s conduct more intensely than that of the man’s, and invoked a range of ‘scripts’ about heterosexual relationships that positioned women as sexual gate-keepers, responsible for communicating their consent or refusal clearly and unequivocally, while men were presumed to be lusty sexual initiators predisposed to ‘push their luck’.¹⁴¹ Jurors were preoccupied with the ways in which the complainant might have ‘inadvertently signalled’ a sexual interest to the defendant, which – even if mistaken - would have reasonably been understood by him as consent.¹⁴² Jurors thought the shared sexual history created an even greater risk of miscommunication, which generated even more intense examination of the victim’s behaviour for conformity with expectations regarding ‘appropriate behaviour’ towards their ex-partner. Similar findings have been found in research on cases involving male complainants.¹⁴³ This work highlights the importance of the rape shield in protecting the trial process from the pernicious influence of gendered expectations and stereotypes on the jury’s decision making process.

Respect for the principle of sexual autonomy means that the argument about belief must be informed by the statutory definition of consent; he is asserting a belief in something that is statutorily defined as being given specifically to him, on the occasion in question – not consent given to other men or to the defendant on another occasion. Because ignorance of the law is not a defence, the only basis on which a defence of belief in consent can be raised is on the basis that the defendant believed at the time that consent was given **to him**. As Irish law currently stands, this belief may be mistaken if honestly held, with the jury allowed to look for the absence of presence of reasonable grounds for that honest belief.¹⁴⁴ The defence of belief in consent, particularly given the entirely subjective notion of honest belief, may be vulnerable to being exploited to make arguments that essentially allow the defence to argue that prior consent means it was legitimate for him to infer consent. This theme is taken up in Chapter Five.

¹⁴⁰ See McGlynn above n.3 at 370.

¹⁴¹ Ellison and Munro above n.94 at 310-311. Although jurors expected a woman to clearly communicate her consent, they thought this could be done through ‘signals’. This in turn opened the door to the idea of inadvertent sexual miscommunication.

¹⁴² 311. Reasonable belief is the standard of belief under the Sexual Offences Act 2003 (England and Wales)

¹⁴³ Grella and others, above n.100.

¹⁴⁴ Under proposals currently under consideration by the Oireachtas, the legal test to be applied may be changed to a reasonable standard of belief.

(ii) The complainant's credibility

Historically, the courts treated evidence of a complainant's sexual reputation as bearing directly upon a witness' credibility.¹⁴⁵ At its most extreme, complainants were portrayed as sexually promiscuous and therefore not worthy of belief.¹⁴⁶ Underpinning this acceptance of sexual reputation evidence as going to credibility were sexist notions of chastity and respectability as being indicators of women's truthfulness.

The rape shield is a formal rejection of such outdated reasoning and barristers, scholars across the common law world reject the use of sexual reputation to undermine the credibility of the complainant's evidence. However, that does not mean it is not still behind arguments for admissibility. A key question in examining contemporary arguments of relevance under section 3 is to see if evidence of sexual experience is being used to undermine the complainant's credibility, or even to say that she is so morally inferior that her testimony cannot be the basis for finding the defendant guilty.¹⁴⁷

Other grounds for arguing relevance

In addition to consent and general credibility, there are other grounds on which the defence might argue (enhanced) relevance. There is a strong case for admission where the sexual experience evidence goes to the identity of the perpetrator and indicates someone else was responsible for the rape. Identity is not a fact in issue in most rape cases. More commonly the defence might argue that the evidence goes to rebutting assertions made by the prosecution or a prosecution witness (usually the complainant) or to show a motive to lie. Essentially both of these arguments go to credibility. On first glance, this kind of argument would appear to be far less objectionable than those seeking to link chastity or respectability to consent and general credibility. However, it is still entirely possible for the relevance argument to bypass logic and be rooted in anachronistic assumptions about classes of complainants, such as children for example. Therefore, a key objective in this research was to scrutinise this kind of argument.

As Professor Clare McGlynn notes, although it may be possible to imagine cases where it is marginally more likely that sex was consensual than not, as a general proposition, this fails to take into account the specificity of sexual relations in reality and in law. Indeed, any possible relevance may well be outweighed by its potential prejudice to the trial's truth-seeking function.¹⁴⁸ As well as distracting the jury, or asking them to think in generalised and anachronistic ways about the complainant, the effect of asking the complainant about her sexual experiences may in itself cause such distress that the jury is prevented from hearing the complainant's full account of what happened. This is another threat to the integrity of the trial process.

¹⁴⁵ *R v Clarke* [1717] 2 Stark 244; *R v Riley* (1887) 16 Cox CC 191.

¹⁴⁶ This notion is, of course, entirely unfounded; indeed, research suggests that women with more extensive sexual histories are the least likely to report a sexual assault and are no more likely to advocate false allegations than other women. Heather D. Flowe, E.B. Ebbesen and A. Putcha-Bhagavatula, 'Rape Shield Laws and Sexual Behavior Evidence: Effects of Consent Level and Women's Sexual History on Rape Allegations.' (2007) *Law and Human Behavior* 31, 159.

¹⁴⁷ This is moral credibility. See Adrian Zuckerman, *The Principles of Criminal Evidence* (Clarendon Press 1989) at 248-9 for the difference between moral credibility and probative credibility.

¹⁴⁸ See McGlynn above n.3 at 370. This is similar to the rationale for the rules forbidding the introduction of the accused's bad character.

Conclusion

In a rape trial the core question for the jury is whether the prosecution has proved beyond a reasonable doubt that the defendant had sexual intercourse with the complainant without her consent; and at that time he knew that she did not consent or was reckless as to whether she consented or not.¹⁴⁹ This chapter has shown how evidence of the complainant's sexual experiences risks introducing irrelevant or prejudicial material that may distort rather than promote the truth-finding function of the trial. Arguments for admissibility of sexual experience evidence may be based on the impermissible inferences that prior consent makes consent more likely and that prior sexual activity is indicative of reduced credibility. As shown in this chapter, there are very good reasons to say that such inferences are logically and legally unsupportable. Admissibility arguments must be also considered in the wider context of rape culture and the resonance of rape myths in society and in rape trials.

A key aim of this research was to critically examine the qualitative data to explore how barristers reason and argue for or against the relevance of sexual experience evidence in section 3 applications. The discussion in Chapters Four, Five and Six unpacks admissibility arguments to explore how barristers think about probative weight and risk of the jury engaging in illogical and discriminatory reasoning in the context of section 3 applications.

The next chapter examines the legal and procedural framework of the Irish rape shield.

¹⁴⁹ Paraphrasing s1(1) Criminal Law (Rape) Act 1981.

THE RAPE SHIELD

Introduction

This chapter examines the rules governing the introduction and use of evidence the complainant's sexual experiences in Irish rape trials as contained in section 3 of the Criminal (Law) Rape Act 1981. The chapter sketches the law on rape and the process by which the complainant gives evidence in the trial, and then examines the particular issues that arise in relation to cross-examination of rape complainants.

1. The law on rape and the process of giving evidence in a rape trial

The offence of rape is tried in the Central Criminal Court, by a judge sitting with a jury. In a rape trial the prosecution bears the burden of proving both the physical element of the crime of rape, sexual intercourse without consent, and the mental element – the defendant's guilty mind. The prosecution must prove both elements to the standard of beyond a reasonable doubt. The defendant does not have to prove anything although he can raise a defence and he can give evidence in his own defence if he wishes.

The prosecution must prove that the defendant¹⁵⁰ had sexual intercourse¹⁵¹ with the complainant without her¹⁵² consent.¹⁵³ Since 2017 consent has been defined in Irish law to mean free and voluntary agreement to engage in intercourse. A person does not consent to a sexual act in the following situations: where they submitted because of a (threat of) force; the complaint was asleep/unconscious; they were incapable of consenting due to alcohol or drugs; they were unable to communicate agreement due to a physical disability; they were being unlawfully detained at the time or the putative consent came from someone else.¹⁵⁴ Consent may be withdrawn at any time before the act begins or while it is taking place.¹⁵⁵ A lack of resistance does not constitute consent.¹⁵⁶ A person may refuse consent to any sexual act – this flows from the constitutional right to bodily integrity and the right to sexual autonomy.

The prosecution must also prove that the defendant knew the complainant was not consenting or was reckless as to whether she was or not. The accused is not reckless if he had an honest belief that the woman was consenting.¹⁵⁷ This test for belief is primarily subjective, i.e. not what the reasonable man

¹⁵⁰ For rape under the 1981 Act, a male aged 10 years of age or older may be prosecuted for rape. S52(3) Children Act 2001 as substituted by s129 Criminal Justice Act 2006.

¹⁵¹ Or for rape under section 4, penetration of the anus/mouth by a penis, or vaginal penetration by an object.

¹⁵² Rape under section 4 may be perpetrated by a man or woman against a male or female victim.

¹⁵³ S2(1) Criminal Law (Rape) Act 1981.

¹⁵⁴ S9(2). This is a non-exhaustive list: s9(3).

¹⁵⁵ S9(4).

¹⁵⁶ S9(5) of the Criminal Law (Rape) (Amendment) Act 1990 as amended by s48 Criminal Justice (Victims of Crime) Act.

¹⁵⁷ This is also true for the crime of sexual assault.

believed as to the presence of consent but rather what the individual accused actually believed.¹⁵⁸ This belief can be unreasonable as long as it is a genuinely held belief.¹⁵⁹ The Supreme Court has held that a jury is under no obligation to believe “an obviously false story” from the accused; and that jurors should use “shrewdness and common sense” to judge what the accused claims as to his mistaken belief “against their view of what an ordinary or reasonable man would have realised in the circumstances.”¹⁶⁰ The Law Reform Commission has described the current law on belief in consent as [placing] a premium on ignorance, lack of consideration, and insensitivity.¹⁶¹ It has recommended reforming the law by moving to a primarily objective test, having regard to certain subjective elements.¹⁶² The Criminal Law (Sexual Offences, Domestic Violence and International Instruments) Bill 2025 proposes to introduce a new test of reasonable belief, and the jury shall have regard to all the circumstances, including any taken by the man to ascertain whether the woman was consenting.¹⁶³ However this change is still only a proposal.

The complainant's testimony is a central part of the prosecution's case in a rape trial. In recognition of the considerable psychological challenges in giving evidence about sexual violence, and the effects of these on someone's ability to give their best evidence, the trial process allows for limited accommodations for complainants. These are aimed at making the process of testifying less stressful and thus to enhance the quality of the evidence presented to the jury. Such measures include anonymity,¹⁶⁴ exclusion of the public from the courtroom,¹⁶⁵ and the right to be accompanied in court by a relative, friend or support worker.¹⁶⁶ In some cases, the trial judge may direct a screen be placed between the complainant and the defendant so the complainant cannot see them when giving evidence.¹⁶⁷ More commonly the judge may direct that a video link is used to relay the complainant's testimony.¹⁶⁸ In some situations, often for children, a video recording of the interview of the complainant

¹⁵⁸ Section 2(2) of the 1981 Act adds that if, at a trial for a rape offence, the jury has to consider “whether the man believed that a woman was consenting to sexual intercourse” the jury is to have regard to “the presence or absence of reasonable grounds for such a belief” as well as any other relevant matters in considering whether the man so believed.”

¹⁵⁹ *The People (DPP) v C.O'R.* [2016] IESC 64.

¹⁶⁰ Para 57.

¹⁶¹ At para 2.87.

¹⁶² LRC Report: *Knowledge or Belief Concerning Consent in Rape Law* (LRC 122-2019).

¹⁶³ Head 4, General Scheme of the Criminal Law (Sexual Offences, Domestic Violence and International Instruments) Bill 2025.

¹⁶⁴ S7 Criminal Law (Rape) Act, 1981. Anonymity is also granted to the accused person.

¹⁶⁵ S6 Criminal Law (Rape) Act, 1981 as amended ss19 and 20 Criminal Justice (Victims of Crime) Act, 2017. Those permitted to be in the courtroom when a hearing is conducted otherwise than in public include persons accompanying or supporting the victim and bona fide representatives of the press. See Delahunt, M. *Vulnerable Witnesses and Defendants in Criminal Proceedings* (Clarus Press: 2024).

¹⁶⁶ s13 Criminal Evidence Act 1992 or s39 Criminal Justice Act, 1999.

¹⁶⁷ See ss14A(2) and s14AA Criminal Evidence Act 1992. The screen is a small foldable projector screen. In *G.M. v DPP* [2023] IECA 151 the Court of Appeal upheld the trial judge's decision, based on the investigating Garda's assessment of her vulnerability and the nature of the trial, to allow a screen to be placed in front of the complainant while she gave evidence in the trial of her husband for multiple counts of rape contrary to s4 of the Criminal Law (Rape) Amendment) Act 1990. In 2025 a screen was only used on one occasion in the Central Criminal Court. See Courts Service above n.50 at 110.

¹⁶⁸ Eg See *People (DPP) O'Brien* [2025] IECA 306. In 2025, evidence was given by video link in criminal trials before the Central Criminal Court on 37 occasions See Courts Service 2026 above n.50 at 110.

by a Garda may be played instead of live testimony.¹⁶⁹ As well as protecting the complainant from some unnecessary distress, these measures aim to facilitate the complainant to give their best evidence to the court, thereby safeguarding the accuracy of the trial process and, ultimately, the eventual verdict.

When a complainant gives evidence, prosecution counsel first poses a series of non-leading questions to them based on their statement to a member of An Garda Síochána. Following this, the complainant is cross-examined by defence counsel¹⁷⁰ to test the evidence given and allow them to comment on any arguments made by the accused person. The defence's right to cross-examine the complainant is a core element of the constitutional right to a fair trial.¹⁷¹ Cross-examination is an indispensable element of the adversarial trial and is essential to test the evidence and expose unreliability. Counsel has a duty to present the defence case as strongly as possible, which often entails a robust cross-examination of the complainant. When cross-examining, counsel can ask leading questions, but must only ask questions and introduce evidence that are relevant to the question of the defendant's guilt or innocence.¹⁷² The right to meaningfully confront the complainant includes a right to interrogate the credibility and consistency of the complainant's account. However, that right does not extend to the use of myths and stereotypes.

Admissible evidence

Before a jury can receive and consider any evidence for the purpose of reaching a verdict in a criminal trial, the evidence must be admissible in law. To be admissible, evidence must first be relevant. Evidence is relevant if it renders a particular fact in issue in the trial more likely or more unlikely. In other words, relevant evidence is evidence that can help to establish or refute that the accused person committed the alleged offence. Relevance must be assessed in the context of the building blocks of the prosecution and defence cases, and on the basis of ordinary sense and experience.¹⁷³ Legal relevance depends not only on a logical link being established but also the strength of that link; weakly relevant evidence should be excluded. In other words, just because there is some relevance to the evidence does not mean it is legally relevant, if it only minimally bears on the likelihood of the existence (or not) of a fact in issue.

Even if a piece of evidence is legally relevant it will still not be admissible if it falls foul of an exclusionary rule, such as the rules against hearsay, privilege or opinion evidence. Justifications for exclusionary rules include the need to safeguard core values and principles at the heart of the constitutional order,¹⁷⁴ to protect the trial process from unreliable evidence,¹⁷⁵ evidence that may distort

¹⁶⁹ s16 CEA 1992.

¹⁷⁰ An accused person is not permitted to personally cross examine the victim. See s14c Criminal Evidence Act 1992 as amended.

¹⁷¹ A trial in due course of law under Article 38.1 of the Constitution. *The People (DPP) v M.D.* [2017] IECA 322.

¹⁷² Rape complainants often experience the cross-examination as disrespectful, distressing and even re-traumatising: Herman above n.30.

¹⁷³ *The People (DPP) v Almasi* [2020] IESC 50 at [24]. "Facts are relevant because of their relationship with facts in issue and assume importance in terms of weight as the jury assesses the facts. Central to any issue of relevance is to ask what case is being made and whether ordinary sense and reason renders a fact disputed as to relevancy more likely in consequence of being considered as part of the overall body of evidence." Ibid. Relevant evidence is evidence that makes the matter that requires proof more or less probable. *DPP v Kilbourne* [1973] AC 729, 756. *R v A* [2001] UKHL 25 at para 31 *per* Lord Steyn; *People (DPP) v Ferris* (10 June, 2002, unreported), Court of Criminal Appeal.

the search for the truth, arouse the prejudice of the jury, or inject unreasonable delay into the process.¹⁷⁶ Section 3 may be understood as one of these protective general exclusionary rules designed to protect the integrity of the trial process.

Prior to the introduction of section 3 in 1981, evidence of the complainant's sexual experiences was considered relevant and was treated as admissible. It was regularly invoked by defence counsel to support a claim of consent, or to tarnish the complainant's character and therefore discredit him/her. Cross-examination of a complainant about sexual experiences with the accused and third parties was unrestricted, as long as the questions arose on the accused's instructions or from the case as alleged by the prosecution. According to Supreme Court judge¹⁷⁷ Peter Charleton, this allowed a wide-ranging exploration of the complainant's private life:

Such an ill-defined standard ostensibly enabled intimate relations with others to become the focus of a cross-examination. This extended even as to asking if the complainant had any sexual experience prior to an incident, and could involve traversing the entire[ty] of any real or asserted relationship within which that occurred.¹⁷⁸

Section 3 changed the legal context to make it more difficult for defence counsel to bring in evidence of a complainant's sexual experiences. The threshold to be reached by the defence on a section 3 application is explored in more detail below. Before focussing section 3, it is important to note this fundamental point; that in order to be admissible, sexual experience evidence must satisfy **both** the ordinary relevance rule **and** reach the threshold to be admitted as an exception to the general exclusionary rule in section 3.

2. The Rape Shield Provision: Section 3 of the Criminal Law (Rape) Act 1981

Section 3 was introduced as part of landmark legislation on rape, in which it was presented as the most important change in the law on rape in the legislation.¹⁷⁹ Despite its importance, most of the debate about the 1981 Bill centred on the definition of rape, which feminists criticised for being too narrow.¹⁸⁰ The Minister's speeches repeatedly acknowledged the influence of s2 of the 1976 Act,¹⁸¹ which section

¹⁷⁴ Such as the right to silence or the right to inviolability of the dwelling for example and the rule excluding unconstitutionally obtained evidence. See Liz Heffernan and Yvonne Daly, *Evidence in Criminal Trials*, (3rd edn, Bloomsbury 2025).

¹⁷⁵ The rule against hearsay.

¹⁷⁶ The collateral finality rule.

¹⁷⁷ Retired as of April 2026.

¹⁷⁸ *W.C. v DPP* [2024] IESC 48 per Charleton J at [4].

¹⁷⁹ Minister of State at the Department of Justice Seán Doherty TD. Seanad Éireann debate Wednesday 1 April 1981, Vol 95 No 14.

¹⁸⁰ Eg see Senator Mary Robinson's contribution to the Seanad Debate. Wednesday 1 April 1981 Vol 95 no 14. Second Stage.

¹⁸¹ "I have referred briefly to the British legislation, the Sexual Offences Act, 1976, on this problem, and let me again acknowledge our indebtedness to the text of that legislation." Minister S Doherty TD Seanad Éireann debate, Wednesday 1 April 1981 Vol 95 no 14. Second Stage. One rationale for the section is only mentioned in passing when describing the rationale for holding the section 3 hearing in camera: "To enable the judge to assess the merits of an application it will frequently be necessary for counsel for the accused to indicate in some detail the nature of the evidence or of the cross-examination and since one of the main reasons for restricting the freedom of the accused to cross-examine or to adduce evidence of this kind is to protect the complainant as far as possible from the ordeal that this would entail — and indirectly to reduce the risk that this would deter other women from reporting rape — to allow applications to be heard in public — even in the absence of the jury — would be inconsistent with this basic objective and would greatly reduce the protection it

3 effectively mirrored, apart from an arguably more stringent relevance test.¹⁸² This is important because the English and Welsh provision “was intended to prevent the introduction of evidence that would lead the jury to believe that the victim was promiscuous and readily consented or that her evidence was less likely to be sound”.¹⁸³ Clearly, section 3 was also intended to prohibit the kind of discriminatory reasoning based on the ‘twin myths’, i.e. that prior consent implied future consent and that sexually active women lie about rape.¹⁸⁴

The provisions of section 3 apply to the overwhelming majority of sexual offences.¹⁸⁵ Interestingly, when it was originally enacted, section 3 did not apply to sexual offences of so-called ‘defilement’ against girls aged younger than 15 or 17. The reason given was that in such cases consent was not an issue and so a rape shield was unnecessary.¹⁸⁶ Section 3 applies today to such cases, but it is interesting that in 1981 legislators thought it would not be needed, indicating a possible shift in judicial attitudes. Chapter Five explores participants’ views on sexual experience evidence in trials of sexual offences against complainants under the age of consent.

would afford to complainants.” Minister S Doherty TD Seanad Eireann debate, Wednesday 1 April 1981 Vol 95 no 14. Second Stage. See also Dail Eireann debate Tuesday 4 Nov 1980 Vol 323 No 8, Second Stage debate.

¹⁸² See below.

¹⁸³ Home Office, *Speaking Up for Justice: Report of the Interdepartmental Working Group on the Treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System* (1998) at para 9.62. The 1976 Act was based on the Report of the Advisory Group on the Law of Rape, Cmnd 6352, 1975, London: HMSO at Para 131. The Committee was chaired by Mrs Justice Heilbron. The Committee found that a woman’s sexual experiences with partners of her own choice was not indicative of truthfulness or relevant to the likelihood of her consenting. However, the 1976 Act did not adopt the standard of admissibility (striking similarity or close in time and fairness) recommended by the Committee and instead adopted a judicial discretion.

¹⁸⁴ When introducing section 3, Minister of State Seán Doherty TD cited only one example of possible relevance. This was the example of a woman who regularly picked up men in bars and had sex with them and subsequently demanded money from them. In such a case, “the evidence might relevant for the purpose of proving consent. It would be part of the case for the accused that what had occurred in such a case was similar to what had occurred in the cases of other men and that because he had refused to pay her money the charge of rape followed.” Dail Eireann debate Tuesday 3 March 1981, Vol 327 No 4. Criminal Law (Rape) bill 1980: Committee Stage (Resumed). This would be an exception on the grounds of a similarity which is narrower than the impermissible inference targeted by a rape shield. However, there are good reasons to believe the evidence would be best construed as going to credibility (including motive to lie) rather than consent - see McLachlin J in *R v Seaboyer* [1991] 2 SCR 577 and Elaine Craig, ‘Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada’s Rape Shield Provisions’ (2016) 94 Canadian Bar Review 46.

¹⁸⁵ Section 3 applies in trials for any offence coming under the statutory definition of a “sexual assault offence”. Under the 1981 Act as amended, this means: rape; attempted rape, burglary with intent to commit rape; aiding, abetting, counselling and procuring rape; attempted rape or burglary with intent to commit rape; incitement to rape; rape under section 4; attempted rape under section 4; aiding, abetting, counselling and procuring rape under section 4 or attempted rape under section 4 and incitement to rape under section 4; aggravated sexual assault; attempted aggravated sexual assault; sexual assault; attempted sexual assault; aiding, abetting, counselling and procuring aggravated sexual assault; incitement to aggravated sexual assault or sexual assault and conspiracy to commit any of these offences. Because sexual assault is simply a statutory renaming of the crime of indecent assault, indecent assault is also covered. See *Criminal Law (Sexual Offences and Human Trafficking) Act 2024* (28/2024), s. 6(a), S.I. No. 391 of 2024 and Law Reform Commission, *Criminal Law Rape Act 1981 Revised Act* available at <https://revisedacts.lawreform.ie/eli/1981/act/10/revised/en/html#SEC2>. Section 3 also applies to offences relating to sexual offences against children under s6 Criminal Law (Sexual Offences) Act 1993 and an offence under the Criminal Law (Sexual Offences) Act 2006. As of 31 August 2024, the right to SLR also applies to all of these offences: *Criminal Law (Sexual Offences and Human) Act 2024* (28/2024), s. 7(a), (c), S.I. No. 391 of 2024.

¹⁸⁶ “I might add that, unlike the Private Members Bill, the Government Bill does not apply the relevant provisions to trials offences under section 3 of the Criminal Law Amendment Act, 1885 and sections, 1,2 and 4 of the Criminal Law Amendment Act 1935. It does not do so because it would have no relevance in practice. In none of the 1935 Act offences does the question of consent arise since consent is not a defence. ... In rape trials it is the fact that absence of consent is a central issue that causes difficulties about the introduction of this evidence.” In this respect the Government legislation differed from another Private Members Bill on rape proposed at the time. See Doherty above n.179.

Section 3 prohibits the defence from introducing any evidence or questioning any witness about the complainant's sexual experiences:

If at a trial any person is for the time being charged with a sexual assault offence to which he pleads not guilty, then, except with the leave of the judge, 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[...]¹⁸⁷

Although originally limited to sexual experiences with third parties, in 1990 the section was extended to cover a complainant's sexual experiences with the defendant.¹⁸⁸ This significant change predated the equivalent reform in England and Wales by almost a decade,¹⁸⁹ and was a powerful statutory expression of consent as specific to each instance of sex and as inherently revocable. The change appeared in the same reforming Act which also criminalised rape within marriage.¹⁹⁰ However, as will be explored in Chapter Four this research raises important questions about the efficacy of the shield in cases where the complainant had been in a sexual relationship with the defendant.

Section 3 does not apply to the prosecution. To date, this has not attracted any controversy, but that may change. Certainly, the Irish shield is out of step with Scotland and Canada on this point.¹⁹¹ The risks of sexual experience evidence to the accuracy of the jurors' decision-making process, and the risk of distress to the complainant exist independently of who is adducing the evidence. Furthermore, if the prosecution adduces sexual experience evidence, or makes an assertion about lack of sexual experience this will open the door to a defence application to cross-examine on it in rebuttal.

According to section 3, the prohibition on sexual experience evidence may be lifted, but only with the trial judge's leave following an application by the defence. If the application is successful, the judge may still control the ways in which the information is introduced at trial, by policing the cross-examination to ensure compliance with the limits of the leave granted.¹⁹²

The admissibility test: something more than relevance

The test for admissibility of sexual experience evidence under section 3 remains the same as in 1981. The judge deciding a section 3 application has a duty to vindicate the defendant's constitutional right to a fair trial. The right to a fair trial means that the accused person has the right to the presumption of innocence¹⁹³ and that accused has the right to test the evidence.¹⁹⁴ The evidence must first satisfy the

¹⁸⁷ Section 3(1) as amended.

¹⁸⁸ Criminal Law (Rape) (Amendment Act) 1990, s13. Interestingly, given its importance, legislators gave minimal consideration to this amendment.

¹⁸⁹ See S41 Youth Justice and Criminal Evidence Act 1999.

¹⁹⁰ S5 Criminal Law (Rape)(Amendment) Act 1990.

¹⁹¹ *R. v. Kinamore* 2025 SCC 19. See <https://www.yorku.ca/osgoode/thecourt/2025/10/31/r-v-kinamore-the-problem-with-perfect-symmetry-in-sexual-assault-trials/> and s276 of the Criminal Code of Canada.

¹⁹² Section 3(3).

¹⁹³ Article 38.1 of the Constitution. A trial in due course of law includes the presumption of innocence and the burden on the prosecution to prove its case to the standard of beyond a reasonable doubt. *State (Healy) v Donoghue* [1976] IR 325; *Hardy v Ireland* [1994] 2 IR 550; *O'Leary v Attorney General* [1995] 1IR 454.

¹⁹⁴ *O'Callaghan v Mahon* [2005] IESC 9.

common law relevance test.¹⁹⁵ Then the judge must be satisfied that Section 3 test is also met. Section 3(2)(b) requires something more than relevance¹⁹⁶ to justify the granting of leave:

The judge shall give leave [to adduce the evidence/ask the question] 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.

This test is narrower than the 1976 English legislation on which it was modelled.¹⁹⁷ Leading practitioner-scholar Thomas O'Malley explains the Irish test as follows:

[T]he judge must be satisfied that, unless the question is allowed, the jury might reasonably be satisfied of the defendant's guilt. This suggests that the prosecution case must at first appear to be very strong and, furthermore, that the disclosure [to the jury] of information about the complainant's previous sexual history would significantly alter a reasonable person's assessment of that case.¹⁹⁸

In the leading case of *G.K.* the Court of Appeal confirmed that the threshold for admissibility is high and that it is even higher when the complainant is a young person:

Having regard to the severely restrictive terminology of the statutory provision, the court is of the view that, 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. Furthermore, the younger the complainant, the less desirable it is to ever allow cross-examination which may well be extremely traumatic for a complainant of tender years. Where a form of questioning is allowed it must be confined to what is strictly necessary and should never be utilised as a form of character assassination of a complainant.¹⁹⁹

The Court in *GK* stated that such evidence is only admissible if it is directly relevant to a specific issue in the case and if its exclusion would make the trial unfair to the accused. The Court thought that sexual experience evidence could be admitted under section 3 where there is an evidential basis for the assertion of relevance that goes beyond the mere fact of other sexual experience. There relevance was tied to rebutting an assertion of virginity through medical evidence.

More recently the Court of Appeal has held that cross-examination cannot be used to pry unnecessarily into a complainant's personal life and any exploration of private life or sexuality must only be to the

¹⁹⁵ *People (DPP) v GK* [2007] 2 I.R. 92. Section 3(4) makes clear that the ordinary rules of evidence apply; that nothing can be introduced by virtue of the Act which could not have been introduced prior to its implementation.

¹⁹⁶ This phrase is taken from O'Malley above n.22 at [19-09]. The trial judge deciding a section 3 application is not exercising their discretion, but is exercising their judgement in line with the statute. *People (DPP) v GK* [2007] 2 I.R. 92 at [25] per Kearns J.

¹⁹⁷ Section 2(2) Sexual Offences (Amendment) Act 1976, stated "the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked." This provision has been repealed and replaced by s41 Youth Justice and Criminal Evidence Act 1999.

¹⁹⁸ Thomas O'Malley, *Sexual Offences and the Law* at [18-06].

¹⁹⁹ *People (DPP) v G.K.* [2007] 2 I.R. 92, [25]. Emphasis added. The Court of Criminal Appeal said that a decision to refuse may be more readily justified in most cases than the converse. In *People (DPP) v E.H.* [2019] IECA 30, the Court of Appeal said that the statutory threshold is a high one "but not an impossible or unattainable one", at [28].

extent strictly necessary to ensure fairness.²⁰⁰ The Court of Appeal has emphasised the trial judge's duty to ensure that the cross-examination of witnesses is an exploration into where the truth lies, not an exercise in re-victimisation or in confusion.²⁰¹

The Supreme Court has expressed confidence in the effectiveness of section 3 in excluding irrelevant evidence.²⁰² Charleton J in *W.C.* described the test as follows:

... the complainant may not be asked about a prior sexual experience to that with which the charge is concerned unless that could reasonably influence the jury as to the issue in the case: that issue being consent where the alleged event is recent; or whether sexual contact occurred where the charge is a historic one and, most usually, the complainant was then under-age for consent.²⁰³

According to the statutory test, such evidence “only becomes relevant only where, reasonably considered, it may lead to a jury having a reasonable doubt as to the truth of the allegations.”²⁰⁴ This suggests that arguments that mobilise unfounded generalisations about complainants should not succeed. However, the appellate courts' emphasis on the strictness of the admissibility test is in tension with what has been termed a “permissive attitude towards the admission of sexual experience evidence” on the part of trial judges.²⁰⁵ Decisions on admissibility are shaped by the arguments made by counsel for the defence, the prosecution and the complainant's lawyer for the application. This gets to the heart of this project: what does relevance really mean in section 3 applications? What is the import of the explicit statutory test in section 3(2)(b)? How, and in what situations, might sexual experience evidence ever be relevant to the issue of consent or the issue of the defendant's belief in consent? Could such evidence ever go to other issues such as motive to lie, or identity of the perpetrator, for example? How might sexual experience evidence ever have a bearing on credibility? Has the introduction of a statutory definition of consent, as well as evolving norms around sexuality and a greater cultural awareness of victims' rights and interests changed the calculation made by lawyers when thinking about relevance? Chapters Four and Five explore these issues by investigating how lawyers and other stakeholders understand and apply the admissibility test.

A key part of the framework governing the (in)admissibility of sexual experience evidence is the complainant's right to separate legal representation. This is considered next.

Separate Legal Representation for Complainants

Complainants are entitled to state-funded independent legal representation (SLR) to advocate their interests on a section 3 application.²⁰⁶ This important procedural innovation was first proposed by rape

²⁰⁰ *The People (DPP) v G.D.* [2023] IECA 301 at [26] (*per* Edwards J); *The People (DPP) v G.K.* [2006] IECCA 99, [2007] IR 02 [103-104]. A restrictive approach to admitting questions or evidence about a complainant's prior sexual experience was also adopted by the Court of Appeal in *The People (DPP) v D McD* [2019] IECCA 99.

²⁰¹ *The People (DPP) v Sweeney, Beirne and O'Toole* [2024] IECA 205.

²⁰² *W.C. v DPP* [2024] IESC 48 at [7].

²⁰³ *W.C. v DPP* [2024] IESC 48 at [59].

²⁰⁴ *Ibid*

²⁰⁵ S. Leahy, “Whether rules or discretion? Developing a best practice model for controlling the admissibility of sexual experience evidence in sexual offence trials” (2014) 49(1) *Irish Journal of Legal Studies* 65 at 68; RCNI above n8.

²⁰⁶ S4A Criminal Law (Rape) Act 1981. 4A.—(1) Where an application under section 3 or 4 is made ..., the complainant shall be entitled to be heard in relation to the application and, for this purpose, to be legally represented during the hearing of the application.[...]. Introduced by section 34 Sex Offenders Act 2001. In Scotland, The Victims, Witnesses and Justice Reform

crisis centres, victim-survivors, feminist organisations and members of the Joint Oireachtas Committee on Women's Rights in 1987.²⁰⁷ It was rejected by the Law Reform Commission on the grounds of dubious constitutionality and the risk of alienating the jury.²⁰⁸ Further calls during the passage of the 1990 Act for its introduction by legislators and the DPP²⁰⁹ were rejected.²¹⁰ SLR was finally introduced by the Sex Offenders Act 2001.²¹¹ Although it took 14 years to become reality, and then only for a limited sub-category of sexual offences, Ireland was the first country with an adversarial criminal process to grant complainants a right to SLR in this context. It is now available in one form or another in many countries that have adversarial criminal trials.²¹² Surprisingly, given that section 3 was inspired by its English predecessor, complainants in England and Wales have no right to SLR for applications to adduce sexual behaviour evidence. However, the Law Commission recently recommended that it be introduced.²¹³

When originally introduced, SLR only covered rape cases and aggravated sexual assault and allied offences. In 2006 it was extended to trials of child sexual abuse offences (defilement offences) and soliciting. However, until 2024, complainants in sexual assault trials²¹⁴ were not entitled to SLR.²¹⁵ In August 2024 the right to representation was expanded to the part of the cross-examination dealing with the sexual experience evidence.²¹⁶

Separate legal representation is a recognition of complainants' rights to privacy and dignity. Complainant participation in the section 3 application process has powerful potential in terms of making victims feel less concerned about being ambushed with questions about their sexual pasts. Equally important, is the role of the SLRs in supporting the application of the law, specifically the relevance test and the section 3(2)(b) threshold. This could be said to be a rule of law supporting rule. The lawyer

(Scotland) Act 2025 includes a right for victims to have a right to publicly funded independent legal representation when applications are made to use evidence of their sexual history or character in sexual offence cases. In England and Wales, the Law Commission has recently recommended ILR. Above n.1.

²⁰⁷ Fourth Report of the Joint Oireachtas Committee on Women's Rights on Sexual Violence chaired by Máire Geoghegan-Quinn, TD. The original proposal was for ILR for the complainant throughout the trial.

²⁰⁸ 1988. The Commission conflated two proposals, one for ILR throughout the trial, with the narrower proposal of ILR during the section 3 application. The more limited impact of a proposal during the section 3 application would not infringe the right to a fair trial, and the argument about alienating the jury does not make sense when one considers that the Commission was proposing that section 3 application be heard before the trial in the absence of the jury. Para 28.

²⁰⁹ See the contributions in the Dáil Éireann debate; Tuesday, 20 Nov 1990 Vol. 402 No. 8, per Deputy Barnes and Deputy Fennell.

²¹⁰ Dail Debates Deputy Kirk, Minister of State, Dáil Éireann debate -Tuesday, 20 Feb 1990, Vol. 395 No. 9.

²¹¹ Section 34. Research was key to the advocacy by Dublin Rape Crisis Centre and others around this change. See Ivana Bacik, Catherine Maunsell and Susan Gogan, *The Legal Process and Victims of Rape* (The Dublin Rape Crisis Centre 1998).

²¹² In a mapping exercise of twelve 'pure' adversarial and eight quasi-adversarial countries, Iliadis and others found that only five countries offered no form of SLR, suggesting that SLR is not all that uncommon within legal systems that employ adversarial frameworks. Mary Iliadis, Olivia Smith and Jonathan Doak, 'Independent Separate Legal Representation for Rape Complainants in Adversarial Systems: Lessons from Northern Ireland' (2021) 48 *Journal of Law and Society* 250.

²¹³ Law Commission above n.1. In Northern Ireland SOLAs provide independent legal advice prior to the trial process. They are focussed on the privacy right of complainants with respect to medical records disclosure or previous sexual history.

²¹⁴ The 2024 Act extended s4A to "sexual assault offences" see above n.185.

²¹⁵ Criminal Law (Sexual Offences and Human Trafficking) Act 2024.

²¹⁶ Section 4A(5A) Criminal Law (Rape) Act 1981, as amended. "Where a judge has given leave [...], the complainant shall be entitled to be heard in relation to the evidence or the question and, for this purpose, to be legally represented during the adducing of that evidence or the asking of that question." Inserted by s7(b), Criminal Law Sexual Offences and Human Trafficking Act 2024.

representing the complainant by contesting the defence's application, is thereby requiring the defence to clearly articulate their application by showing how the evidence is relevant and how it comes with the exceptions to the rape shield. This should have the effect of adding clarity to the application and supporting the judge in considering the defence's application. This should also enhance the consistency of rulings under section 3 and standardise practice in cross-examination. However, given that the rulings are not published (they are generally given *ex tempore*), it is not possible to know whether this is in fact what is happening.

There are significant issues around the information provided to complainants and their lawyers, and relatedly, the ability of lawyers and the complainant to prepare a meaningful response to the defence's application, given the pressures of time. Of interest here is Scotland's recent introduction of a right to independent legal representation.²¹⁷ There, complainants have a right to request a copy of the application, the complaint or indictment, and a right to request a copy of any evidence referred to or related to the application.²¹⁸ The defendant has a right to object, in which case the court will decide. In Ireland, complainants have no such right to information. This issue is returned to in Chapter Seven's discussion of the SLR role.

The defence is obliged to provide advance notice to the prosecution of their intention to put the questions or adduce evidence. The provisions state that this must be done before, or as soon as practicable after, the commencement of the trial or preliminary trial hearing.²¹⁹ The prosecution, must "as soon as practicable after the receipt by it of a notice, notify the complainant of his or her entitlement to be heard in relation to the said application and to be legally represented, for that purpose, during the course of the application."²²⁰ The Legal Aid Board must grant the complainant a legal aid certificate which covers representation by a solicitor or a barrister engaged by the Board.²²¹ The complainant (in practice, the Legal Aid Board) must be given enough time to allow them a reasonable opportunity to arrange legal representation.

Once a section 3 notice issues, the Legal Aid Board assigns a solicitor to the complainant. The complainant is the Legal Aid Board's client. A solicitor is formally assigned by the Legal Aid Board. In

²¹⁷ S275ZB of the Criminal Procedure (Scotland) Act 1995 Act as inserted by s105 of the Victims, Witnesses, and Justice Reform (Scotland) Act 2025. This followed the Dorrian Review in Improving the Management of Sexual Offence Cases (2021). In 2025 the Scottish government announced funding for a more generalist level of legal advice for victims in rape and attempted rape cases but limited to a pilot conducted with the University of Glasgow. See University of Glasgow (2025) Scottish Government Pilot to Improve Victims' Experiences of the Criminal Justice System. Available at: https://www.gla.ac.uk/news/archiveofnews/2025/april/headline_1169872_en.html.

²¹⁸ Or Complainers as they are termed in Scotland. The Scottish rape shield is contained in Sections 274 and 275 of the Criminal Procedure (Scotland) Act 1995, as amended.

²¹⁹ Section 4A(2) Criminal Law (Rape) Act 1981. In 1990, when this was first proposed, the idea that the defence would have to give any notice at all regarding their intention to cross-examine on sexual history was considered impractical and a threat to the constitutional right to a fair trial by the Attorney General and by the Minister for Justice. "The Attorney General was strongly opposed to the proposal to include it and I agreed with him. He pointed out that it was not practical to determine such an application in advance of the trial. He thought it would be inevitable that the trial judge would adjourn his decision to the appropriate stage in the trial. The proposal would compel the accused person to decide on the form of his defence before the prosecution had adduced any evidence at all. It would seem that the defence would have to make such an application in every case just to keep their options open. Even if the judge decided against the application at the outset, matters could unfold during the trial which would force him to reconsider the application during the trial. "Later on he mentioned the "possible constitutional implications of its effect on the conduct of the defence of the accused." 88 Dáil Éireann debate, Tuesday, 20 Nov 1990.

²²⁰ S4A(3).

²²¹ See the Civil Legal Aid Act 1995 ss.27 and 28 as amended by the Sex Offenders Act 2001 s.35.

Dublin the solicitor usually delegates attending court/consultations to a legal clerk.²²² The Legal Aid Board retains counsel.

The judge must be satisfied that all notice requirements have been complied with before they hear the application or allow the question/evidence. If the judge considers the complainant needs more time to arrange legal representation, they judge shall postpone the hearing or adjourn the trial.²²³ However, the provisions make no specific mention of specific time limits to be applied.

In 2019 the Legal Aid Board reported that “[T]he reality is that it is unusual for notice to be given to the prosecution prior to the commencement of the trial. Notice is normally given after the commencement of the trial, normally shortly before the complainant is due to give evidence.”²²⁴ This impacts the time available to find counsel to act as SLR and to fully brief them. As the Board noted in its submission to the O’Malley Review in 2019:

With the short notice there is often no meaningful period available in which instructions can be taken from the client and advice in relation to the application tendered. Rarely is there time for a full consultation in the law centre beforehand. At best there may be a short consultation with the client in the courthouse directly before the application is made, but often the first contact between the client and their legal representatives is outside the courtroom door.

Interaction between the Board and the State/Defence is generally quite limited. Interaction includes practical matters such as ensuring the Board receives the papers relevant to the application. There is no formal procedure for providing the Board with all the relevant papers.²²⁵

As Chapter Seven details, the issues of information and adequate time for consultation and preparation of submissions on behalf of the complainant came up repeatedly in the interviews for this project.

Section 4A makes no provision for separate legal representation for any appeal against conviction; where a ground of appeal is focussed on the question of sexual experience evidence the complainant is not separately represented.²²⁶ This means that the appellate court, unlike the trial judge, is not benefitting from submissions from the SLR. This is regrettable given that the judgments of the Court of Appeal (and the Supreme Court) are essential to the development of principles shaping practice in this area.

It is impossible to know how often sexual experience evidence is introduced in sexual offences trials. This is because it may be adduced without a section 3 application at all, during the trial. However this should not happen. The best way of estimating the numbers is to look for numbers of referrals by the Director of Public Prosecutions to the Legal Aid Board for separate legal representation for complainants.

The Legal Aid Board provided the following information to this study:

²²² Communication with experienced barrister on file with author.

²²³ Ss4A(5) and 5D Criminal Law (Rape) Act 1981.

²²⁴ Legal Aid Board, *Submission to the Review of the Investigation and Prosecution of Sexual Offences*, 16th January 2019, at [1.13].

²²⁵ Ibid.

²²⁶ See Delahunt above n.165 at [21-06].

Data regarding clients referred to Legal Aid Board by DPP²²⁷

Data from 26th March 2025 to 31st December 2025.

	2025*
No. of cases	110***
Sex of client**	
- Male	11
- Female	99
Case Location***	
- Dublin	52
- Leinster (excluding Dublin)	26
- Munster	25
- Connacht/Ulster	7

Notes

* Data only available from 26th March 2025 to 31st December 2025;

**presumed sex based on client first name;

***based on Law Centre handling the case.

*** 104 S3 applications while 6 S3 and S19a Cases

These figures are noted with caution; they were provided for the purposes of this research, and they cannot be guaranteed to be entirely accurate. However the Legal Aid Board is working towards improving its data collection and governance.²²⁸ Even noting these reservations, when the data cited above is compared with that available in the Courts Service Annual Report we can see that it suggests that well over a third of sexual offences trials involved an application for a separate legal representation

²²⁷ Email Communication from Legal Aid Board Research Section, 11 September 2026, on file with the author. The file states: "The data enclosed relates to the matters covered under section 28 (5A) of the Civil Legal Aid Act, 1995, and specifically to matters covered under section 3 of the Criminal Law (Rape) Act, 1981:

1. cases involving legal aid provision in respect of representing victim/complainants of sexual offences where their sexual experiences are sought to be adduced at trial.
2. cases involving legal aid provision in respect of victim/complainants of sexual offences where they are to be cross-examined on their sexual experiences." Ideally, in future one would be able to disaggregate the applications from the cross-examination to avoid any possible duplication in the data.

²²⁸ See <https://www.legalaidboard.ie/about-the-legal-aid-board/research-and-statistics/statistics/open-data/>.

for the complainant on a section 3 application and cross-examination. This figure was arrived at as follows. According to the Courts Service Annual Report 2025, the Central Criminal Court dealt with 148 trials in total in 2025.²²⁹ It is not possible from the available data to say how many of these were rape trials. The Central Criminal Court deals primarily with sexual offences, but also deals with other non-sexual offences such as murder. As noted above, in 2025 93% of offences resolved by trial were sexual offences. If 20% are discounted as non-sexual²³⁰ this would give a figure of 118 sexual offences trials.

The Courts Service Annual Report 2025 cites a figure of 361 trials held in the Circuit Court for 2025.²³¹ It does not state how many were sexual offences trials. Based on the annual report data, sexual offences accounted for 45% of all offences resolved by trial in the Circuit Court in 2025.²³² Based on this proportion, that gives a figure of 162 sexual offences trials.²³³ This is likely to be an overestimation, because, unlike other offences, defendants in sexual offences are usually charged with multiple offences, especially in prosecutions of alleged offences of sexual abuse of a child or children.

This gives a total estimated figure of 280²³⁴ sexual offences trials across both jurisdictions in 2025. Using the Legal Aid Board figure of 110 cases, cited above, this means at least approximately 39% of sexual offences trials involved a section 3 application and cross-examination. This is a very conservative estimate. The Legal Aid Board data only covered March to December 2025. Furthermore, the number of Circuit Court sexual offences trials for 2025 is probably lower than 162 for the reasons mentioned above. It is entirely possible that sexual experience evidence was adduced in far more than 39% of trials in 2025.

Even taking a conservative figure of around 39%, and noting the caution expressed about the Legal Aid Board figures, this is a considerable increase on the most reliable comparable figures. The 2009 Rape and Justice in Ireland study found that section 3 applications were made in 20% of cases studied.²³⁵ This important finding suggests that far from being a minor issue, section 3 and the use of sexual experience evidence is a live and important issue in many sexual offences trials.

Conclusion

This chapter has set out the Irish rape shield in its legal context, by explaining the law on rape and the process of giving evidence in a rape trial. The chapter explained the historical development of section 3, from its original form in 1981 which only prohibited evidence of sexual experiences with third parties, to the inclusion in 1990 of evidence of experiences with defendant. This move was connected to larger

²²⁹ Courts Service above n.50 at 100.

²³⁰ See Keenan and Healy above n.9. Alternatively, one could use the same methodology for calculating the Central Criminal Court trials as for Circuit Court; i.e. going on the Annual Report figures, 93% of sexual offences in 2025 were sexual offences and 93% of the total number of Central Criminal Court trials is 138 trials. However, this is likely to be an overestimation, so the figure 80% cited in Keenan and Healy is used for the Central Criminal Court. If the 93% proportion is used, the ultimate end figure is 33%.

²³¹ Courts Service above n.50 at 100.

²³² 743 sexual offences were resolved by trial (convictions and acquittals), out of a total of 1,639 total offences resolved by trial (convictions and acquittals). These figures exclude guilty pleas, nolle prosequis, offences taken into consideration and where the defendant died. See Courts Service 2026 above n.50 at 104.

²³³ 45% of 361.

²³⁴ 162 Circuit Court trials and 118 Central Criminal Court trials.

²³⁵ Hanly and others above note n.38.

legislative and societal shifts around recognising the fact and harms of relationship rape. The chapter went on to examine the heightened admissibility test set out in section 3 (2)(b) and which is underscored by judicial dicta from the appellate courts and legal scholarship. The chapter also explained the important role of the complainant's Separate Legal Representative in section 3 applications, which has recently been extended to cross-examination of the complainant on sexual experiences and detailed the notice and procedural requirements around making a section 3 application.

Finally, the chapter noted that, at least an estimated 39% of sexual offences trials involve a section 3 application and cross-examination on sexual experience. Therefore, this is an important issue directly affecting a substantial proportion of sexual offences trials. In addition, it likely has an indirect effect on other sexual offences trials (where the threat of a section 3 is mooted or considered). Taking a wider lens, it is possible that the relative regularity with which such applications are made may be influencing individuals' decisions not to report sexual crime to the gardaí.

The following four chapters set out the findings of this research. Chapter Four presents the discussion of the findings relating to the general operation of section 3 in contemporary Irish rape trials. Chapter Five explores the findings relating to sexual experience evidence and adult complainants, and Chapter Six does the same for evidence relating to child and adolescent complainants. Chapter Seven addresses the factors that impede or support the operation of section 3, focussing on late notice and the role of the separate legal representative.

HOW IS SECTION 3 WORKING?

Introduction

This chapter is the first of the four findings chapters. It examines the general findings in relation to the operation of section 3. It begins with a brief consideration of the data in relation to the impact of sexual experience evidence on complainants. This underscores the importance of section 3 and the SLR. Then it goes on in part 2 to explore the findings regarding how well section 3 is operating. As will be shown, most lawyers were quite positive about how it is working, indicating that most applications are grounded in the facts and relate to relevant evidence. This confidence is considered in light of the further detail provided by the participants in to how they approach section 3 applications generally. The final section examines the interplay of disclosure of a complainant's counselling records and section 3.

1. The power of sexual experience evidence

Sexual experience evidence can have a powerful impact on a rape trial. It can impact how a jury hears and assesses a complainant's testimony. This experienced senior court accompaniment support worker explained that sexual experience evidence can work by resonating with culturally engrained values and stereotypes about 'real rape' and who is, and who is not, a victim of rape.

I suppose the prejudices that exist out there that sometimes I see in juries when they're making decisions or they're coming to verdicts where, you know, they're swayed by [...] that idea that sometimes women — because it's mostly women who are affected, should behave in a certain manner in order for them to elicit the type of response — the victim response, you know the perfect victim. So, it's not as bad as it used to be, but it still exists, and sometimes I might if I go to, you know another trial and I see it again. I'm like oh, I thought we'd progressed from that and then I'm like oh, we haven't really not as much as I think we think we have. (SW 2)²³⁶

Participants were also clear that evidence of sexual experience can be extremely powerful in cases involving young people:

So they would say they would go to her credibility and reliability of the impression she's given to the jury in her evidence. Um, and the court might say, yes, you know, she has portrayed herself in a particular way, but nonetheless - and in their charge - it doesn't mean anything, you know, but it does often have a very real effect in my experience with juries. (PL 5)²³⁷

This policy specialist highlighted the cumulative and embodied effects on a complainant of being asked about other sexual experiences:

I remember [complainants] saying when they were giving evidence, they're not necessarily they're not just recalling it with words. You know, it's ... oftentimes there can be a reliving of the experience, or kind of a — sensations that goes with that. And when you add that entire experience to then also

²³⁶ SW= Court Accompaniment Support Worker.

²³⁷ PL= Practising Lawyer.

being asked about sexual history that they might deem as completely irrelevant or very exposing. You just wonder if they're – if it's maybe too much for the one occasion. (PS 3)

A complainant may become defensive simply because of what they are being asked about:

[...] you know, over the years I've seen it where the person — the victim has been so distraught that they've overreacted and been very defensive — **to [the] jury sometimes it looks like you're trying to hide something when you're not, you just feel you're under attack and that you're being asked about your previous sex life [...], you know, and it's been turned in a way that it, it seems, something that it's not.** (SW 2, emphasis added)

The suggestion here is that the jury will wrongly infer that the complainant is being evasive and that she is therefore less credible. This shows the power of sexual experience evidence to affect the jury's fact finding process.

Sometimes, the evidence may cause the complainant to become so distressed or stressed that the entire case falls apart. This prosecutor recalled entering a *nolle prosequi* because of the complainant's fear of cross-examination on her sexual experiences:

She just couldn't take it, she just had a mini breakdown in the middle of the trial, and we had to... We had to pull the trial as a result, we had to make a decision whether her — her health and wellbeing was more important than the prosecution. (PL 8)

Taken together, these comments point to the power of sexual experience evidence to shape the testimony presented to the jury, and even the outcome of the trial. This underscores the importance of ensuring the provision is working effectively.

The next section discusses participants' views on how section 3 is working to achieve its objective of excluding irrelevant and misleading evidence of the complainant's sexual experiences from the trial.

2. The practice of section 3 applications

Legal practitioners stated that judges hearing applications expect the three lawyers (defence and prosecution counsel and the SLR) to walk them through the section 3(2)(b) admissibility test. This was described as not a lofty exercise but one grounded in the materials or questions to be asked. The basis for section 3 applications can be something mentioned in the book of evidence (e.g. the complainant's statement) or a notice of additional evidence.²³⁸ Alternatively, the application might arise from the defendant's memorandum of interview or from the defendant's instructions. In some cases, an application might arise during the trial itself, because of something the complainant or another witness says in evidence. In interviews, lawyers said that judges are far more willing than they were in the past to intervene in cross-examinations that go beyond the parameters of the leave granted. Some speculated that this might be because of judges' experience with legislation requiring them to protect the complainant from intrusive questioning about their private life.²³⁹

²³⁸ See above re disclosure of records.

²³⁹ Where the defence wants to ask questions about the private life of the victim, they have to seek leave. Judges are conscious of the duty to protect complainants from secondary victimisation via intrusive questions about their private life under the Victims of Crime Act 2017, s21. However there is no SLR for this. S21 may also crop up in connection with section 3 where the defence wants to ask about a previous sexual experience and abortion. This is where both section 3 and 2017 Act might come up. Presumably it would also come up in relation to prior allegations of sexual violence.

Most surmised that section 3 applications are less common than they were. Objectively, this does not appear to be echoed by the data obtained from the Legal Aid Board. However, it may be that the applications are not as overtly concerned with smearing the complainant's character.

The vast majority of lawyer participants considered section 3 to be working well.²⁴⁰ Most lawyers stated that in general, section 3 is filtering out unfounded attacks on complainants' characters. For example, there was consensus among lawyers that questions about a complainant's use of medical contraception were not as common as they would have been even a few years ago.²⁴¹ Many connected the shift in practice to changing social norms:

You can't sling mud. Again, when I started out you could sling mud. Now, I didn't, because I wasn't experienced enough to do those type of cases. But you could see a lot of badgering and, shouting whatever at witnesses, complainants. That doesn't happen anymore. (PL 3)

You know, a lot of the things that section 3 was introduced to eliminate are long gone. I think the situation of sort of, you know, trawls through people's prior sexual history to demonstrate that they are, you know, a person of low moral standing because they have sex outside of marriage. I mean, running that in front of a modern jury would be completely counterproductive nowadays. Yeah, it just wouldn't happen. (PL 4)

Some lawyers commented on how counterproductive a section 3 application can be from the defence's perspective:

My experience in practice is sometimes when complainants are talking about their experiences or something that happened with the occasion, it's actually an opportunity for them to- and it kind of reveals humanity about them. So, if you- it's very personal, it's very, very private, intimate part of your life but if you- in some cases where complainants are- have to answer the questions about sexual experience in other occasions they come across so genuine, so human and it gives them a chance to put across their personality that actually can assist their credibility. ... And you know, sometimes they get angry you can understand that or upset or defensive and start arguing saying "that's got nothing to do with this", but occasionally I have seen it where... The room gets very quiet and it's almost like it's sort of a- it can be... a moment in the case where the complaint has an opportunity to really be believed I suppose, it depends and you know, nobody should be criticised if they get angry or want to argue about it or find it upsetting. But it's not always a negative thing for the complainant, and I suppose that's why some of them take the view of, "I'll answer any question, I have no problem with it". (PL 6)

This comment shows how speculative questions about a complainant's sexual experience evidence may actually enhance a complainant's credibility. Of course the fact that this may happen in some cases does not justify the admission of irrelevant or misleading evidence.

In contrast to the view among lawyers that generalised attacks on character based on sexual experiences are no longer happening, non-legal practitioners took a different view. They thought that

²⁴⁰ This finding echoes Leahy's research above n.44 and Laura Hoyano 'The Operation of YJCEA 1999 section 41 in the Courts of England and Wales: views from the barristers' row', available at <<https://www.criminalbar.com/wp-content/uploads/2018/12/REPORT-FOR-CBA-WEBSITE-FINAL-ERRATA-with-Executive-Summary.pdf>>. See also Conaghan and Russell above n.70 at ch 5.

²⁴¹ See *DPP v D.D.* [2018] IECA 192.

although overt character assassinations are not usual, a complainant's sexual life is still a fertile area for exploration.²⁴²

Nowadays, [cross-examining about alcohol consumption] doesn't really wash with juries as much anymore and you know, taking drugs isn't as [big] a thing that ten years ago it was. So, the juries aren't as against that, but how you behave in your private [sexual] life... Sometimes, I think that they still have that prejudice — [it] still exists somewhere, and the defence know that. (SW 2)

[P]erhaps years ago, it would have been more in fashion to be outright in terms of, you know, trying to name promiscuity, whereas it's my sense is it's slightly more guarded and, um, thinly veiled now. (PS 3²⁴³)

Indeed, most participants — regardless of their professional identity — stated that complainants are still being asked about their other sexual experiences. Furthermore, most lawyers said that section 3 applications are likely to be successful. Various reasons were suggested, including that defence counsel only pursue applications they believe will be granted. Others cited judges' reluctance to create a defence appeal point. It is not possible for this study to confirm or disprove the section 3 applications are likely to be successful, nor to explain why this is so. However, the finding that most lawyers *believe* they are likely to be successful is significant because it strongly suggests that there is some reality to this belief. This prompts two questions: how do lawyers think about the threshold of admissibility in section 3(2)(b), and what kinds of arguments are made in a section 3 application? These questions are considered in the remainder of this chapter and in Chapters Five and Six.

3. The admissibility test in section 3

Section 3 is not an absolute prohibition on questions or evidence of the complainant's sexual experience. Instead the court must be satisfied that the evidence should be admitted because it meets the test set out in section 3(2)(b).

In contrast to the statutory language and the dicta of the courts, lawyer participants viewed the test as not particularly onerous. Significantly, no participant referred to the wording of the admissibility test in section 3(2)(b); instead, as the quotes above show, the word 'relevance' was used. Given the convoluted statutory language, this is understandable. However, the threshold of admissibility in section 3 is much higher than simple relevance. It only allows the complainant's sexual experience to be adduced where the evidence could make a difference between guilt and innocence.²⁴⁴ Participants' (defence and prosecution) use of the term relevance without any reflection on the statutory test is concerning when considered in light of how participants discussed the admissibility test.

Instead comments focussed on the need to link the evidence to a particular aspect of the prosecution or defence case.

[I]t'll all be based on the facts of an individual case and you've been able to show relevance. You have to — you have to tie it down. (PL 3)

²⁴² See Chapter Three above.

²⁴³ PS=Policy Specialist.

²⁴⁴ See Chapter Two .

[U]sually it's done on the basis of, there's generally a certain level of general agreement between the parties that some specific factor or some specific piece of information is relevant, as long as it's done in an appropriate way, and it's just narrowly focused on that particular issue. (PL 4)

[In] my experience, not only are [complainants] protected by the prosecution counsel, they're protected by the judge. They're protected by their own [representative]. And defendants to get it, in my experience, have absolutely to make it relevant. And they're confined in the questions they can ask. (PL 12)

It appears that practitioners view section 3's primary function as being to protect complainants from unduly humiliating questioning about their sexual reputation or behaviour, questioning that targets the complainant's moral standing and aims to portray her as someone whose word cannot be taken seriously. While this is undoubtedly an objective of the section, its purpose is much broader. Section 3 is also aimed at excluding evidence which relies on one of the prohibited inferences. These are: that the complainant consented on the other occasion and therefore should be taken as more likely to have been consenting on the occasion in question; and that women who are sexually active are less likely to be telling the truth). This underscores the importance of scrutinising exactly *how* defence counsel may argue that the evidence is relevant to the issues in the case, what kinds of arguments about the evidence are being made in support of admissibility and how they connect to the issue of consent/belief in consent and/or credibility. This participant described how time pressures may mean such scrutiny does not happen:

Participant: [T]hat is often what happens as well, that there's nearly an agreement reached between counsel that cross-examination can take place on particular points that maybe are sought but not on other points. So there's an agreement in advance that there's a limitation on the cross-examination on certain points.

SR:²⁴⁵ And that's done without any scrutiny by the judge?

Participant: Yeah.

SR: That's a kind of horse- I mean, horse trading is probably an insulting way to describe it but -

Participant: No, that's exactly what it is. That is exactly what it is. It is horse trading. So that often happens. (PL 10)

Another participant expressed concern at the lack of guidance from the Superior Courts on the remit of section 3:

I think I think to some degree that we need some clarification as to the, the full limits and remit of section three. Um, at the **moment, it's a very, very haphazard, depending on what's being asked, who your judge is, what's being sought**. So I think perhaps more, more authorities from the superior courts, routinely in cases. [...] so I think a little bit more, I think a little bit more guidance from the superior courts is required because we all are just speaking either from experience, going back to the fundamentals, um, and we're relying on English and Canadian authorities and Australian authorities quite a lot when things get a little bit dicey, um, or a little bit outside of our, our, for want of a better term, common or garden rape. (PL 5, emphasis added)

Some expressed a desire for greater clarity around what kinds of evidence are covered by section 3.

²⁴⁵ SR= Sinéad Ring.

I mean, I think I would favour, um, a statutory definition because I think there has been confusion in these applications just from speaking to colleagues about how far does prior sexual experience go? Is it, you know, flirting with someone? Is it, you know, having a kiss with someone or, you know, like that? (PL 9)

The lack of clarity around section 3 is even more challenging when it comes to digital evidence, such as messages on phones or on social media or dating apps, where the evidence relates to suggestions or insinuations. While it appears that most practitioners are operating on the assumption that these are all covered by section 3, greater clarity on this important matter would be welcome.

Finally, many participants stressed the importance of the role of the Separate Legal Representative (SLR) in advocating for the complainant and facilitating a focus on relevance. The reflections of this legal aid board clerk illustrates how the SLR can help section 3 work effectively:

[defence counsel] had given [SLR barrister] 14 areas of previous sexual history evidence [with the defendant] which she fine-tuned. The defence seemed to want to talk about the previous sexual incidents between them at certain times because it would show she was lying to her family about when they were together, and that goes to her credibility. The judge did give him quite a hard time, asking him to explain exactly where he was going, saying things like “but where does that get you?”. Defence counsel didn’t have a copy of his areas for the judge, my counsel had to read it out to him. In terms of submissions, for the most part, the complainant agreed to answer the questions, counsel advised some relevance to establish the nature of their relationship but should not be gratuitous. The judge told him he could not get into the nitty gritty of the acts, more so the fact of the acts occurring. [SLR] advised the court that she was concerned defence counsel was going to go on a trawling exercise but that if he could put certain matters to her on the accused’s specific instruction, that should be facilitated. The Judge granted leave but nothing gratuitous and only those matters that have [sic] been highlighted to the court. [LA 1²⁴⁶]

Analysis of participants’ comments on the SLR are examined in Chapter Seven.

4. To which fact(s) in issue does the evidence of sexual experience go?

As Chapter Three explored, defence lawyers may make arguments in support of admissibility that are linked to different aspects of the case, including various facts in issue. In the interviews conducted with participants for this project, lawyers discussed the various ways in which sexual experience evidence may be argued to be admissible.

Participants stated that section 3 applications are often linked to consent. This might be the defendant’s assertion (in interview or in instructions to counsel) that the complainant did in fact give consent to the sexual activity, or, that he honestly believed²⁴⁷ that the complainant was consenting. Most participants also mentioned the importance of drawing out inconsistencies in order to undermine the complainant’s credibility. They distinguished this from simply saying someone is not worthy of belief *because* of their

²⁴⁶ LA- Legal Aid Clerk. Note emailed to author post the interview, on file with author.

²⁴⁷ Under current Irish law, an honest but unreasonable belief in consent is a recognised defence to rape if genuinely held. See *People (DPP) v O’R* 2016 IESC. Under the s2(2) of the 1981 Act, in determining whether a person honestly believed that the other person was consenting, regard shall be had to the presence or absence of reasonable grounds for such a belief.

sexual history. These are important assertions that need to be examined more closely. Chapters Five and Six explore the question of relevance in further detail, first in relation to trials involving adult complainants, and in Chapter Six, in relation to trials involving a complainant who was a child at the time of the alleged offence(s).

There are certain circumstances, in which the admission of sexual experience evidence is less controversial, and where it can be an important tool for vindicating the defendant's right to a trial in due course of law and for protecting the integrity of the trial process. A prime example is where the evidence goes to the issue of identity. The prosecution may adduce evidence of semen, pregnancy, disease or injury to show that the complainant was raped by the defendant. Evidence that purports to show that the injury/disease/semen/pregnancy was caused by another man may be vital to the defence and, therefore, to a trial in due course of law. This lawyer offered a good illustration of such reasoning.

I had a case where the complainant went to the SATU²⁴⁸ and had a - semen was found. DNA testing was done on the semen. She indicated she had not had intercourse in a particular period of time, which effectively discounted that semen being from anyone else. But when the DNA analysis was done, it showed that it belonged to an unknown male and did not belong to my client. So the question that then arose was - the obvious inference to be drawn from that was actually there had been no intercourse between my client and the complainant.

[...] But the evidence she gave then was actually, [...] she refused to say it. Was she with someone else? So now we're getting into an area where we have to ask about that. [...] And now suddenly a section three arises. So we have to stop the trial, get in the Legal Aid Board. Legal Aid Board [SLR] come in and say, well, obviously this is relevant. And she accepts it's relevant because, you know, it's a central issue in the case you've got - you know, we've got the forensics. And now she has an explanation for the forensics [the complainant stated that she had had sex with her boyfriend]. So I was very clear cut. I mean the hearing itself took didn't take very long because everyone agreed that was obviously relevant.

[...] The judge gave an indication that she thought it was ... obviously relevant because, you know, there's- there's only two ... major possibilities. One of which is that there was only one episode of sex, and that it was with unknown male and therefore not with my client. And the other alternative is that there was two instances of intercourse. Um, and so you'd have to question whether the previous one happened. It would be completely artificial not to have a discussion about that, the initial case. (PL 4)

Assuming that the defence's case was that they never had sex, counsel must be allowed to cross-examine the complainant on why she said she had not had sex with another man prior to the rape.

However, at the same time, there are reasons to be careful about this evidence. It is entirely possible the complainant did not think it important to mention to the garda interviewer that she had had sex with her boyfriend in the period before the rape, because it was consensual and private. It is also possible that she did not recall the prior instance of sex, because when she gave her statement her mind was dominated by the recent rape. The judge would also need to be especially careful to ensure that the questioning did not go too far into the nature of that other relationship or the details of their sex life, since these are collateral matters. So there are issues regarding this evidence, but that is not to say

²⁴⁸ Sexual Assault Treatment Unit.

that the questions by the defence should not be allowed. Such questioning is essential to vindicate the right to a trial in due course of law.

Chapters Five and Six explore in more detail how lawyers participants discussed relevance/admissibility of sexual experience evidence. Before turning to this, it is important to note that most participants emphasised the use of complainants' counselling records in section 3 applications. This is examined next.

5 Counselling records and section 3 applications

Most participants mentioned material disclosed by the prosecution to the defence as important for section 3 applications seeking to challenge credibility.²⁴⁹ These are usually digital evidence of messages on phones and the complainant's counselling records.²⁵⁰ Arguments about the relevance of both are examined in Chapters Five and Six. At this point it is important to note the particular observations about the utility of counselling records.

The quote below highlights the centrality of counselling records to the defence:

Because I mean, if you're in counselling, how likely is it that you're only talking about the rape? You're not you're talking about your life. You're talking about loads of other things. You're talking about new relationships, old relationships, how it's affected your relationships. That's – that's the fishing expedition. That's the thing that everybody wants their hands on, because **that will find you your nugget that gets you your section three application.** (PL 6, emphasis added)

Another lawyer explained how the mention in a note of another instance of abuse by a different person might be used to challenge credibility:

Participant: It could be in counselling notes when she tells a counsellor that, you know, she was abused by her dad or whatever and whatever, and if it becomes relevant to – to what it's doing, like, if she's now being accused of being abused by – she's now accusing an uncle of abusing her. Well, if she previously accused her dad of abusing her and didn't – Whether she made a complaint or didn't make a complaint or, or whatever, you know.

SR: So what are you saying there – that that that they're mistaken in memory, or?

Participant: it could be anything. [...] It's either you're mistaken or you're confused or you're lying or you've imagined it or you've – it- it can be anything. It just could be anything. But it has to be relevant. It has to be relevant to your defence. (PL 12)

Clearly then, lawyers consider sexual experience evidence drawn from counselling records as powerful evidence that can play a crucially important role in the defence case. However, some lawyers and policy workers expressed deep scepticism about the reliability of this evidence. Concerns centred on the record being multiple hearsay and the purpose for which it was written differing from the goal of the criminal process (therapeutic as opposed to fact finding):

[A] counselling record is a note that somebody took of something they perceived you to say. [...] you as a complainant are supposed to answer questions of what somebody else interpreted you to say

²⁴⁹ These include phone records, school records, counselling records, or care records held by The Child and Family Agency. Disclosure adds to an already significantly delayed process; this is explored in Chapter Seven.

²⁵⁰ For children a wider range of records may be engaged- such as care records and school records.

at the time, even though what they're saying they've written down is not a verbatim record. In what other world would that be evidence? (PL 10)

The quality of that record depends entirely on the author and their understanding of the purpose of the note. So the fact that a note written by a third party, that's not verbatim, that's based on their interpretation of the client that's sitting in front of them, which could have been taken years previous, is then being kind of, like, juxtaposed with a statement that the complainant may have given to the Gardaí, read through and signed -is -that's wild to me. I mean, frequently the client will not know what is in a therapeutic note. And it's, it's, it's entirely the work of a professional [and] the professional's interpretation of what a client says or how a client presents. Which is very different to what a client is stating explicitly in their garda statement, which they get an opportunity to read over and make sure that it's accurate. Um, and then when you when those two documents are put side by side and inaccuracies are pointed out, [...] the fact that that is used as a tool to discredit the veracity of the complainant's claims is, I think is wild. [...] The content of the therapy sessions may not be accurately portrayed in those therapy notes. You know, it's not a transcript. It's not a, it's not factual – it's a very subjective recording of what that session looked like or what that therapeutic relationship looked like. (PS 3)

Since the interviews were conducted, the law on disclosure has changed. Under legislation passed in summer 2026, the issue of disclosure to the defence of the complainant's private records²⁵¹ held by third parties is to be subject to mandatory judicial screening.²⁵² The provisions apply to records relating to child protection, counselling, health care and social work. It remains to be seen how judges will interpret the new statutory test, which centres on whether the evidence is likely to be relevant to an issue at trial.²⁵³ The comments presented here illustrate the value to the defence of this evidence, on the one hand, and the prior questions that must be asked by judges about the reliability of counselling records and other third party records. The insights of Chapters Five and Six are important in this context because they dissect arguments about how and in what circumstances sexual experience evidence drawn from counselling records or other sources are claimed to be relevant.

Conclusion

This chapter has presented the findings on how section 3 is working. First the chapter showed that sexual experience evidence can have a powerful effect on the complainant and on the trial process. A key finding is that lawyers considered section 3 to be an effective shield for complainants from intrusive and humiliating questions. Participants also were also of the view that, generally speaking, section 3 applications are usually granted.

The chapter showed that, in contrast to the statutory language and the courts' dicta on the threshold to be met in a section 3 application, the dominant view was of the section as a protection against humiliating questioning. However, section 3 is about much more than lawyers treating complainants respectfully; its core concern is to protect the jury from unfounded assertions and stereotypical

²⁵¹ A child protection record, a counselling record a medical record or a social work record.

²⁵² Section 19(A)(11) Criminal Evidence Act 1992 as amended by Section 22 of the Criminal Law, Civil Law and Defence (Miscellaneous Provisions) Act 2026.

²⁵³ A key question for a judge deciding on disclosure is whether such evidence if disclosed is likely to be relevant to an issue at trial: Section 19A(5)(a) and Section 19A(11) as amended by the 2026 Act.

reasoning about complainants in rape cases. This insight informs the analysis in Chapters Five and Six.

The chapter also showed that evidence of sexual experience is highly valued by the defence and can play a key role in challenging the complainant's evidence. The right to effectively cross-examine the complainant and to put the defence case as fully as possible is core to a trial in due course of law. The chapter discussed a clear example of how sexual experience might be relevant: where a fact in issue is identity and the evidence goes to identity.

Finally the chapter highlighted the centrality of counselling records to the defence case and the question marks raised by some participants about the reliability of such records (and hence their probative value).

Chapter Five and Six consider more closely the arguments about the relevance of sexual experience evidence. Chapter Five focusses on cases involving adult complainants.

SEXUAL EXPERIENCE EVIDENCE AND ADULT COMPLAINANTS

Introduction

This chapter focusses on how lawyers discussed the admissibility of sexual experience evidence of adult complainants. As Chapter Three highlighted, lawyers were confident that section 3 applications are likely to be granted. Therefore it is important to understand what kinds of arguments are being made in section 3 applications, particularly how lawyers discussed the purpose for which sexual experience evidence is sought to be adduced.

The chapter evidences a certain dissonance between the general view among lawyers, described in Chapter Three, that section 3 is working well, and the findings presented in this chapter which show that sexual experience is often used to improperly infer consent from prior experiences, or to portray the complainant as outside the category of a 'real rape' victim. This is illustrated in Part 1, which explores the arguments made in relation to sexual experiences with a third party. This is perhaps the most controversial category of sexual experience evidence,²⁵⁴ and was the sole target of section 3 when it was initially introduced into law in 1981. The findings here suggest that there is much cause for concern regarding the influence of rape myths and the impermissible inferences targeted by the rape shield.

The type of sexual experience evidence most frequently cited as being the subject of section 3 applications in adult cases was evidence of prior sexual experiences with the defendant. Participants' reflections on this are examined in Part 2. The chapter shows that in cases of relationship rape, there is a presumption that the other sexual experiences are relevant and admissible. This takes the law back to its pre -1990 position when section 3 did not cover sexual experiences with the defendant. The chapter also shows how in some limited cases sexual experience evidence can legitimately be used to counter a specific assertion in the prosecution case.

Finally the chapter examines the issue of digital communications between the complainant and the defendant. Disclosure by the prosecution of digital evidence from a complainant's phone is one of the primary sources of information on which section 3 applications are based. The findings presented in the final subsection of this chapter show how such evidence can be exploited by defence counsel to make claims about the complainant that run counter to the idea of sexual autonomy and which raise fundamental questions about the reliability and probative value of such communications.

²⁵⁴ See Chapter Two.

1. Evidence of Sexual Experiences with Third Parties

Participants referred to applications by defence counsel seeking to ask the complainant about other sexual experiences with third parties, some of which were events that happened decades earlier. The evidence included sex in previous intimate relationships, previous instances of sexual violence, consensual sex in risky situations and sexually suggestive digital messages or photographs. Evidence in this category was said to serve one of several purposes: to show a pattern of behaviour; to rebut part of the prosecution case; to undermine the complainant's general credibility. These are considered in turn.

A *Evidence of a pattern of behaviour*

Participants described applications based on the argument that the evidence showed a particular pattern of behaviour that was similar to the events under consideration by the court.²⁵⁵ Such evidence was said to go to consent and the defendant's belief in consent or to challenge credibility.

This lawyer described how evidence of sexual practices outside of normative heterosexuality may be used to argue consent or belief in consent:

If [digital evidence] show[s] that perhaps this person, allegedly this complainant allegedly had sex with more people, other people in similar situations. Use an example at a house party that maybe on that night they had sex with one other person on the night or the week before there was two other people. They may perhaps want to be showing a pattern, or kind of to be able to show that their client was of the opinion that this is what the person did, and they didn't think there was anything unusual about it, kind of showed that, that scenario. (PL 11²⁵⁶)

Clearly the argument is based on the complainant engaging in behaviour that is similar to circumstances of the rape and therefore the defendant can claim he had an honest belief that she was consenting. It is in fact an argument based on the first impermissible inference- that prior consent is indicative of later consent, even in cases where the sexual experiences were with men other than the defendant.

In the next quote, a separate legal representative (SLR) for a complainant discusses a case involving multiple defendants. Despite the SLR's strenuous objections, counsel for one of the defendants was allowed to question the complainant about sexual intercourse she had with two other men unconnected to the prosecution the week before the alleged offences.

[the defence argued] this is relevant because if the jury knew that this is a person who has at least had that experience of having sex with more than one person on the same evening, then it'll put a different light on the idea that she's having sexual experience or sexual intercourse with a group of lads allegedly on this particular night. So, it's this kind of, it's almost like a propensity type of argument, but I guess because the two incidences were very close in time, the judge felt that there was something in it. So, the judge allowed that type of questioning. (PL 6)

²⁵⁵ Propensity reasoning is usually used in relation to the defendant's bad character; where someone has a pattern of breaking the law in a particular way for example, this might be introduced as an exception to the general rule that character evidence is prohibited since it could unduly prejudice the jury against the defendant. However this is very strictly regulated, and propensity reasoning is usually on the basis that the previous behaviour is strikingly similar to the events in question.

²⁵⁶ PL= Practising lawyer.

In both of these examples, the evidence is said to go to a pattern of similar behaviour and therefore to consent or the defendant's honest belief in consent.²⁵⁷ However, in both, evidence of sex with multiple partners, or sex at a party, are not particularly unusual behaviours – or at the very least there is no reliable way to show that and so the probative value of the evidence is questionable.

A third example illustrates the risks involved in the 'pattern of behaviour' or 'propensity' style argument. A lawyer described a case where the complainant's consent was conditional on the defendant agreeing to use a condom, but he did not do so. The argument on the section 3 application was that the complainant's consent to sex without a condom on a previous occasion with a different man was relevant to the question of her consent to sex without a condom with the defendant on the occasion charged. Even though the defendant accepted that the complainant's consent was conditional on him using a condom, it did not matter as long as he could point to another occasion on which she had sex without a condom, irrespective of with whom. The section 3 application was successful.

[The defence] got permission to, to cross-examine her on the basis that - on the basis that she had previously had sex without a condom with [her ex-boyfriend - not the defendant]. And she said that was because 'I was in a relationship with him, and we had agreed that we would have sex without a condom,' but she had actually told this defendant, and he had agreed that she had told this defendant that she would not have sex with him without a condom. But then he went and had sex with her without a condom. But the jury acquitted, so... I'm not over that one. I'm absolutely not over that one. Totally not over it. So, so you just don't know. (PL 12)

The argument for relevance here is premised on the idea that having sex without a condom is unusual behaviour and a woman's history of engaging in such sex is important information for the jury to know about when deciding on a rape charge. Not only does this offend logic, but it amounts to saying that a woman's ability to choose the conditions under which she can agree to have sex are limited by her past decisions.

Internationally, the similarity exception to the general rape shield is controversial and several jurisdictions have declined to incorporate it, because of difficulties in setting the degree of similarity required.²⁵⁸ In England and Wales there is a provision that allows for a similarity exception. Section 41(3)(c) of the Youth Justice and Criminal Evidence Act 1999 allows for sexual behaviour evidence to be admitted. The test is whether the evidence is 'so similar' to the sexual behaviour of the complainant at or about the same time as the event in question and that 'the similarity cannot reasonably be explained as coincidence'. Two related elements interact in the English provision: a high degree of similarity combined with an uncommon quality which places the similarity in behaviour beyond a scope of coincidence.²⁵⁹ The problem is that unless the similarity principle is tightly defined to highly unusual circumstances then its application is likely to lead to the admission of irrelevant evidence. The significance of any similarity and hence the probative value of the evidence, depends on the assessment of how unusual the other sexual experience is, something that is difficult if not impossible to gauge in the absence of reliable statistics about private sexual behaviours. As Conaghan and

²⁵⁷ It also might be said to go to the fact of consent itself, which is also problematic for the same reasons and for the reason that neither of these behaviours is particularly unusual or, to put it more accurately: it is not known how usual or unusual either of these behaviours is for people in the same age group and friendship group as the complainant. It may be impossible to know this.

²⁵⁸ McGlynn n. 3 at 11.

²⁵⁹ Conaghan and above n.70 at 157.

Russell note, “in most contexts we have simply no way of gleaning the necessary statistical evidence to enable us to make a defensible probability calculation.”²⁶⁰ The similarity exception is also vulnerable to the attitudes and knowledge or ignorance of the judge about sexual practices. A court might consider sex at a house party to be extremely rare, but for young people, it may be far more common. Once it is in, the evidence can be extremely powerful because of its ability to portray the complainant outside the category of a real rape victim.

The examples discussed involve diverse experiences, ranging from sex at a house party, to taking part in a threesome. It is not known how common or uncommon such experiences are among Irish adults. According to Irish law, consent is specific to each person, each situation, and each sexual act.²⁶¹ Consenting to, enjoying or desiring sex with one or multiple partners at a house party or otherwise does not necessarily reveal anything about whether the complainant consented to sex with the defendant on the night in question. By the same token, neither should it, in itself, be allowed to provide the defendant with grounds for arguing that because of the prior consent in similar situations, he believed she gave him consent on the night in question.

Where there are really unusual features to the previous experience and these are replicated in the events charged this gives the evidence greater probative value and thus greater relevance. But great care must be taken to ensure in all cases that evidence of the complainant's sexual experience is not simply a vehicle for improperly inferring consent from prior experiences, or of portraying the complainant as outside the category of ‘real rape’ victim.

B Evidence that rebuts the prosecution case

Lawyers also identified relevance as flowing from the evidence's power to undermine credibility. However they were careful to note this was different to invoking the second of the twin myths (that sexual promiscuity is indicative of reduced or no credibility). Instead relevance was connected to contradicting something in the complainant's statement or the prosecution case. The next two quotes illustrate this approach.

[W]hen I say credibility, it's about suggesting, you know, *if someone puts themselves forward as a particular type of person* or makes a statement of fact that you can prove isn't true, that's how you attack the credibility. It's not to say that someone who engages in whatever sexual activity or is, has sex with lots of different people, or, you know, how is that, you know, how does that affect their credibility? And so if someone is - there has to be some sort of relevance to the case (PL 4)

Relevance is to do with the primarily the credibility of the - does that information tally up with what the defence is proposing as their defence. And consent is always a huge issue. And one thing we are all aware now is internet, Tinder and all that. It is that. .. The accused says I met her on Tinder. It was the first time meeting her and we had sexual intercourse without [sic] consent. .. And the defence might want to know if she's going to many such dates in the past, if she, in her statement says this was my first ever Tinder date, or I never had sexual intercourse before on a first date. So that might be relevant material in there. It would have to be teased out in advance. You'd have to have some grounding to make the application. Yeah, but You can - You know, your client might say, she told me that, you know, this is information you get from your client. It's not something that will

²⁶⁰ Ibid at 159.

²⁶¹ Section 48 Criminal Law (Sexual Offences) Act 2017.

automatically lead to an application for section three, but it's information that may become relevant, and the defence will have to show at some stage that it is relevant, and then make the application to the judge. And making a case of whether her dating on Tinder is marrying up with what she said happened on this particular occasion. Again, a bit like the extreme of the virgin who had a child. If she's if she's making allegations or he's making allegations that aren't ringing true to what is discoverable, then it becomes relevant. (PL 3)

In these extracts the participants are tying relevance to probative credibility. The evidence is said to contradict something the complainant is asserting or the prosecution is asserting about what happened. This may well be legitimate. However, it is worth pointing out some of the questions provoked by these quotes, when read critically. In the second example, if the complainant says she never used Tinder and then it becomes clear she may well have, that could undermine her credibility. However the question is, how far should questioning be allowed to go? Should this (alleged) inconsistency open the door to evidence of sexual activity with other people whom the complainant met on Tinder? This is a collateral matter that does not go to the facts in issue.

The primary concern with both quotes is the reference in the first quote to the claim that the prosecution or the complainant has asserted herself to be a certain 'type' of woman. The implication seems to be that the complainant has made herself out to be virginal, innocent, sexually respectable. This worry about the type of woman is echoed in the reference to the virgin who has a child in the second quote. But how could someone make such an assertion or are they in fact being penalised for stereotypical assumptions about certain classes of complainant? Or is it indeed simply a cover for character assassination? As will be seen in Chapter Four, this is a particular problem in cases involving young girls where they are constructed as always asserting their innocence and virginity (and therefore sexual experience evidence is needed to counter this false assertion). The myth of the lying complainant and the myth of the real rapist and the real rape victim also cast a long shadow over this kind of argument.

C To undermine the complainant's general credibility

Many lawyers also spoke about the importance of evidence that simply went to undermining the complainant's general character. This senior policy specialist described an application that sought to adduce previous pregnancies years earlier.

[I]t was pregnancies that occurred when the person was [...] a young adult. [...] I mean, I can only speculate that they were trying to... cause some discredit to the complainant by virtue of the fact that they had had a pregnancy young. (PS 3)

This is an attempt to cast the complainant as unworthy of belief because of her past sexual experiences, to distance her from a 'real rape' victim. It depends for its force on a set of unfounded assumptions about credible young people being sexually innocent and inexperienced. The theme of adducing sexual experience evidence to undermine the credibility of young people came through very clearly in the interviews and is examined in more detail in Chapter Six.

This Legal Aid Board clerk offered the following example of a section 3 application that was an attempt to cast the complainant as sexually promiscuous and therefore of damaged credibility.

We were advised that morning that the defence team wished to ask [about]:

1) [...a] sexual incident in a nightclub when she was a teenager

2) [...] a relationship with a married man

The complainant advised that there was nothing in either of these questions, and she was happy to answer. [SLR] therefore advised she would relay those instructions. [SLR] explained her instructions to defence counsel who then withdrew the application [...] [LA 1²⁶²]

This underscores the value of the role of the SLR in making sure section 3 is effective in achieving its objective of excluding impermissible inferences of weakened credibility from sexual experiences.²⁶³

Another example of evidence aimed at generally undermining credibility is evidence of abusive sexual experiences with a third party. As noted in Chapter Three, counselling records were cited as a useful source of such information. In this extract the participant gives the example of someone who has disclosed other experiences of sexual violence but who did not make a complaint to the gardai about them:

Participant: That becomes relevant if it's an allegation against somebody else. That's a relevant issue that you are. Here's, here's a person who's made an allegation. And this is the [garbled] in every case. You're making an allegation of me. But didn't you make allegations about this person, this person, this person and never went to the guards, yet they did far worse than I did, yet. You know, she.

SR: That just becomes — you don't need to tie that one.

Participant: That's ah.. you have to make you have to make the application. (PL 3)

The spectre of the myth of the lying complainant looms large over this assertion of relevance. There is no mention of evidence that the other disclosure of rape/abuse was false – indeed according to the quote, it never even reached the gardaí. Therefore it appears that the relevance claim is that the mere fact of a disclosure is a reason to question the complainant's credibility. This is precisely the kind of impermissible inference prohibited by section 3.²⁶⁴

A lawyer participant gave an example where the defence had become aware through disclosure that the complainant had been raped years previously, and that her parent had advised her to vocalise her non-consent if anyone ever tried to assault her again. Counsel wished to question the complainant about why she had not screamed during the alleged rape before the court. Based on the complainant's instructions, the SLR barrister (the participant) objected to the section 3 application and the application was refused.

Participant: [t]he judge ruled that it shouldn't be allowed, and the barrister asked the question anyway, and they were making the point that, you know, "she- she'd been there before, why didn't she scream this time". This- it was that type of argument... they got away with it is how I'd describe it.

SR: Okay.

Participant: So, a cheeky thing to do but they did do it.(PL 6)

²⁶² LA= Legal Aid clerk.

²⁶³ Chapter Seven explores the role of the SLR.

²⁶⁴ See Chapter Two.

This was far more than “a cheeky thing to do”; this was a blatant attempt to mobilise the lying complainant myth and the culturally potent image of ‘real’ rape as involving force and resistance. This example shows the lengths that some defence counsel will go to, even in contravention of the judge’s refusal to allow questioning on other sexual experiences.²⁶⁵

So far this chapter has explored ways in which evidence of a complainant’s sexual experience with third parties might be argued by defence counsel to be admissible under section 3. The next section explores the findings in relation to evidence of other sexual experiences with the defendant.

2. Evidence of Other Sexual Experiences with the Defendant

Section 3’s prohibition on questioning about the complainant’s other sexual activity with the defendant was introduced in 1990, the same year as the criminalisation of rape within marriage.²⁶⁶ Until then a wife’s consent to sexual activity given on marriage was effectively irrevocable. In a similar vein, the amendment to section 3 sought to eliminate the argument that, because of their relationship, the defendant was entitled to assume consent to sex.

The prohibition on question about prior sexual experiences with the defendant must be understood in the context of the reality rape within relationships. As discussed in Chapter Two, most rape happens within relationships and is underreported.²⁶⁷ A report of one instance of sexual violence may be precipitated by months or years of emotional, financial, physical and sexual abuse of the victim.²⁶⁸ The victim may have been groomed from a young age.²⁶⁹ Economic vulnerability is a key mechanism of control and domination and facilitates sexual violence in a relationship.²⁷⁰ Coercion and control play a central role in intimate partner sexual violence,²⁷¹ contributing to the longer duration of intimate partner sexual violence (sometimes over years) and the especially low disclosure rate (16% compared to 47% for sexual offences generally).²⁷² Societal perceptions of rape as mirroring the real rape stereotype

²⁶⁵ Previous sexual abuse also arose in relation to prosecutions for non-recent child sexual abuse and contemporary child sexual abuse.

²⁶⁶ Section 5 Criminal Law (Rape) (Amendment) Act 1990. For a recent case see *The People (DPP) v G.M.* [2023] IECA 151.

²⁶⁷ CSO 2023 above n.11, Wieberneit, M., Thal, S., Clare, J., Notebaert, L. and Tubex, H. (2024) ‘Silenced survivors: A systematic review of the barriers to reporting, investigating, prosecuting, and sentencing of adult female rape and sexual assault’, *Trauma, Violence, and Abuse*, 25(5): 3742–3757. See also CSO 2023.

²⁶⁸ Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP, New York 2009); T. Palmer, “Failing to See the Wood for the Trees: Chronic Sexual Violation and Criminal Law” *The Journal of Criminal Law* 2020 Vol 84(6) 573. RCI 2026 above n.90 at 44-45.

²⁶⁹ See this report of a case where it appears the sexual relationship began when the complainant was a 16 year child and lasted at least 9 years. The defendant pleaded guilty to the offence of defilement and to two counts of rape. <https://www.irishtimes.com/crime-law/courts/2025/10/13/woman-felt-like-she-had-been-murdered-after-rape-by-her-partner-court-hears/>

²⁷⁰ Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2nd edn, Oxford University Press 2024). 23% of people who are unable to work due to long standing health problems and 23% of those who are homemakers experienced sexual violence by a partner: CSO Table SVS35 available at data.cso.ie

²⁷¹ Rape Crisis statistics show that almost three quarters of intimate partner sexual violence incidents involved additional violence including physical abuse as well as harassment, intimidation and abuse of power/control. RCI 2026 above n.90 at 45.

²⁷² Ibid.

mean that rape in a relationship is often still viewed as less serious than stranger rape.²⁷³ However rape by a current or former partner entails grave and distinct harms.²⁷⁴

Given this reality, it is concerning that legal practitioners adopted a less-than-sceptical approach to claims of relevance in relationship cases. On the contrary, lawyers stated that it is almost impossible *not* to explore the couple's prior sexual experiences together. Their shared sexual history was seen as obviously relevant by many defence counsel and by some prosecuting counsel. Participants discussed such evidence as going to context, to rebutting a part of the prosecution case and to show an honest belief in consent. These are considered next.

A To provide relevant context

Participants often did not specify precisely what the evidence would go to show in relationship cases but these quotes illustrate that it was connected to providing context:

You're trying to get the truth out by asking about prior sexual experience. So it becomes relevant in that sense that **you're not trying to ridicule, humiliate or anything. You're just trying to say, well, it's a relevant question because for 20 years we've had, (sic) normal sexual relationship, led the perfect life. And this comes out of the blue.** So you're not really asking about - you need the permission of the court, but you're not really asking about the sexual position there. You're just asking that sexual intercourse did take place with me on many occasions, and I never did anything to you. So there's a relevance where a latitude would be coming into the court, because the history of the couple is relevant, as opposed to the history of the sex experience. (PL 3)

Participant: Well, I've come across a lot of them. ..it always comes up in cases whether they're married or where there's a previous sexual relationship between the parties.[...] Because I think it's all about, "oh well you consented before, why didn't you consent now?" This type of... You know, that's their [defence counsel's] line of reasoning, you know? [...]

SR:²⁷⁵ So, how is it relevant, given that we know most rape happens in relationships anyway?

Participant: Yeah. I think- I think it's... I think it's used as a... I think from a fairness perspective - my own take on it is that the jury should know there's a previous history between the parties, that there's a fundamental unfairness to the accused if they are not aware of that. (PL 8)

In these statements, the default appears to be that such evidence should always be admitted. This position takes the law back to its pre-1990 position, and narrows the applicability of the rape shield to sexual experiences with third parties. The arguments here appear to imply that in relationship cases that prior consent is always relevant to consent or honest belief in consent. This is worryingly close to

²⁷³ Kelly Simonson and Linda Mezydlo Subich, 'Rape Perceptions as a Function of Gender-Role Traditionality and Victim-Perpetrator Association' (1999) 40 Sex Roles 617. Victims of relationship rape are more often blamed for the rape.: Candice M Monson, Jennifer Langhinrichsen-Rohling and Tisha Binderup, 'Does "No" Really Mean "No" After You Say "Yes"?': Attributions About Date and Marital Rape' (2000) 15 Journal of Interpersonal Violence 1156.

²⁷⁴ Hamilton G and others, 'Family Violence and Sexual Harm' (RMIT University 2023) <<https://doi.org/10.25439/RMT.24208758>>; WHO Factsheet Violence Against Women <https://www.who.int/news-room/fact-sheets/detail/violence-against-women>. In this recent Irish case the victim described the rape as akin to being murdered: <https://www.irishtimes.com/crime-law/courts/2025/10/13/woman-felt-like-she-had-been-murdered-after-rape-by-her-partner-court-hears/>

²⁷⁵ Sinéad Ring.

understanding consent as irrevocable and undermines the right to self-determination at the heart of sexual autonomy. As Chapter Two explained, the fact that they had sex previously is not probative of consent or belief in consent; it only (possibly) evidences a claim that the complainant was arguably more likely to have consented to sex with the defendant than another woman who was not his partner would have been. This does not help the jury in its decision on the facts in issue. The question of whether the complainant consented to the impugned sex is a question that must be answered by the jury with regard only to the temporal and situation-specific definition of consent in law.

The fact they were in an existing relationship will usually be set out by counsel for the DPP as part of the prosecution case. There is of course an enormous difference in tone and meaning between a prosecutor explaining that the couple knew each other and had been intimate, and a defence lawyer cross-examining the complainant about their sexual history. The use of such evidence is best understood as part of a defence strategy to contrast the impugned sex with stereotypical notions of 'real' rape. It is a way of arguing that what happened was perhaps unpleasant for the complainant but was not rape. Prosecution counsel must be alert to the risks to the trial of sexual experience evidence pertaining to the couple's prior history and must interrogate any claims that the evidence is simply context. Instead they should be resisting such claims and arguing that the evidence must have sufficient relevance to the issues at trial to pass the threshold in section 3(2)(b).

B To rebut a specific point made by the complainant/prosecution

Some lawyers stated that sexual experiences with the defendant were only relevant when introduced to contradict something important in the complainant's statement or testimony.

[Y]ou know, generally someone gives an explanation as to why they weren't consenting to something by reference to the general sex life that they had. Or they explain that they never would have sex at a particular time or in particular circumstances, or engage in a particular act and indicate, and I never, we never did that in the relationship before. Or he had asked me to do that before and I'd always refuse or, you know, it wasn't.. That's when it most it's most likely to come up. (PL 4)

[I]f they have a history of sexual relations, let's say in a husband and wife scenario. Well then, you know, and he says she did consent. Well, and ... she says, no, I didn't consent to anal sex. But if, if somewhere back in the, in the documentation or whatever or the husband said we had anal sex once a week for the last ten years. Well, then - then it's relevant because, you know, in the sense of it's just a straightforward... If she [had] said - on this occasion I did not want to have anal sex with him. That's fine. But **if she, if she comes forward and says, I never wanted, consented to anal sex, well, then he should be allowed to question her about whether they actually had had anal sex before, the two of them.** (PL 12, emphasis added)

In these scenarios, the defendant's instructions are that a key part of the complainant's statement is untrue. There is a direct conflict between something the complainant says that goes to a fact in issue, and the accused's memorandum of interview or instructions to his lawyer. In such a scenario, if there is evidence of other sexual experiences between them that supports the defendant's account, then this is surely a legitimate basis for making a section 3 application. However, the trial judge must carefully interrogate whether the prosecution is in fact relying on the claimed assertion, or whether the defence is simply picking up on (alleged) inconsistencies in order to introduce salacious information about the

complainant. Such a strategy could be an attempt to convert rape into sex in the minds of the jurors,²⁷⁶ and/or to turn the complainant into someone with damaged moral credibility, someone whose testimony does not justify forming the basis of a conviction.

This participant was asked to consider what they would do where the accused makes assertions about their sex life that is not supported by other evidence; in other words, where the sexual experience sought to be adduced is simply an assertion by the defendant:

SR: You know, [the accused says] we've had a great sex life. It got a bit kinky towards, in the last few months, but always consensual. But you don't have anything in counselling records or, you know, phones, anything to back that up, but you still have him saying this to you in his statement.

Participant: Then you, again with that one you would put forward to the judge: This is my defence. **This is what he's claimed in his interviews. Now I have nothing to base that on. But these are my instructions, and I think I should be entitled to ask these and go through the history of the relationship between the persons**, because it comes down to credibility and because there's no other evidence, there's no corroboration, there's no nothing- maybe there will be corroboration of bruising because she went to the SATU there. That might be. But there's no corroboration of anything going back in the past or their history. **You might push that boat out to see if a judge will permit you, on the basis of what he has said in his interviews and what she hasn't said. It's the basis of what she hasn't said.** (PL 3, emphasis added)

Support workers and one lawyer participant were concerned that the accused's instructions to counsel in such a case may be a lie. For example, the accused might assert that that the couple regularly engaged in consensual 'rough sex'. If, as is their constitutional right, the accused person does not give evidence, this claim goes untested by the prosecution. However, the defence must be allowed to put the point to the complainant. Trial judges assessing the probative evidence of previous sexual activity with the defendant must be very careful to scrutinise arguments for admissibility to protect the trial process from information that might distract jurors or mobilise arguments based on the real rape myth. This might mean in a case where there is no supporting evidence for the defendant's claim by limiting the leave to one question only, e.g. did you and the defendant ever engage in BDSM? If the answer is no this should be the end of the questioning. Furthermore, even if they did previously engage in BDSM there can be no suggestion that prior consensual intercourse, even if unconventional, means that that consent can be inferred for the occasion in question.

So far this chapter has shown that participants had a generally very permissive approach to the admissibility test in cases of relationship rape. Most lawyers' default position was that the sexual history of the relationship should be admissible. This is at odds with the text of section 3 itself and if accepted, would mean that rape shield should not apply to people in relationships.

It also noted that there were some legitimate uses of section 3 – i.e. where the evidence went specifically to rebutting a key part of the prosecution's case. However a note of caution was sounded in relation to cases where the sexual experience 'evidence' is the defendant's assertion that they previously engaged in a particular sexual practice. In such cases, the section 3 application may be simply a way for the defence to cast the complainant as someone who does not fit the profile of a 'legitimate' victim of 'real rape'.

²⁷⁶ Aileen McColgan, 'Common Law and the Relevance of Sexual History Evidence' (1996) 16 Oxford Journal of Legal Studies 275 and Ellison and Munro (2009) above n.70.

The final topic that commonly appeared in participants' reflections on sexual experience evidence with the defendant is digital communications.

C Evidence of digital communication to show an honest belief in consent

In cases involving a casual relationship, the defence may wish to bring in evidence of digital communications by text or on social media apps between the complainant and the defendant. Messages sent in the weeks and months leading up to meeting in person may often contain references to sexual acts that each person enjoys or does not enjoy, or may include photographs of parts of their bodies. Judges may allow questions on these messages where the defence is arguing that they go to a defence of belief in consent.

Just take the example there of what kind of - what the dating apps and text messages. I think they would [be allowed to cross-examine complainant]. And I've seen them being allowed, because I suppose to - kind of show the history of the relationship, to show, kind of even as to how they got to that point. And again, it would come back from the defence point of view. It would be looking at a kind of a reasonable [sic²⁷⁷] belief argument. You know, this had been said in the messages and these kind of things have been said, and then people would meet up and this happens, they would be coming at it again from that point of view. (PL 11)

In this scenario, counsel would be trying to show that prior online discussions about sex (that may or may not have taken place) were relevant to a defence of honest belief in consent. This is highly prejudicial evidence; an English mock jury study found that "evidence of sexting was in many cases more prejudicial for jurors than evidence of previous sexual intercourse".²⁷⁸ Internationally, scholars have found that records of mobile phone text messages and social media posts are one of the main vehicles by which rape myths and stereotypes enter rape trials.²⁷⁹

However, the probative value of such evidence is highly questionable. Digital communications may be used to evidence a complainant's behaviour as incompatible with 'ideal victim' stereotypes.²⁸⁰ As many scholars have noted, digital communications relating to sexual themes can have multiple and varying meanings and interpretations,²⁸¹ and are not necessarily of any significant probative value. Indeed, as Quilter and McNamara note, there are dangers in treating text messages as documentary evidence that can be read in the same way as police statements and records of interview:

²⁷⁷ This should be honest belief. Such a belief, even if unreasonable, is a full defence. Although it should be noted that the jury must take into account the presence or absence of reasonable grounds for that honest belief- s2(2) Criminal Law (Rape) Act 1981. Important question must be asked about the boundary between a mistaken belief in consent and recklessness, but they are beyond the scope of this report.

²⁷⁸ Herriott above n.31.

²⁷⁹ Julia Quilter and others, 'Text Messages and Social Media Posts as Evidence in Rape Trials: A New Entry Point for Rape Myths?' [2026] *Crime, Media, Culture: An International Journal* 17416590261429130; Elaine Craig 'Sexual communications, digital intimacy, and the extremely limited admissibility of evidence of a complainant's intention to consent' [2026] 49:1 *Dalhousie Law Journal* 1; McDonald above n.37; Fanny Ramirez and Vincent Denault, 'He Posted/She Posted: Unpacking the Affordances of Social Media Evidence in Sexual Assault Cases' [2025] *Crime, Media, Culture: An International Journal* 17416590251345744

²⁸⁰ Graceann Carimico, Thuy Huynh and Shallyn Wells, 'Rape and Sexual Assault' 17 *Georgetown Journal of Gender and the Law* 359; Holly Jeanine Boux and C Daum, 'At the Intersection of Social Media and Rape Culture' (2015) 1 *University of Illinois Journal of Law, Technology and Policy* 149; John G Browning, 'Digging for the Digital Dirt: Discovery and Use of Evidence from Social Media Sites' (2011) 14 *SMU Science and Technology Law Review* 465.

²⁸¹ See Quilter and McNamara above n. 106 at 98 and Quilter and others above n. 279; Craig above n. 279.

Reading evidence of text messages divorced from the context of their authorship or production, and with insufficient attention to the fragmented and often contradictory way that texts ‘explain’ what has occurred, increases the risk that the author will be accused of inconsistency and fabrication.²⁸²

Context is everything and too great an emphasis may be placed on the text message as a record of reality.

Craig explains how text messages and social media messages are very tenuously probative of consent (or honest belief in same):

Digital sexual communications are frequently open to interpretation; and only rarely can they reasonably be said to reveal a reliable inference about a complainant’s actual sexual intentions for the future, let alone a reliable inference connecting her state of mind at the time she sent them to her state of mind regarding consent at the time of the alleged offence.²⁸³

In situations such as the one alluded to in the quote above, it appears that defence counsel may be drawing on what King and others call a ‘modern myth’ that individuals who use dating apps, and engage consensually in casual sexual encounters, can be presumed more readily to be consenting.²⁸⁴ This contravenes the statutory definition of consent and invokes one of the twin myths targeted by the rape shield: that previous sexual experiences make consent more likely. The use of sexual experience evidence (including evidence of digital communications) in this way collapses the crucial difference between (a) believing someone is consenting to the sexual act (the legal standard) and (b) assuming, based on the complainant’s sexual interactions with the defendant that they will consent if advances are made (which is a form of recklessness, a sufficient *mens rea* for rape or sexual assault). An argument for admissibility that rests on such faulty reasoning must be rejected.

The evidential challenges inherent in digital evidence is taken up again in the Chapter Five in relation to sexual experience evidence of young complainants.

Conclusion

This chapter set out the project’s findings in respect of how the admissibility test in section 3 is being applied by lawyers. It showed a dissonance between the confidence expressed by practitioners about how effectively the section is working, described in Chapter Three, and the detail provided by participants in respect of the arguments in section 3 applications. It shows that the enhanced relevance test enshrined in section 3(2)(b) is not to the forefront of defence or prosecution counsels’ minds when thinking about admissibility of sexual experience evidence. The chapter gave examples of various grounds on which lawyers talked about how the complainant’s sexual experiences may be argued to be relevant. It painted a nuanced picture of the ways in which arguments about relevance may be made and how they may be stronger in some cases than in others.

The chapter began by examining sexual experiences with third parties. It showed how the ‘pattern of behaviour’ argument can mobilise the most outrageous inferences of consent. Emphasis was placed

²⁸² Quilter and others above n. 279.

²⁸³ Craig above n. 279 at 12.

²⁸⁴ Alice King, Vanessa E Munro and Lotte Young Andrade, ‘Operation Soteria Improving CPS Response to Rape Complaints and Complainants. Final Findings from Independent Academic Research’ (The University of Warwick, 2023) at 61.

on the need for particular vigilance to ensure that the prior experience is particularly unusual and similar to the impugned intercourse.

The chapter also canvassed other examples of relevance arguments, and showed that sexual experiences with third parties may be being employed to animate outdated assumptions about consent and when it is acceptable for a man to assume belief in consent. These assumptions run counter to the essence of sexual consent as situation specific, person specific and revocable.

The chapter then interrogated the common view that sexual experience with the defendant is straightforwardly relevant and admissible, showing how this was in direct contravention of section 3. The chapter then considered narrower arguments rebutting specific parts of the prosecution case and showed how these might be justifiable within the terms of section 3. Finally the chapter explored the use of digital communications and found that the probative value of such evidence is very low indeed - to such an extent that it runs the risk of distorting the trial process.

In relation to both evidence of sexual experience with third parties and experiences with the defendant, the chapter traced the pernicious influence of the real rape myth and the myth of the lying complainant in arguments about relevance/admissibility. In all categories, there is considerable evidence of attempts to cast the complainant outside of the status of real rape victim, and as a lying complainant.

The problems with the arguments about relevance identified in this chapter were even more acute in lawyers' discussion of sexual experience evidence in cases involving young people. This is the subject of the next chapter.

SEXUAL EXPERIENCE EVIDENCE AND CHILD COMPLAINANTS

Introduction

This chapter explores the findings in relation to the admissibility of sexual experience evidence of child complainants. This chapter was not planned; at the beginning of the project, the focus was on adults. However the interviews led in a different direction. Participants repeatedly emphasised that section 3 applications are regularly made in cases involving young complainants, and they had a lot to say about the kinds of material that might constitute evidence of sexual experience and the purposes for which the evidence might be sought to be adduced. This chapter explores the themes that emerged during analysis of the interviews and highlights the influence of rape myths. The ‘real rape’ myth surfaced in the widespread construction of the complainant as either sexually innocent or promiscuous. Regardless of whether they were discussing young children or adolescents, participants compared complainants with an imagined pure and sexually ignorant child. The myth of the lying complainant was particularly evident too. The impact of these rape myths influenced the greater variety of material said to constitute evidence of sexual experience, and the arguments about how that evidence connected to the facts in issue.

In this chapter, the term ‘child’ is used to reflect the fact that anyone under the age of 18 is legally a child, and anyone under 17 is legally not capable of consenting to sex. It is also used to reflect the importance attached to the innocent child victim of sexual violence in arguments for admission of sexual experience evidence, even in cases involving adolescents.²⁸⁵ The term adolescent or teenager is also used when discussing cases involving children aged between 13 and 16 years.

The chapter begins by setting out the general findings. The expansive interpretation afforded to the meaning of ‘sexual experience’ evidence is explored in relation to digital communications and care records.

Section 2 explores the purpose for which evidence of sexual experience is adduced. Since consent is usually not in issue, the emphasis is often on credibility. Throughout the chapter, the argument is that complainants are regularly being measured against an imagined and impossible standard of an ‘innocent’ child who is not only ignorant of sex and sexual matters generally, but who is also entirely uninterested in sex or sexuality (and who does not possess a smartphone). This is a version of the ‘real rape’ myth that works to distance the complainant from the status of legitimate victim. It is based on

²⁸⁵ A. McAlinden, “Deconstructing Victim and Offender Identities in Discourses on Child Sexual Abuse: Hierarchies, Blame and the Good/Evil Dialectic” (2014) *The British Journal of Criminology*, Volume 54, Issue 2, C. Smart, “Reconsidering the Recent History of Child Sexual Abuse, 1910– 1960” *Journal of Social Policy* 29(1), 2000, 55– 71, 56.

culturally engrained stereotypes that have influenced law and society for centuries²⁸⁶ and continue to do so.²⁸⁷

Echoing Chapter Four, this chapter also notes the importance of nuance. It explores how in some limited instances, it may be important for the vindication of the defendant's fair trial rights for sexual experience evidence. The chapter focusses on how such evidence may go to a defence of reasonable mistake as to age, or in cases involving peers, a defence of consent or honest belief in consent.

1. General Findings

All interview participants indicated that sexual experience evidence regularly features in cases involving child and adolescent complainants. Participants stated that leave to adduce sexual experiences is regularly sought in such cases, and that the application is likely to be granted. One unsuccessful application was mentioned. It involved an application to question a 13 year old complainant about the reference in her statement to having had a boyfriend.

The data shows that the threshold for what material is seen as relevant is understood by lawyers as lower than the threshold for sexual experiences involving adults. This is because the complainant is constantly being compared to the 'real' child victim of sexual violence; someone who is innocent and uninterested in sex. Across all interview data on young people and sexual experience evidence, there was a recurring emphasis on whether the complainant was/not a virgin and whether they had an interest in sex.

Participants referenced a wide range of examples of evidence sexual experience evidence and probative value was given an expansive interpretation. This surprising finding – that young people are particularly likely to be cross-examined on their sexual experiences and that they are vulnerable to a wider range of materials being used for this purpose – is explored in more detail in relation to two categories of evidence: digital evidence of viewing pornography and care records. Young people are especially exposed to section 3 applications because of the influence of the real rape and lying complainant myths, and because of the greater number records about them compared to adults, created through their use of phones in particular. For some vulnerable children, there are detailed records created by third parties as a result of their interaction with the social care system. As the rest of the chapter explores, lawyers connected claims of relevance to credibility, and to the myth of the real child rape victim. The underlying, sometimes unspoken but often implied, assumption is that to be credible a child or adolescent must be entirely uninterested in sex.²⁸⁸

²⁸⁶ Bulfin above n. 75.

²⁸⁷ See Ring and others above n. 3 at ch 1-3.

²⁸⁸ As well as digital communications about sex, and social care records, diaries were also frequently mentioned by participants. They may be adduced for example to show the complainant's state of mind in relation to the defendant or to show an interest in sex with the defendant or, even more controversially, simply an interest in sex in general. There are significant questions about the probative value of diary entries. Diaries of teenagers are not reliable accounts of reality. They are spaces of fantasy and unreality. Furthermore, complainants may not remember making diary entries and so the extent to which they can respond to questions about it is limited. Adducing such evidence carries a clear risk of the jury basing its reasoning on irrelevant, distracting and highly prejudicial material. In addition to these concerns, the defence is tying credibility to the complainant's interest in sex. As with records of digital communications, the structure on which the relevance claim rests is an assumption that to be credible, a child or adolescent must be entirely sexually innocent.

Records of Digital Communications

Young people are especially exposed to section 3 applications because of the digital trails they create. They use smartphones²⁸⁹ and live a rich online life, through social media apps, phone texts and accessing the internet.²⁹⁰ Digital disclosure throws up a range of possible sources of sexual experience evidence.²⁹¹

Yeah, it's certainly more open for sure. Absolutely. I mean, it makes very little difference if, you know, there's a 40 year old man in a married relationship who's looking at porn, you know, it's kind of where does it get you? But it is -it is certainly more relevant. [...] I think it is more of a, a grab for [...] younger complainants. (PL 5²⁹²)

Participant: I mean, if you're defending in [a case involving a young teenage complainant], I suppose you can ask her about her use of pornography, her use of- did she see pornography, did she - and to

SR: how is it relevant? How is that relevant?

Participant: No, but I mean, if she's again, you're going to have to base it on the facts. If she's painting herself as somebody, within her statement, **as somebody who's puritanical**. (PL 3, emphasis added)

These statements show that children's and adolescents' greater exposure and vulnerability to section 3 applications is not only due to the fact that there is more information available about adolescents than adults, it is also attributable to lawyers' very broad interpretation of relevance when the complainant is young. This is an important finding because it shows that adolescent complainants in particular are more exposed to having their private lives used against them in a rape trial than are adults - even where the details do not concern actual sexual activity engaged in by the complainant but are merely viewing pornography.

The second statement appears to suggest the evidence of watching porn is necessary to rebut a part of the prosecution case, i.e. an allegedly misleading impression about the 'type' of person the complainant is. This resonates with the quote at the end of Chapter Four about challenging the type of person the complainant is supposedly presented as. The use of the word 'puritanical' here is revealing; it shows the binary vision imposed on all adolescent complainants – as being either totally ignorant of sex, and therefore a 'real' victim of sexual violence, or as being the opposite, promiscuous and therefore not a victim.²⁹³ Of course such reasoning is targeted by the rape shield. Other more practical questions arise: *how* might a young person portray themselves as 'puritanical'? *Why should* the court expect a young person to mention their interest in porn, when giving a statement to a garda about an alleged sexual violation or when testifying in court? Surely for a court to do so would be entirely

²⁸⁹ 93% of 8-12 years and 99% of 12-15 years own their own smart device: CyberSafe Kids Trends and Usage Academic Year 2024- 2025 2025 available at cybersafekids.ie. The report is based on a survey of 7,093 8-12 year olds in 94 primary schools and 2,080 12-15 year olds in 23 secondary schools from across Ireland.

²⁹⁰ Two-thirds of 8-12 years olds and 99% of 12-15 year olds have social media accounts with age 13+ terms and conditions. Ibid p. 5.

²⁹¹ Disclosure is dealt with in Chapter Seven.

²⁹² PL= practising lawyer.

²⁹³ McAlinden above n. 285 at 180; Phillippe Aries, *Centuries of Childhood: A Social History of Family Life* (Vintage Books 1962).

unrealistic and at odds with the forensic inquiry at hand. Furthermore, teenagers are regularly exposed to pornography through their phones and many use it for information about sex.²⁹⁴ Pornography might be part of a grooming process or part of the context of the abuse itself. Indeed, Rape Crisis Ireland has documented pornography use in one in five instances of abuse.²⁹⁵

As well as viewing pornography, participants mentioned sexually explicit or suggestive messages as being the subject of a section 3 application. The probative weight of such evidence is extremely dubious. Consensual sharing of intimate images or sexting includes self-produced images, texts or emojis that are sent to sexual partners or prospective sexual partners in order to flirt, arouse or initiate sexual activity.²⁹⁶ The consensual exchange of sexts in private is increasingly used by adolescents as a way of flirting or signalling interest in the other person and as a means of initiating sexual activity.²⁹⁷ It can also be a way for adolescent to express their sexuality and form intimacy.²⁹⁸ A recent study in Ireland among a sample of 848 adolescents aged 15-18, found that 44.4% of participants had frequently been asked to send a naked image of themselves,²⁹⁹ and 16.9% had frequently sent a naked image of themselves.³⁰⁰ On the other hand, research indicates that sexting may be linked to coercion, harassment, bullying and violence.³⁰¹ Other research conducted with Transition Year students in Ireland indicates that just under 20% of girls had been pressured to send sexually explicit photographs or videos of themselves.³⁰²

The motives and meanings behind evidence of having viewed pornography or sending sexually suggestive texts are highly contestable and weakened credibility (or consent) cannot be inferred from a complainant's engagement in behaviour that is normalised (if problematic) for adolescents. As will be shown later in this Chapter, the idea of the complainant as either sexually innocent or not surfaced repeatedly in how participants discussed relevance.

Social Care Records used to Undermine Credibility

Young people with experience of the social care system are particularly exposed to section 3 applications. Participants indicated that third party records, such as social care, medical, counselling or school records, can provide a fertile source of defence arguments seeking to undermine a

²⁹⁴ Anne Nolan and Emer Smyth, *Sexual Initiation and Sexual Health Behaviours among Young Adults in Ireland*, Economic and Social Research Institute, 2025 Research Series Number 1, available at [esri.ie](https://www.esri.ie).

²⁹⁵ This rate has remained stable for the last three years. See RCI statistical reports for 2023-2025 inclusive.

²⁹⁶ Dora Bianchi and others, 'Psychometric Properties of the Sexting Motivations Questionnaire for Adolescents and Young Adults' (2016) 35 *Rassegna di Psicologia* 5; Justin W. Patchin, and Sameer Hinduja 'Sextortion among adolescents: Results from a National Survey of U.S. Youth': Erratum' (2020) *Sexual Abuse: Journal of Research and Treatment*, 32(5), 61.

²⁹⁷ Bianchi and others above n. 296

²⁹⁸ Carolina Villacampa, 'Teen Sexting: Prevalence, Characteristics and Legal Treatment' (2017) 49 *International Journal of Law, Crime and Justice* 10.

²⁹⁹ It is illegal to send and share sexual images of anyone under the age of 17, under the Child Trafficking and Pornography Act 1998.

³⁰⁰ Mairéad Foody and others, "'It's Not Just Sexy Pics": An Investigation into Sexting Behaviour and Behavioural Problems in Adolescents' (2021) 117 *Computers in Human Behavior* 106662 <<https://doi.org/10.1016/j.chb.2020.106662>>.

³⁰¹ Jessica Ringrose and others, 'A Qualitative Study of Children, Young People and "Sexting": A Report Prepared for the NSPCC' (National Society for the Prevention of Cruelty to Children 2012).

³⁰² 18.8% Debbie Ging and Ricardo Castellini da Silva, 'Young People's Experiences of Sexual and Gender-Based Harassment and Abuse During the Covid-19 Pandemic in Ireland: Incidence, Intervention and Recommendations' (DCU Anti-Bullying Centre, Dublin City University 2022) at 19.

complainant's credibility. Young people who have experience of contact with the care system, are more likely to be subjected to section 3 applications, simply because there are more records about them. Often these records can relate to a considerable period of time. The finding that care-experienced children and young people are at heightened exposure to being cross-examined as to sexual experiences, echoes the insights of a recent review of the processing of sexual offences in Ireland. A participant from the Child and Family Agency with oversight of disclosure raised as a matter of concern the potential disadvantage in terms of disclosure and exposure to cross examination for complainants who have a care history.³⁰³

A very wide range of behaviour may be contained in social workers' reports. They may include reference to concerns about the young person having been sexually exploited by someone else in the past or engaging in 'risky' behaviour or sexually suggestive behaviour.

The probative value of social care records will depend on the case at hand and the facts in issue. However a number of general points can be made. First they are hearsay, because they are out of court statements being adduced for the truth of their contents. Second, the complainant is being asked to answer questions about a record which s/he has not created and which may be many years old. The record may relate to a matter which the complainant has long forgotten. The record may contain errors. This lawyer was concerned about a complainant having to answer questions about an old record they did not create:

Yeah, I had one case where there was a reference in the - in a social work note, a note taken by a social worker whereby she had said she had observed the child who was five at the time thrusting on the couch. And then they wanted to cross-examine on that sexual experience and this whole idea of sexual experience is like - what is that for five-year-old child, you know? So, by the time the matter came to court, the child was 14 and had no recollection whatsoever about this incident that was noted by a social worker on a record that that child did that. (PL 8).

Even if there is a possible marginal relevance between the evidence and the facts in issue, there is a real risk that the trial's objective of establishing the facts will be frustrated by the introduction of such evidence. Indeed, this risk is heightened given the potential of care records to mobilise stereotypes about care-experienced complainants as damaged or promiscuous and therefore not credible. Such discriminatory reasoning has deep roots, going back to (at least) the early twentieth century when accepted victims of child sexual abuse were treated by doctors and lawyers as moral threats who had lost their natural innocence and were not to be trusted as a witness in a criminal trial.³⁰⁴

Having set out the main general findings about section 3 applications and having highlighted two categories of evidence sought to be admitted or questioned about (digital evidence and care records) the next section explores the relevance question more closely.

2. Evidence of Sexual Experience to Undermine Credibility

Sexual experience evidence may be used for a variety of purposes, some of them targeted by the rape shield, and some not. In cases involving young people, the evidence might be used to undermine credibility by showing that the complainant is a particular type of person, or it may be used in a

³⁰³ Keenan and others above n.9 at 86.

³⁰⁴ Ring and others above n. 3 at ch 3.

focussed way to rebut an aspect of the prosecution's case that goes to a fact in issue. As Chapter Three noted, the former is caught by the rape shield, but the latter may not be, as long as the evidence has probative value. When it came to children and teenagers there was a blurring of the boundary between these two purposes; both were often invoked at the same time. This is due to the continued salience in Irish culture of the binary tropes of the sexually innocent pure child who is a legitimate victim on the one hand, and on the other, the sexually experienced teenager who is transgressive, dangerous and who should not be believed.³⁰⁵

Participants discussed credibility of children and teenagers in a different ways to how it was discussed in relation to adults. There was a recurrent emphasis on virginity. This lawyer explained how being able to show that someone had lied about being a virgin would be extremely damaging to credibility.

Participant: you know, particularly if it's a person in a position of authority and a younger person, you're going, well, I'm not as bad as this looks. **It looks worse if she was a virgin.** So that is something. It's highly relevant for a jury to hear.

SR: In what sense?

Participant: Like. Like, so if you have somebody who's telling, who's putting -if you have a complainant, who's saying, I am a virgin, I was a virgin until this event. And you're saying, oh, no, because I think that's a huge thing to lie about. And that's a credibility point for the jury to take into account. Yeah. So your whole story then.

SR: Is -kind of - there's a question mark over it?

Participant: Yeah, there's a question mark if you're lying about that. What else are you lying about? Like why would you lie about that? (PL 10, emphasis added.)

As with cases involving adults, if evidence shows a fundamental inconsistency in the complainant's account that goes to their credibility, defence counsel has an obligation to pursue this in cross-examination. However, the extent to which the questioning should be allowed to then explore details about someone's sexual history is another question. The concern is that the evidence will be used to try to blacken the complainant's character, in circumstances where consent is legally impossible, regardless of the person's sexual experience.³⁰⁶ Recall the line: "It looks worse if the complainant was a virgin." This smacks of an attempt to dilute the defendant's culpability by portraying the complainant as being of damaged sexual virtue.

The quote above related to a case where the defendant was much older than the child complainant. In the following comment the participant was discussing a case involving peers. All lawyers described a considerable increase in the number of cases involving peers. In such cases, the charge is often engaging in a sexual activity with a child under 17. Someone charged with this offence can put forward

³⁰⁵ Debbie Ging and others, '#Slane Girl, Beauty Pageants and Padded Bras: Flashpoints in the Sexualisation of Children Debate in Irish Media and Political Discourse' (2019) 19 *Feminist Media Studies* 412. This has long historical roots: see Ring and others above n. 3 at ch 4.

³⁰⁶ The Supreme Court has stated that sexual experience is very unlikely to be relevant in cases involving complainants under the age of consent: "In modern times, [...] prior sexual experience is not relevant to any charge of under-age sexual relations because consent is not in issue." *WC v DPP* [2024] IESC 48 at [61] per Charleton J.

a defence of consent if they are younger or up to two years older than the complainant, and if the complainant was aged 15 or 16.³⁰⁷

[S]o when it comes to juveniles or teenagers, usually, the defence want to establish that the complainant has had sexual intercourse before. Because many of those cases are consent cases. Um, and I think it was the, I think it was the *GK* case itself where the court, um, said, you know, **members of the jury might not appreciate that somebody so young could be sexually active. So that might be relevant to their consideration as to credit and reliability.** So when it's a juvenile, it's usually that they've either had sexual intercourse before or that they had a boyfriend who they were intimate with, and that kind of arises for the consent issues that often arise with teenagers [...].(PL 5, emphasis added).

Unlike in cases where the defendant is much older, if the defendant and complainant are peers (and the complainant is over 15), the defence of consent (and therefore also the defence of belief in consent) is permitted. In such cases it is likely to be raised. However the fact that someone may have had other sexual experience in itself is not relevant, unless one relies on one of the twin myths forbidden by the rape shield, i.e. that prior consent makes consent more likely or prior experience means the complainant's evidence is less/not credible. In the extract cited, the argument seems to be tied to credibility, to rebutting an impression the jury is said to be at risk of forming. This claim is based entirely on the complainant's age - neither this participant nor any other mentioned an assertion of virginity by the complainant or prosecution. This makes the reference to *GK* less than convincing. In *The People (DPP) v GK* the prosecution had clearly asserted virginity and made that an issue in the case. There was evidence of the complainant's hymen being torn. It was this and the prosecution's presentation of the complainant as sexually inexperienced that lead the Court of Criminal Appeal to find that the evidence of other sexual activities should have been adduced.³⁰⁸ The court stated "evidence of the ruptured hymen could only be seen as providing significant corroboration of the complainant's evidence which, because of her age, effectively conveyed to the jury the impression that the applicant was the only party with whom she was ever involved."³⁰⁹ This is not the situation described in the extract above.

The assertion that juries attach additional credibility to the evidence of a child is contradicted by research, which shows that often, even in cases involving more 'legitimate' victims (i.e. complainants of child sexual abuse), jurors are often not willing to believe them or to base a conviction on their testimony.³¹⁰ Jurors might be sympathetic to the child as a person, but extremely sceptical of their

³⁰⁷ Where the complainant is over 17, the prosecution must prove the absence of consent, and the defendant's guilty mind in relation to that lack of consent. Where the complainant was younger than 17 the charge is often engaging in a sexual activity with a child under 17. A person charged with this offence can put forward a defence of consent if he or she is younger or up to two years older than the complainant, and if the complainant was aged 15 or 16. Where the complainant was under 15, the charge may be one of engaging in a sexual activity with a child under 15. If the complainant was younger than 15, consent is not a possible defence. In all other cases, the existence or absence of consent is not relevant. Both are offences under the Criminal Law Sexual Offences Act 2006, ss2 and 3 (as amended). For a charge of indecent assault of someone over 15, there is also a defence of consent and honest belief in consent. This is a hangover from the *Criminal Law Amendment Act 1935*. See Ring and others above n. 3 at ch 4.

³⁰⁸ There were other unusual aspects to *GK*. The evidence also came to light in an unusual way- in the psychologist's report after conviction. This was the appellant's third trial for the same offences. *People (DPP) v GK* [2007] 2 I.R. 92.

³⁰⁹ Ibid at [26].

³¹⁰ See generally Jane Goodman-Delahunty and others, 'Greater Knowledge Enhances Complainant Credibility and Increases Jury Convictions for Child Sexual Assault' (2021) 12 *Frontiers in Psychology* 624331 <<https://doi.org/10.3389/fpsyg.2021.624331>>. Goodman-Delahunty J and Martschuk N, 'Mock Jury and Juror Responses to

testimony, attaching undeserved significance to delay in disclosing³¹¹ or inconsistencies in details of accounts, or seeing them as too emotional or not emotional enough.³¹² This strong cultural resistance to believing children and young people is the reason why reports to the gardai of sexual violence against children and adolescents are still so low.³¹³

In addition, there may be also an increased willingness on the part of jurors to acquit defendants in cases involving peers. This was mentioned by a few participants but put particularly well by this participant:

Participant: I would say, I think the cases involving younger people are quite hard to get a conviction on, because I think people look at young and more often than not, it's a young man who's done something when they're 15, 16, 17, has no other convictions, is now working, going off to university and kind of made one mistake and is from a good family and things like that. I think they're quite hard to get convictions on.

SR: Why do you think that is?

Participant: I think because I suppose a lot of people kind of look at them and often see themselves as their own children or something. You know what I mean? And kind of think, God, you know, if they're older, what would I have done at that age? Or what if my child did something like that or you know what I mean? So I think there's people I know, and I know jurors are supposed to be impartial and all that kind of thing, but I think, unfortunately, it's human nature. They're going to look at them and think, you know, that's something they did when they were 16 or 17. It was stupid and it was wrong. But you know what I mean? Are we going to hold that over them for their whole life? Now, I'm not talking about ones where there's extreme violence and - I'm talking about kind of, you know, kind of kind of, I suppose he said she said kind of more not to trivialise them, but more minor things. I think it's harder. Yeah. (PL 11)

All of this weighs against any (implicit) claim that the jury will afford the child or adolescent complainant of sexual violence a credibility boost.

This same participant was asked to imagine a case where neither the prosecution nor the complainant has any assertions whatsoever, implied or explicit, about the complainant's virginity, and to explain how the admissibility argument might be made. The framing of the complainant's supposed deviance as important context is striking.

Participant: So [the prosecution] just give the bare bones facts. I suppose the defence then will have to kind of, from their point of view, to paint a kind of a fuller picture as to who she is, and probably for their own client. If their own client is saying that, yes, he had sex with her, but it was consensual. You know what I mean? They have to kind of point out that, you know, she was having sex with

Uncharged Acts of Sexual Misconduct: Advances in the Assessment of Unfair Prejudice' (2020) 228 *Zeitschrift für Psychologie* 199.

³¹¹ Quincy C Miller, Alissa Anderson Call and Kamala London, 'Mock Jurors' Perceptions of Child Sexual Abuse Cases: Investigating the Role of Delayed Disclosure and Relationship to the Perpetrator' (2022) 37 *Journal of Interpersonal Violence* 23; Rosaleen McElvaney, Sheila Greene and Diane Hogan, 'Containing the Secret of Child Sexual Abuse' (2012) 27 *Journal of Interpersonal Violence* 1155; Rosaleen McElvaney, 'Grooming: A Case Study' (2019) 28 *Journal of Child Sexual Abuse* 608.

³¹² Jonathan M Golding and others, 'Big Girls Don't Cry: The Effect of Child Witness Demeanor on Juror Decisions in a Child Sexual Abuse Trial' (2003) 27 *Child Abuse and Neglect* 1311.

³¹³ See Chapter One of this report.

people, and yes, he was as well, but you're kind of just to paint a fuller picture of who she was as more than what's been put across by the prosecution. Does that make sense? So they kind of bring it in at that point of view just to say, you know, yes, you did have sex with X, Y, and Z. But, you know, is it fair to say that you also had sex with other people? And you were you may have had you may have been a problem teenager. You may have been out drinking. You may have been at a period of your life where things were very bad and things like that. So they would have to kind of, in their point of view, kind of flesh out who she was at the time.

SR: And do you think judges will see that as part of a full defence? Like they'd be they would be okay with that or would they push back against that?

Participant: It would be it would be accepted to a degree that you couldn't kind of push. You can put it could be put to somebody that, you know, I mean, You this is the lifestyle you lived or you this x, x, y and z. But if they kind of if the person was denying it or getting upset by it, they're not allowed to push it anymore. They'll be allowed to them because it is their case. You're allowed you have to put your case to somebody, but they wouldn't be able to do kind of in an aggressive or forceful manner. Yeah. Or a way to trick to trick the person. You know. (PL 11)

A little later in the interview, the participant expanded the time period:

We want to show that, you know, this was something she was engaged in, this was something she was engaged in. And, you know, [to show] she wasn't necessarily, again, going to use the phrase the innocent party in this. So they probably have to be some middle ground there as to kind of like, yes, it can be asked, but it can't, you know, only certain things can be asked. And she would have to be made aware. And again, this is the purpose of section three, to have the person there made aware of exactly what she's going to be asked about and the kind of questions that will be asked. So perhaps if there was an incident where she was caught drinking ten years ago and or three years ago and was sleeping and sleeping with someone else, she would be asked and she could be told, you'll be asked about this, you'll be asked about this portion of your statement, or you'll be asked about these text messages. (PL 11)

The focus is on clarifying 'the type of person' the complainant is, and tying sexual activity to other activity in order to paint a picture of the complainant as deviant. But what probative value should the jury attach to information about the complainant's other sexual activities, at the time or years previously? Over a third of teenagers have had sex before reaching the age of 17.³¹⁴ This is the kind of character assassination that the Court in *GK* itself condemned.³¹⁵ When asked to explain further, lawyers emphasised that the evidence would go to counter an allegedly 'false impression' of sexual innocence. However, no participant mentioned a prosecution assertion of virginity. This is concerning because of the power of such evidence to distort the jury's reasoning.

The closest example of using the evidence to challenge credibility in a focussed way was in the next extract. This lawyer carefully explained the ways in which they³¹⁶ would think about relevance and young people. The interview is quoted at length because it illustrates a number of important points.

³¹⁴ Anne Nolan and Emer Smyth, *Sexual Initiation and Sexual Health Behaviours among Young Adults in Ireland*, Economic and Social Research Institute, 2025 Research Series Number 1, available at esri.ie.

³¹⁵ "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." *People (DPP) v GK* [2007] 2 I.R. 92 at [25] per Kearns J.

³¹⁶ This participant.

it's only going to be relevant if someone said, I would never do that or I've never done that, or I'm not the type of person who would do that. [...]

If the dividing line is at a point where there is a genuine concern a jury will take away the suggestion that it is unlikely this person will have consented to this act because it's unlikely someone of that age would be sexually active, and therefore they must have been raped because they wouldn't have been consenting, or they wouldn't have known what they were doing, they wouldn't have understood the nature of the act then it could theoretically be relevant, because you'd want to demonstrate that this was a person who was highly sexualised, who actively engaged. [...]

if you're dealing with a situation where the, um, there's a legitimate concern that not giving that context because of the age of the person, circumstances of case would give would misrepresent the context to the jury. **That if a jury would take it away, uh, that, well, it seems unlikely that she would have consented to having sex with this much older person. Uh, because just her age and the level of sexual experience and interest we would attribute to a child of that age, then it might be relevant.** So we're just really would depend on the facts of the case.

... the accused counsel has to put up to a judge and just as importantly, put up to counsel for the -for the complainant a legitimate link to the case or to the context of the case. So to say, well, judge, we'll be suggesting to the jury or that **we're concerned that a jury will think that someone who's only just turned 14 is unlikely to have consented to having sex with a 20 year old drug dealer unless they know the context that this was something that she was habitually doing from the age of 13 onwards.** Um, you know, they would be robbed of the context. And you have to put it up there and put it up to scrutiny, and you have to articulate -you're articulating the relevance in advance without the, you know, without the, uh, without actually being in the course of the cross-examination, you have to do it by reference to what's in the case. And it may be that you're refused and you have the opportunity of coming back again, depending on how the evidence flows. Yeah. But that's why the section three process is there. (PL 4)

Given the highly prejudicial nature of the evidence described here, i.e. evidence of previous experiences of having sex for drugs, the importance of section 3's admissibility test could not be clearer. The participant explains two different ways in which the evidence, might be said to go to a fact in issue. First the argument is that it would contradict the assertion that the complainant would never have sex for drugs. This is a sound basis - as long as the complainant has in fact made such an assertion (or the prosecution has). Indeed the participant had referenced this kind of argument earlier in the interview. It is reproduced here for clarity:

I mean, if someone is saying just that I did not consent to have sex with him because I had no interest in having sex with him on that occasion, then it might be not relevant. But if they're saying, oh, you know, no, I never would have sex with people for drugs, then it is relevant. I mean, if you're able to bring forward proof that person was doing this a lot and they deny it then, and it might also be that the cross-examination on that point is, is very, very short. (PL 4)

Assuming that the complainant's assertion that she would never have sex for drugs was obtained prior to the section 3 application, introducing evidence to contradict such an assertion seems to be legitimate and within the terms of section 3.

However the second and third paragraphs of the longer extract argue that 1) jurors would attach additional credibility to the complainant's account *because of her age* and 2) the evidence provides

important context that corrects for that supposed credibility boost. As noted above this first assumption is deeply flawed. For the judge to allow questioning of the kind alluded to here on the basis of presumed assumptions held by the jury about the complainant because of her age, would be an abrogation of the rape shield.

Are there other ways in which the evidence could be admissible? Perhaps. If it were said to go to a defence of reasonable mistake that the complainant was in fact over 15 or 17³¹⁷ this would be a stronger basis for arguing admissibility. But how should a judge go about assessing the probative value? Should they think about similarity? Presumably not because it does not (cannot) go to consent. The essential element to be shown is how the defence connect the prior experiences to the defendant's honest belief. There would need to be additional evidence in order to make that link.

2.1 Has the prosecution actually made a claim that the defence is now rebutting?

It is possible that the prosecution may have made the complainant's sexual inexperience relevant to the facts in issue. If the prosecution case was that the complainant was a virgin, this would be more analogous to *GK*. The complainant may have said in her statement "that's not something I'd ever done before", or "I was a virgin at the time"³¹⁸, or "he wanted me to do it, and I didn't want to do it because I'd never done it before." In those situations, the defence could legitimately wish to challenge that assertion of sexual inexperience, if they had evidence to contradict those assertions of sexual inexperience. This would be the same as the kind of specific narrowly focussed application to rebut a specific part of the prosecution case seen in adult cases in Chapter Four. In cases involving very young children, there may be a stronger basis for saying that the jury may well assume from the prosecution's case that the complainant was not sexually active. However this would have to be considered very carefully indeed.

Counsel should establish that any assertion *has* been made by the prosecution about the complainant's sexual experience, and that it has been tied to an issue in the case, i.e.. consent, belief in consent or a very specific aspect of the complainant's credibility. As Charleton J in *W.C.* noted,

[T]he prosecution would require a good reason to lead evidence that a complainant had no prior sexual experience[...]. It is difficult to know how that might be relevant or why such a fact might be put in issue.³¹⁹

This is an important warning to prosecutors about the dangers of introducing evidence of sexual experience.³²⁰

It is also important to bear in mind the importance of training for garda interviewers. Where the evidence in chief is pre-recorded it is easier for statements then to become part of the prosecution case that perhaps might not otherwise have become part of the case.³²¹ This leaves the complainant more at risk of going into matters that are not salient, but which then open the door to section 3 applications:

³¹⁷ Sections 2(4) and 3(3) Criminal Law (Sexual Offences) Act 2006 as amended. In both defences the court must consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the particular age.

³¹⁸ Eg see *People (DPP) v W.I.* [2023] IECA 148.

³¹⁹ *The People (DPP) v WC* [2024] IESC 48 per Charleton J at [61] citing *The People (DPP) v Cronin* [2008] IECCA 94.

³²⁰ Although it must be noted that such evidence might be useful in some cases to bolster a complainant's credibility. See McDonald above n.37.

I don't think the prosecution ever seek to set someone up as being, as you say, the perfect complainant or get into that. It tends to just arise in - especially bear in mind the fact that most children giving evidence are giving evidence in a pre-recorded DVD [specialist interview by Gardaí which has been recorded on DVD and then played to the jury as the child witness' evidence in chief] where senior counsel for the prosecution would have been very slow to get into certain issues, but the gardai, in asking the questions have continued down the line that they didn't need to go down. So material is there, which is going to be played to the jury because you're stuck with what's on the DVD. (PL 4)

On the other hand, another lawyer talked about the challenges for prosecutors in trying to get ahead of section 3 applications, by saying that the adolescent complainant is sexually active:

SR: If you were prosecuting, how would you deal with that? Like would you try and lead and say, look, she is sexually active, and just get it out of the way, that way.

Participant: And then I suppose, unless [the complainant] has volunteered it in her statement, um, you can't um, and that really, unfortunately, is the, the trap that the defence can, can spring. What I will say is, um, an awful lot of the guards who investigate the, the sexual crimes, um, are excellent. And they will have gotten that out of the complainant within their statements. So you might have that gift to give. There are others who aren't. So others who perhaps are maybe more rural. They don't have the designated specialist units. They don't have specialist interviewers. They don't have any of those facilities, um, really at hand. And they they're the ones where scant statements are kind of given with lots of potholes. You can't really go back to the complainant looking for additional statements unless there's some gaping hole. Um, and when it comes to it, they may not have asked the complainant that question at all. And then the defence really are the ones who can open that. (PL 5)

These quotes are illustrative of the dilemma facing many prosecutors: how to deal with partial or incomplete accounts that are a function of the way evidence is taken by the gardai, while at the same time dealing with the impact of rape myths in how defence arguments are constructed. The quotes also raise important questions about what should an interviewer ask a complainant about- how much detail, if any, *should* they ask for in relation to their other sexual experiences? This suggests a need for research into the training and continuing professional development for gardaí on the taking of statements from complainants in sexual offences cases, particularly where the complainant is a young person. A rigorous approach to the admission of sexual experience evidence by the courts, especially careful scrutiny of claims that there has been an assertion of virginity would help address much of the problems flowing from statements.

Conclusion

This research has found that section 3 is of key importance in rape and sexual offences cases involving young people, and that the section is not working effectively in these cases. When compared with adults, child and adolescent complainants are at a heightened risk of being cross-examined about other sexual experiences, and even about other matters that are not sexual experiences but are

³²¹ DVDs can be edited by agreement of the prosecution and the defence. However, it is speculated that to agree to an edit that would mean a section 3 point was lost would not be a desirable strategy for any defence lawyer.

evidence of a curiosity or interest in sexual matters generally.³²² This heightened vulnerability is due to two factors: the volume of information available to the defence about complainant's private lives, and the resonance of the culturally embedded image of the virginal innocent child victim of sexual violence. In claims for relevance the background operating assumption is often that young people must be either entirely ignorant and uninterested in sex ('innocent') or else they are promiscuous and therefore of dubious credibility. Young people are placed in an impossible position; they must either volunteer private details about their natural curiosity in sex or previous sexual experiences or defence counsel may claim they are asserting their virginity and must be cross-examined on entirely unrelated sexual experiences. Digital evidence from social media and dating apps, records of professionals in respect of care histories, as well as counselling records and school records provide a fertile terrain for defence counsel to launch a section 3 application. The probative value of such evidence is highly contestable. In the case of accessing pornography or sending a nude, the evidence, taken at its highest could only be said to go to an interest in sex (and even this is debatable). Even if, for argument's sake, it does show an interest in sex, it is not relevant simply to disabuse jurors of a view of the complainant based on anachronistic and unfounded myths about children/adolescents and sexuality. Finally, even if the prosecution has made an assertion of virginity of some kind, and the evidence is said to go to rebutting this claim, evidence of a curiosity about sex is of insufficient probative value to rebut that assertion.

This chapter has also shown that in some cases, section 3 applications can be justified by reference to the test in section 3(2)(b) and fairness to the defendant. This is where the evidence goes to rebut an assertion by the prosecution or complainant that goes to a fact in issue. This could be virginity, but it could also be something that supports the complainant's credibility and relates to a specific aspect of the complaint. However, the probative value of the evidence and what the evidence actually shows must be carefully considered and clearly established, with judges keeping a keen eye out for arguments connected to mythical thinking about children and rape complainants.

The next chapter departs from the focus on relevance/admissibility to explore the impact of key factors influencing the effective operation of section 3. These are: late notice of applications, and the role of the Separate Legal Representative.

³²² Sexualisation at an early age can be indicative of having experienced abuse. Ángel Castro and others, 'Childhood Sexual Abuse, Sexual Behavior, and Revictimization in Adolescence and Youth: A Mini Review' (2019) 10 *Frontiers in Psychology* 2018 <<https://doi.org/10.3389/fpsyg.2019.02018>>.

FACTORS IMPACTING THE EFFECTIVE OPERATION OF SECTION 3

Introduction

This chapter sets out the findings in relation to particular aspects of section 3 applications and hearings that significantly impact the operation of the rape shield. These are: applications made close to the trial; and the role of the complainant's Separate Legal Representative (SLR). These are more than mere administrative or support matters, they go to the heart of the effectiveness of section 3.

Before exploring each in detail, it is important to note the wider context of systemic delay in which applications to adduce evidence of other sexual experiences are made. Systemic delay is recognised by practitioners and academics as a key challenge facing the Irish criminal process.³²³ Victims have also spoken publicly about the harmful effects of delayed trials. This submission to the Oireachtas Joint Committee on Justice, Home Affairs and Migration from Paula Doyle, a complainant in a 2024 rape trial is powerful:

My personal experience of getting to trial in this country with our present judicial system felt inhumane and incomprehensible. It took my case 2 adjournments and 4.5 yrs to get to court. Our present judicial system is already broken, unfair and at present damaging for victims. As a victim, I was not living. I was barely surviving. At times I already felt like I was the one on trial before my case even begun. It is not a victim-centred justice system and there is no chance of recovery or beginning of healing for a victim when the thread of a life as you now know it, is being put on hold, as you find you are a 'witness' in a case that has destroyed your previous existence.³²⁴

Participants in this study also described the effect of delays on complainants, where they are psychologically preparing for the trial to proceed, and then it is put back for six months or more. Participants described complainants as being "defeated" and "like the air has been sucked out of them".

I don't think that anybody really understands the knock-on effect of you know, waiting, waiting three or four years to go to court and then being told, "oh, actually it's not gonna happen this year, maybe next year and get your life, you know, go back to your life that you had and then come back to us in a year's time and get yourself ready again". It's incredibly distressing for people. (SW 2).³²⁵

³²³ Keenan and Healy and others above n.9; Bar of Ireland above n.129.

³²⁴ Paula Doyle, 'Submission in Respect of the General Scheme of Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025, Personal Account', in Lisa Murray and Paula Doyle, 'Submission in Respect of the General Scheme of Criminal Law and Civil Law (Miscellaneous Provisions) Bill 2025 Head 19', at 2. Available at https://data.oireachtas.ie/ie/oireachtas/committee/dail/34/joint_committee_on_justice_home_affairs_and_migration/submissions/2025/2025-11-13_submission-lisa-murray-and-paula-doyle_en.pdf.

³²⁵ SW= Court Accompaniment Support Worker.

Participants also highlighted the particularly deleterious effects of systemic delay on the child complainant's ability to give their best evidence.³²⁶ In a child's life even a few years is much more significant, than in an adult's. Participants mentioned cases involving children where the period from report to trial was as much as 10 years.

Applications to adduce sexual experience evidence introduce further delays into this already congested system, creating huge inefficiencies, and compounding complainants' distress. Surprise applications made close to the start, or during the trial itself, can impact a complainant's confidence and impact their ability to give evidence effectively and clearly, and the ability of the SLR to present the complainant's interests.³²⁷ The Oireachtas has sought to address this issue by providing for preliminary hearings of certain issues, including section 3 applications. However, this research finds that section 3 applications are continuing to be made just before the trial.

1 Notice for Section 3 applications

The O'Malley Review proposed that the defence be required to give notice of a section 3 application in a preliminary hearing. This would be to allow the prosecution to prepare the complainant and allow the Legal Aid Board to appoint a senior lawyer to represent the complainant's interest at the section 3 hearing during the trial.³²⁸ The Criminal Procedure Act 2021 finally introduced a new system of preliminary trial hearings.³²⁹ The Act allows the trial judge to hear and determine the section 3 issue on a preliminary hearing. The Court of Criminal Appeal has held that there is an obligation on the defence to move in a timely manner any application to cross-examine a complainant as to their prior sexual experience.³³⁰

A key finding of this project is that the 2021 Act is not being implemented as intended. Every participant mentioned the last-minute nature of section 3 applications.

Participants praised the Judge in Charge of the Central Criminal Court, Mr Justice Paul McDermott for trying to make real the promise of the CPA 2021. Mr Justice McDermott is requiring defence lawyers to complete the preliminary trial hearing form³³¹ and expects the issues to be fully ventilated in advance.

Notice is very scant. It never, if ever refers to the actual content. So, it's quite interesting. Down the country, on Circuit, they would tend to resort to the original form of notice, which is simply a letter

³²⁶ Since 2024 a protocol is in place to expedite rape cases involving victims and defendants aged under 18. This is a significant development. In its first year 65 cases were fast-tracked reducing waiting times for juvenile cases from 20 to 8 weeks. See Courts Service above n. 50 at 22. The protocol was drafted by a working group chaired by Ms Justice Caroline Biggs. Anecdotally, it appears that similar efforts are also being made to expedite sexual cases involving young people in the Circuit Court. However, unlike its Northern Irish equivalent, the protocol does not apply to sexual offences other than rape; for example, cases of alleged sexual assault or defilement. Depending on the insights gained from the review of the operation of the protocol, it should be expanded. See <https://www.courts.ie/docs/default-source/publications-files/protocol-to-expedite-rape-and-murder-cases-involving-victims-and-defendants-under-18-years-of-age.pdf>.

³²⁷ Bacik's 2010 study noted that SLRs did not have enough time to adequately respond to applications. Bacik n. 38 s14AA. See also Leahy above n.44.

³²⁸ See Chapter Five of the Review: O'Malley above n.22.

³²⁹ Section 6. The prosecution has an appeal on a question of law from preliminary hearing orders that exclude evidence: section 7. Preliminary, or pre-trial hearings were first proposed by the Law Reform Commission in 2006 in its Report *Prosecution Appeals and Pre-Trial Hearings* (LRC- 81-2006).

³³⁰ *The People DPP v Walsh* [2008] IECCA 111; *The People (DPP) v G.P.* [2021] IECA 144.

³³¹ See The Rules of the Superior Courts 11986-2022, Schedule 1, Order 85A and Schedule 2, Form 7. Available at <https://www.irishstatutebook.ie/eli/2022/si/122/made/en/print>.

with two lines: Please be aware. We're putting you on notice. We intend to move an application under section three. In Dublin, Judge McDermott has tried to start a new practice whereby you would fill out the preliminary trial hearing form, and to that he expects that, the issues are fully ventilated. The reasons why you wish to adduce it are included, and also that you would have any documentation you seek to rely upon filed as well. [S]o he's really trying to push things along. He's completely allergic to the idea that things would be done last minute, or that there would be some sense of, of surprise to any of it, that everything would be done meaningfully. (PL 5)³³²

However, participants reported that although things are changing, often Mr Justice McDermott's efforts are being frustrated by defence lawyers not engaging with the section 3 issue until very close to the trial. Participants reported that, in general, section 3 applications are usually made and heard on the eve of the trial or the first day of the trial before the jury is empanelled.³³³ It appears therefore that, in general section 3 applications are not being dealt with in preliminary hearings.

Participants were critical of the ambush nature of a last-minute application, whereby complainant is told on the eve or the morning of the trial that the defence has indicated that they wish to cross-examine them on an aspect of their sexual history. A complainant may feel rushed, given that the trial has already been put back many times, over years. Participants wondered what true engagement a complainant can really have with their legal advisor in this context, where a complainant may meet their SLR half an hour before the trial is due to start.

[...] I have had conversations with clients who, at this stage where other sexual history is - an application is brought up or it's mentioned, their big concern is, okay, well, hang on, if I need time to think about it and I need time to, you know, meet with a, legal aid. Is this going to delay the trial? Is this going to mean that it's going to be postponed? Is this going to mean that it's jeopardised? And that's, yeah, that's a huge that's a huge pressure to put the client under and a lens that they're then viewing their options through. (PS 3)³³⁴

Serious questions arise about the complainant's ability to meaningfully choose whether or not to contest the section 3 application when it is made at the last minute, after years of delays. If complainants are simply acquiescing to section 3 applications because they feel under pressure to get on with the trial, this would completely undermine the purpose of section 3.

Last minute applications, regardless of why they happen, have a negative impact on the trial itself, if they stress the complainant and exhaust them:

[T]he complainant comes to court thinking that they have a date in the diary to start the trial, then they're told on the first day "oh there's an issue, you're going to get a lawyer in, you're [sic] going to talk to you about your past sexual experiences". The lawyer comes in, there's something about a phone, it takes a few more days for the thing [to] resolve, and you can actually see it, their energy levels drop over the course of the week, and sometimes they're so exhausted by the time they get into the witness box that their presentation's a bit flat. I don't mean that as a criticism of anybody but having met the person, maybe on a Monday or Tuesday, and seeing them giving their evidence or starting their evidence, maybe on a Thursday or Friday, you can actually see that they're not alert,

³³² PL = Practising Lawyer.

³³³ Or, where an issue arises, during the trial itself in the absence of the jury.

³³⁴ PS=Policy Specialist.

they're not animated, their expressions are a bit maybe dulled down, and it seems to me as an observer that it's just weary. They're just exhausted by the process. (PL 6)

An exhausted witness will not give their best evidence to the jury and therefore the jury will not get to hear their best evidence.

1.1 Why are section 3 applications made at the last minute?

There are various reasons why section 3 applications are regularly made with such little notice. One is strategic; participants stated that maintaining the element of surprise was seen by some defence barristers as an important part of the defence. However, participants most often cited disclosure and workload as reasons for the lateness of section 3 applications. This chimes with the finding by Keenan and Healy that the disclosure process generates significant delay in the processing of sex crime.³³⁵ The burden of work involved in the volume of material and the complexity of that material was a recurring theme. Participants described single cases involving thousands of pages of disclosure from multiple sources, including mobile phones, social media accounts, as well as medical and counselling records. Participants identified significant problems with disclosure of third-party records in particular. These problems are flowing from inefficiencies of procedures and lack of adequate resources:

There's an issue with lateness of disclosure, particularly when it comes to third party disclosure like records. And oftentimes this is because the HSE,³³⁶ either refuse to give records and then you've your 19A hearing, which can ultimately lead to a section three depending on the content. Or it's because they don't accept the consent that the complainant has given, or there are various, multiple facilities that the complainant has used, and they each have their own process. So I know that there's one for GPs with medical, card holders versus ones who don't. I know that, certain units, even within the HSE themselves, have different approaches to counselling records. So this means that they're -- they're given on a piecemeal basis in dribs and drabs to the prosecution, who then go through the process of redacting for relevance. And then they're furnished over to the defence. (PL5)

[prosecutors] are doing the best that they can do, but they're doing it in very limited resources. You know, the, the level of resources, particularly outside of Dublin, that's put into gathering the prosecution is just not there. (PL 10)

[B]ecause most people are doing other cases at other times and they're, you know, just haven't focussed their mind on this particular case, it's only when you're going through the [disclosure] discovery and you know, oh, shit, we gotta make a section three because this piece of [disclosure] has come in. (PL 3)

[M]y experience is that if things happen late, it's because actually the consultation with the client or the, or the or the or further disclosure. So there's two things. It's not necessarily that anybody thinks that they're going to that they want to do it late as a tactic. It's usually that there's further disclosure further, stuff that has risen or further instructions from a client that says, right, actually, we need to do a section three application. And so it's usually it's not by intention or, or game plan. It's actually because of just the stupid process that we have of trial process, which actually really is appalling.

³³⁵ Above n. 86. They identified key issues including "the last-minute nature of disclosure requests from the defence, and a failure by the DPP's Office to make disclosure requests and respond to requests from the defence for disclosure in a timely manner. This was underpinned by the lack of attention to case preparation by counsel on all sides until close to the trial date.

³³⁶ Health Service Executive.

And we have late disclosure and we have late handovers from, you know, the, the these trials. .. But you know, everything [in the court system] is a priority so nothing is a priority. Therefore our practices are that, we're not able to have to fast track particularly vulnerable cases, which will mean that all the disclosure is done and all of the pre-trial applications are done. It's - it's more haphazard than you could ever imagine. (PL 7)

Delayed disclosure by third parties is impacting the defence's ability to make a section 3 application using the preliminary hearing procedure, and their ability to be specific about the evidence they want to adduce or the questions they want to pose.

The national shortage of criminal defence barristers is exacerbating these issues. Criminal defence barristers may be juggling multiple cases at once. It may be impossible for someone to fully engage with thousands of pages of prosecutorial disclosure many months out from the trial. Defence counsel in the Circuit Court have even more pressure than their colleagues in the Central Criminal Court because they generally would not have a documentary junior to help them. This can mean the section 3 is only being considered very close to the trial. If a barrister must hand over a case, there may be a delay in finding junior and senior counsel to step in.³³⁷ Once counsel is found, they may take a different view and decide to make an application under section 3 when the previous team had not thought so.

The picture painted by all participants is one of a pressured system in which section 3 applications are made with little notice, leaving defence counsel rushed and complainants feeling ambushed. This is adding to the pressure on complainants and is forcing the Legal Aid Board to rapidly find an SLR and brief them in a very short time period. This raises questions about the ability of the SLR to fully engage with the issues in the application and gain the views of the complainant.

Once the notice of an application is given, the prosecution must notify the Legal Aid Board who will appoint an SLR to advocate on behalf of the complainant during the section 3 application. This person is key to the process, since it is at the hearing that the question of leave and the scope of the questions, if any, are determined. The SLR's role is examined next.

2 The Role of the Complainant's Separate Legal Representative

The SLR can mitigate the likelihood of secondary harm caused by inappropriate applications and questioning regarding sexual experiences. It can also enhance complainants' confidence and quality of evidence, and therefore the integrity of the criminal trial.³³⁸

SLR may enhance complainants' procedural and substantive justice experiences, which in turn could increase their engagement with the justice system and reduce the likelihood of their withdrawal.

All participants described the role of the SLR as essential to the administration of justice in sexual offences trials. In most cases, the submissions by the SLR will be the only counterargument to the defence application:

The DPP don't have a particular position. Oftentimes they won't make a submission on the section three application at all. They will say that the complaint rep is here, that's enough. Sometimes they

³³⁷ Numbers have shrunk since the austerity cuts in 2008-2011. Around two thirds of junior barristers leave criminal practice after 1-6 years: The Bar of Ireland, *Pre-budget Submission. Investing in the Frontline Criminal Justice System* (Bar of Ireland 2023).

³³⁸ See Iliadis and others above n. 212.

will, because it may be something really particularly relevant to the rest of their case or other witnesses, and what other witnesses might say and where the complainant rep wouldn't be privy to that and wouldn't have the other witness statements. It might make sense for them to really fill in the gaps for the court. But in my experience, I'd say 60- 70% of the time the prosecution won't make submissions on it if complainant rep is there. (PL 5)

Other participants stated that on occasion the SLR might take a different view to the prosecution barrister on the section 3 application, such as for example on the scope of questioning. This echoes the views of Irish prosecutors interviewed by Scottish researchers, who recognised that their submissions did not always align with those made by the SLR.³³⁹

The SLR generally operates without the support of a solicitor, with administrative support from the legal aid clerk. Participants who had acted as SLRs also highlighted their respect for complainants and their sense of privilege in doing this important work. Even before obtaining the complainant's instructions, the SLR must identify and understand the live issues and the context in which a section 3 application is being made. This may be extremely difficult where the SLR is given very little detail about the nature of the application and its basis. Participants indicated that each case was different: the notice given by the defence may not give much information about the details of the application, the SLR is not privy to disclosure and the DPP may have only provided the complainant's statement. Participants stated that practice varies among prosecutors as to how much detail is provided to an SLR. Some prosecutors said they will only provide the complainant's statement. Others will provide the book of evidence.

Late notice creates challenges for the Legal Aid Board clerks and the SLR. Prosecutors described having to telephone the Legal Aid Board at 5pm on a Friday for a trial starting the following Monday morning. While participants praised the collegiality and professionalism of the Legal Aid Board, they described last-minute section 3 applications as unacceptable. The Legal Aid Board is under considerable pressure to find a barrister to represent the complainant's interests in the application. One participant described it as a "kind of a scramble to find someone".³⁴⁰ Legal aid clerks expressed concern about their ability to find representatives for the complainant and for the representative themselves to prepare adequately the application. They also face challenges in getting enough information for the SLR:

[...] So I get so I contact [the prosecutor] and I say, can you send me the indictment the complainant statement and the section three? They're the three big things that I ask for. They will always give me the complainant statement. Sometimes the indictment won't be ready. And then the section three again, sometimes they have it, sometimes they don't. I'll normally email once I hear who the defence solicitors are, I will write them a letter or, you know, and like it'll all be emails because it's the night before, but I might just email them and say, basically, do you know where we're acting for Ms A and so you might kindly provide me with a copy of your notice for your section three application and any particulars you might have in relation to the actual questions being asked to the complainant. Very often I won't get a response. (LA 1).

³³⁹ Eamonn P.H. Keane and Anthony Convery, *Proposal for Independent Legal Representation for Complainers Where an Application Is Made to Lead Evidence of Their Sexual History or Character*. (University of Edinburgh 2020) at 19, available at <https://eprints.gla.ac.uk/349113/>.

³⁴⁰ PL 4.

you get like literally one page- and we don't even get that from the DPP. We get that from our head office down in Kerry. But they just forwarded us the email they get [from the DPP]. And it's literally just a paragraph like, it wouldn't be any more than that. (LA 2)

This shows the difficulties faced by SLRs in finding out the context in which the application is being made and the questions that are likely to be asked. A key change that should be introduced quickly, is a reform recently introduced in Scotland.³⁴¹ There, the complainant has the right to a copy of the application and the indictment and the right to request any evidence relating to the application. If the defence objects to the evidence being disclosed, the court will decide whether to disclose it. Complainants in Ireland, through their SLRs, should have the right to the application, the indictment and a right to request the evidence on which the application is being made. This would make the practice more standardised across the country (see below) and make the right to SLR more meaningful and effective.

2.1 The importance of the SLR's advocacy skills and legal expertise

All participants emphasised that the SLR role demands experience of criminal trials, ideally sexual offences trials, and skills of strategic thinking, communication and advocacy. The SLR should know what the law is and how to advocate for more information from the defence or to ask the trial judge to direct the defence to provide more information to the SLR so the complainant can give informed instructions. Participants noted how experience had changed their view of their role as SLR, and that even in cases where complainants consent to the application, they were more careful to remind the judge of their obligations to apply the relevance test under section 3 and to protect the complainant from intrusive questioning about her private life.³⁴²

This lawyer explained the importance of confidence to an effective representation of the complainant's interests:

And I suppose that's where I say the - the benefit of things like not being bullied because, you know, we were dealing with very, you know, these are the people you see in the 9:00 o'clock news in the evening. They're very experienced people and the- the again like the tactics that they deploy ... You have to be very careful of them, they're trying to do a job and they... It just- some of them are so wily. They're so clever about how they go about things or, like, try and shake you down for information, even in a sort of a- in a... in a subtle way. (PL 6)

Experience is also crucial in how to engage with the complainant. Participants noted that difficulties can arise in relation to how to approach complainants and their evidence in a criminal case, and how to maintain the boundary between the section 3 issue and other information in the case:

I do think it is important that you have a nose about how the process works and that it is different than the civil world in terms of dealing with the complainant and, because you're going to have to guess ahead. You have to know the rules of evidence and (..) what could be asked, or what might be asked and that you make sure you're not going to interfere with the prosecution or the accused in the, in that process, that they are left completely pure and let you focus just on what you have to focus on. Because I can't think of any other way where, in criminal law, where you're allowed talk to witnesses, particularly when they're under cross-examination because - like I said before, this can

³⁴¹ S275ZB of the 1995 Act as inserted by s105 of the Victims, Witnesses, and Justice Reform (Scotland) Act 2025.

³⁴² Section 21 Victims of Crime Act 2017.

arise at any point and sometimes it arises only under cross-examination where the witnesses are not allowed to discuss their evidence with anybody. This is an exception to that. So you have to be really aware of [...] what you can discuss with them. (PL 3)

The O'Malley Review recommended that, in order to ensure parity of experience and expertise between counsel for the defence and the SLR, that senior counsels should do SLR work. However, participants were clear that most often the barrister appointed will be a junior counsel.³⁴³ This is because of the unavailability of senior counsel to do section 3 applications at short notice and for less money than other criminal work (or civil work). The prevailing view was that the involvement of junior counsel was not a problem in itself, because experienced 'senior' junior counsel who had been in many sexual offences trials were well qualified to do the work. However, all lawyer participants, including prosecutors and defence counsel and those with experience of acting as an SLR, stated that the quality of representation can vary widely. There is a particular problem with SLRs who are criminal barristers but are not experienced in running sexual offences trials, or who are general practitioners who usually practise civil law, including family law. Some participants stated this was a situation that had improved, especially since the O'Malley Report (which also made recommendations regarding training of lawyers involved in sexual offences cases).³⁴⁴ The Bar of Ireland provides a continuous professional development programme, including dedicated courses on dealing with vulnerable witnesses. It also provides an course entitled Advanced Advocacy Training for members. However the overall view was that problems still remained. These views were typical:

Often counsel assigned on the Legal Aid Board don't have any practical experience of having done a large volume of sexual violence trials. They may not have done any trials at all. Um, they also may not have access to, um, the full information that the parties have in terms of books of evidence and disclosure and, you know, to - you know, the prosecution panel for the DPP goes through a really rigorous open competition process where you're interviewed by a retired judge and two very senior people from the DPP's office, and only a very small number of people get to prosecute on behalf of the DPP and you have to demonstrate that you meet particular competences. And I think in practice what tends to happen with the Legal Aid Board, is that they have people who do other areas of law for the Legal Aid Board. Often there's kind of a scramble to - to find someone, and it's not necessarily someone who has direct experience of dealing with criminal trials. (PL 4)

I think by and large, it works out well. One small failure is, sometimes they instruct barristers who don't have criminal law experience. Well, civil lawyers or whatever, I don't know, but they don't have the criminal law experience. Now, most of them are criminal lawyers, but there's a few in there that are civil lawyers, and you kinda think... they approach clients, be it the Director of Public Prosecutions or accused persons. They approach clients in a different way than criminal lawyers do. That - how you would ask them questions and how you'd get instructions from that client, you have to be kind of very careful not to give state secrets away, and very careful not to load the complainant in this case with, views or information that they don't need. You kind of have to try and keep it as

³⁴³ The 2021 Joint Committee on Justice specifically recommended that in relation to separate legal representation, "it is important that comparable resources are made available, on a par with the legal representation afforded to the Prosecution and Defence to ensure the balance between a victim's rights and the fair procedures to which a defendant is entitled." Houses of the Oireachtas: Joint Committee on Justice, *Report on Victim's (sic) Testimony in Cases of Rape and Sexual Assault* (Houses of the Oireachtas, 2021) 8.
https://data.oireachtas.ie/ie/oireachtas/committee/dail/33/joint_committee_on_justice/reports/2021/2021-06-11_report-on-victim-s-testimony-in-cases-of-rape-and-sexual-assault_en.pdf

³⁴⁴ Ibid at [10.15].

pure as you can. And you do that with your, your, your, your client who is an accused. I mean, what are my instructions? What are you saying happened or what didn't happen? I didn't - you're not going to them and saying, that would be very bad instructions. [...]. And likewise prosecution will never lead a witness into - 'that's a very bad answer', coaching or anything of that nature at all. But it's very important that the person representing the complainant is very focused on the issue. (PL 3)

Well, I suppose, this is going to be one of my personal bugbears with it. Some of them are very good. Some of them, they're people who are criminal practitioners and are kind of at Circuit Court level or kind of mid-tier to senior juniors, and they're very good and they're very experienced. But then unfortunately, there are some people who have little to no criminal experience [...] and they are not ideal. And again, I think you wouldn't see that as much in Dublin because you'd have, I suppose, a huge amount of cases and there's a huge amount of people on the panel. But when you go down the country, you see that a bit more, there'd be people who'd be more civil practitioners. [...] That's a problem. I think the makeup of the panel is a problem. (PL 11)

Indeed, the challenges of the role are such that more inexperienced barristers feel underprepared:

It was a big part of my practice for a while but I found it very difficult to get training in the way the procedure would run for the I don't know if you've looked at section 19A as well.[...] But I just found it really hard to come across that training and I felt that it was a bit of a risk running the section threes if you didn't know how to do the section nineteens. And therefore I started to move on to other work that I felt was less exposed in that sense because if you couldn't run the section 19A and that issue arose, then you're kind of getting into difficulty. [PL 1]

Not everyone would be so conscientious.

Given the importance of the role for the complainant, and for the functioning of section 3, as well the particular skills needed for the role, it is essential that SLR representation is consistently of a high standard. There is a clear need for a more rigorous approach to recruitment of SLRs. Currently, there is only one barristers' panel for civil legal aid (under which SLR falls). The application form for this panel does not require any experience whatsoever in criminal law; any practising barrister who has professional indemnity insurance and has not been the subject of disciplinary proceedings can apply.³⁴⁵ A dedicated panel for SLRs would go some way towards ensuring that separate legal representation for complainants is consistently of a high standard. The Legal Aid Board could require applicants to demonstrate their experience of acting in sexual offences trials over a minimum period of at least three years. Increased provision of specialised ongoing professional development training is also required to support SLRs in delivering a high standard of advocacy in the context of section 3 applications. Membership of the panel could be linked to the completion of such training.

CONCLUSION

This chapter has highlighted important features of the section 3 system that are urgently in need of reform. The impact of systemic delay on the section 3 system was identified. Delayed disclosure, and workload pressures mean that applications are being made very close to the start of trial. This is having serious adverse impacts in terms of creating pressure on the Legal Aid Board to find an SLR, on SLRs

³⁴⁵ Barristers' Panel Application Form, available at <https://www.legalaidboard.ie/about-the-legal-aid-board/external-stakeholders/external-panels/legal-professionals/barristers-panel/>

to get fully across the application, and in terms of complainants' ability to meaningfully engage with the substance of the application.³⁴⁶

This chapter also examined the role of the SLR. The role of the SLR is essential to ensuring section 3 is operating as intended. Given the findings in Chapters Five and Six around the risks of unfounded rape myths entering the trial process via section 3 applications, the importance of this role cannot be underestimated. This is even more important given the recent extension of the right to representation to the part of the cross-examination dealing with the sexual experience evidence, if it is admitted.³⁴⁷ However, the quality of representation afforded to complainants on section 3 applications is not consistently of a high standard. SLRs are not always provided with the information they need to do their job properly, and there is inadequate professional development opportunities focussing on section 3 (and section 19A) applications.

The chapter made a number of suggestions as to how things could be improved. These included, affording the complainant through their SLR the right to a copy of the section 3 application and the indictment and the right to request any evidence relating to the application; and the creation of a panel for SLR barristers, along with dedicated training. These changes would significantly improve the effectiveness of section 3, and thereby better safeguard the quality of the evidence presented to the jury.

³⁴⁶ Data collection for this study was completed before the coming into effect of recent changes to the law on disclosure of counselling records which require a court hearing to determine if disclosure should be ordered. This will likely add additional delay and possibly additional pressure into an already strained system.

³⁴⁷ Section 4A (5A) Criminal Law (Rape) Act 1981, as amended. "Where a judge has given leave [...], the complainant shall be entitled to be heard in relation to the evidence or the question and, for this purpose, to be legally represented during the adducing of that evidence or the asking of that question." Inserted by section 7(b), Criminal Law Sexual Offences and Human Trafficking Act 2024.

CONCLUSION

*[E]vidence rules, more so than substantive offence definitions, or trial procedures, are the most consequential component of rape law architecture for whether rape myths are in circulation in the trial and whether the complainant is retraumatized during cross-examination (noting the inter-relationship between these two trial features).*³⁴⁸

Rape shields are a modification of the rules on what counts as admissible evidence in prosecutions of rape.³⁴⁹ They are a significant incursion on the defence's right to cross-examine the complainant, but they are justified because they protect the accuracy of the evidence presented to the jury, and therefore the integrity of the trial process. The rape shield targets questions and arguments about evidence that invite the jury to make inferences that are not logical, but are based on unfounded generalisations about rape and rape complainants (rape myths). Rape shields target the impermissible inferences that prior consent is indicative of later consent and that prior activity connotes weakened credibility. Both of these inferences draw their power from the 'real rape' myth and the myth of the lying rape complainant. As unfounded generalisations, rape myths present grave threats to the jury's ability to accurately adjudicate sexual crimes.³⁵⁰ The deep resonance of rape myths in society affords defence arguments a power that often may go unnoticed by the judge or the jury, but which nonetheless can distort the jury's fact-finding process and increase the likelihood of an unmerited acquittal.

This report presents the findings of the first qualitative study of the Irish rape shield. It places the shield in its doctrinal and socio-legal contexts and presents unprecedented insights into its operation and effectiveness in achieving its objectives. Drawing on in-depth interviews with key professionals tasked with working with the section as defence counsel, as prosecution counsel, as separate legal representatives, as policy specialists, support workers or legal aid clerks,³⁵¹ it opens up new ways of understanding how the rape shield is working. It is the first study to offer a fine-grained analysis of how lawyers in Ireland reason about the admissibility test for sexual experience evidence. Its findings are important for how we understand the rape shield, how we think about lawyers' interpretations of the rape shield, and how the concept of relevance is being applied more generally in rape trials.

In recent years, public attention and policy level discussions of sexual offences trials has centred on disclosure to the defence of the complainant's counselling records, the defence of honest belief,³⁵²

³⁴⁸ Quilter and McNamara 2026 above n. 106 at 165.

³⁴⁹ And other sexual offences trials.

³⁵⁰ Rape myths can mean that cases do not even reach trial because prosecutors and police may not pursue prosecutions because they anticipate juror prejudice. See Vanessa E Munro and Liz Kelly, 'A Vicious Cycle? Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales', in Miranda Horvath and Jennifer Brown (eds), *Rape, Challenging Contemporary Thinking* (Willan 2009) 281; Anna Gekoski and others, "'A Lot of the Time It's Dealing with Victims Who Don't Want to Know, It's All Made up, or They've Got Mental Health": Rape Myths in a Large English Police Force' (2024) 30 International Review of Victimology 3. Marianne Hester and Sarah-Jane Lilley, 'Rape Investigation and Attrition in Acquaintance, Domestic Violence and Historical Rape Cases' (2017) 14 Journal of Investigative Psychology and Offender Profiling 175.

³⁵¹ Leahy's review (above n.44) included the perspectives of lawyers and support workers on the rape shield. However, that was part of a wider project examining their perspectives on rape trials more generally.

³⁵² Law Reform Commission, above n.162.

sentencing for rape³⁵³ and the introduction of intermediaries.³⁵⁴ These are all important developments. Some attention has been paid to the timing of section 3 applications and the provision of separate legal representation.³⁵⁵ The lack of focus on the admissibility issue might be taken by some observers to mean that the problem of sexual experience has been solved. Indeed many lawyers interviewed for this research were of the view that section 3 is working effectively.³⁵⁶ This report shows however that while the rape shield has had an effect in making cross-examination more forensic and less overtly focussed on the complainant's character, any complacency about its effectiveness is unmerited. Section 3 is not operating as intended to protect the trial's fact finding process. It is providing only weak protection against arguments for admission founded in the impermissible inferences and in the 'real rape' myth and the lying complainant myth. Rather than being interpreted as a meaningful safeguard of the trial's fact-finding process, lawyers of all hues primarily understand it as a protection for complainants against humiliating questions and blatant insinuations regarding damaged virtue. Arguably, these kinds of questions and insinuations would have been ousted regardless of section 3 because they will correctly be identified by the jury as victim-blaming techniques. Section 3, along with case law, sets a threshold for admissibility higher than relevance and one that has a direct connection with a clear risk of unfairness to the defendant. However, it is often being interpreted by lawyers tasked with making an application to the judge as simply a protection against overt victim blaming. Contrary to the text of the provision and the case law, lawyers do not view it as a particularly onerous threshold to meet. This is concerning given the rape shield is supposed to protect the jury from prejudicial and irrelevant evidence, and the complainant from unnecessary distress.

Closer interrogation, in Chapters Five and Six, of how lawyers discussed relevance showed that rather than being an effective safeguard, section 3 is often the means by which rape myths enter the trial process, namely the myth of the real rape (and real rape victim) and the myth of the lying complainant of rape.

The report showed that adult complainants in a relationship with the defendant, and child/adolescent complainants are particularly vulnerable to being cross-examined about the most intimate aspects of their private lives. These are precisely the groups who are most at risk of harm from sexual violence. In cases involving these complainants, the rape shield appears less as a shield, and more as a gateway for arguments based on stereotypical and discriminatory assumptions that have no place in a modern rape trial. These usually relate to the complainant's alleged disposition towards sex generally, towards sex with the defendant, and their reputation.

The report finds that lawyers adopt an especially pro-admissibility attitude to evidence of sexual experiences with the defendant.³⁵⁷ Such evidence was almost always thought of as admissible, and was said to provide context or background. Evidence of prior consent is being used to cast the complainant as inherently untrustworthy or outside the status of legitimate rape victim. The introduction of evidence of prior sexual experiences with the defendant amounts to inferring that consent is

³⁵³ Character references must be given on oath in court or by affidavit; s14, Criminal Law (Sexual Offences and Human Trafficking) Act 2023.

³⁵⁴ 30 intermediaries were used in criminal trials in the Central Criminal Court in 2025. Courts Service above n.50.

³⁵⁵ O'Malley Review above n.22.

³⁵⁶ This echoes the views of the legal professionals interviewed by Leahy (above n.44 at 23-24). It also echoes the views of barristers in England and Wales. See Hoyano above n.240, although that finding view has been contested by Smith above n.10.

³⁵⁷ Chapter Five.

irrevocable. Section 3 is being understood and applied as if the 1990 reforms that brought sexual experiences with the defendant within its ambit never happened. This is a surprising finding, particularly in light of the legislative clarification of consent. It is concerning given the prevalence of sexual violence within relationships.

Digital evidence of communications was tied to the defence of honest belief and/or complainant credibility where the defendant and complainant were acquaintances or in a casual relationship. Digital communications are being used in ways that seek to make the complainant appear more willing to consent than might otherwise be the case. The report showed how this is an invocation of the second 'twin myths'; that prior consent is indicative of future consent. It is entirely at odds with the statutory definition of consent.³⁵⁸ The report also noted the issues with the probative value of sexualised messages on phones, including the multitude of motivations behind sending and receiving such messages, and their potential to be interpreted in a variety of contradictory ways depending on how they are presented by counsel. Section 3 provides no effective protection against the admission of such evidence.

In cases involving adolescents, and to a lesser extent, children, section 3 applications were described by lawyers as being very common. The heightened vulnerability of young people to section 3 applications is not only because of the sheer volume of material available about them but also the resilience of the stereotype of the virginal, innocent child victim. Lawyers stated such evidence was necessary to counter an impression of the complainant as innocent and pure. However, it was clear that participants would make this kind of argument even when there had not been an assertion of virginity by the prosecution.³⁵⁹ Instead the assertion of purity often was said to flow from the fact of the complainant's age. Furthermore, because hypothetical complainants were compared to a sexually ignorant child, what counted as relevant sexual experience was given a very broad interpretation, so that acts far removed from sexual intercourse, such as accessing pornography, sending texts or social media messages, were understood by lawyers as highly probative. Rather than being suggestive of an entirely natural curiosity about sex and sexuality, or a normalised form of interaction among adolescents, such evidence was taken to be important information about the complainant's credibility or even important information that would help the jury decide whether defendant honestly believed the complainant was consenting. Any indication of interest in sexual matters was said to be evidence of dubious credibility or, more often, damaged moral status.³⁶⁰ Often participants talked about the evidence being combined with other information, such as a history of truancy or drinking alcohol. There was no indication from lawyers (prosecution or defence) that trial judges would look unfavourably on such arguments. This all suggests that section 3 is almost meaningless in cases involving children and adolescent complainants and that in many cases jurors are being alerted to sexual experiences that, although not probative of any issue, will resonate with deeply engrained stereotypes about how a 'real' (child) rape victim behaves and will thus negatively impact how jurors view the person's credibility.

Participants discussed section 3 applications where evidence of sexual activity with people other than the defendant was argued to be admissible simply because it undermined the complainant's character

³⁵⁸ Criminal Law (Sexual Offences) Act 2017, section 48. This is of course also true where it is digital evidence relating to a young complainant.

³⁵⁹ Or the complainant.

³⁶⁰ This harks back to older ideas of child sexual abuse victims as having lost their childhood innocence and a moral threat to other children. See Ring and others at ch 2.

and credibility generally. This is obviously at odds with the rape shield. When asked about how such evidence could be argued to be admissible, lawyers suggested if the evidence was said to form part of a distinctive pattern of behaviour which was therefore significant and which the jury should hear about. However the notion of a pattern of behaviour confers a degree of specificity and a quality of being uncommon that was not reflected in the examples participants gave of how this type of argument has been presented by others in cases they have been in. A wide range of relatively common sexual behaviours including having sex with a long-term partner without a condom, or having sex at a house party, were described as falling into this category. The report showed that a particularly heightened scrutiny is necessary in relation to defence arguments along these lines, because of the risk that the argument may in fact be an attempt to cast the complainant as someone outside the boundaries of a 'real' rape victim.

There is evidence that some section 3 applications are narrowly focussed on an alleged inconsistency in a key element of the prosecution's case which is said to be supported by the evidence of sexual experience. This is more in keeping with the purpose of section 3 and the trial judge must give such applications very careful consideration given the fundamental importance of a fair trial. However, questions remain around what arguments exactly are being made about inconsistency and whether they are in fact probative or whether they are relying on the impermissible inferences targeted by the rape shield and/or rape myths. Further empirical research in the form of a court observation would aid in answering this important question.

In short, the rape shield is perceived and treated by lawyers (defence and prosecution) as a filter for excluding humiliating and openly victim-blaming lines of cross examination. It is not preventing lawyers from making arguments for admissibility (about a growing range of material) based on an impermissible inference about consent or credibility, or which draw their power from the cultural resonance of rape myths about 'real rape' and the lying complainant. The meanings given to relevance in section 3 applications are elastic and often underpinned by discredited rape myths. In many cases the evidence could not be said to rationally affect assessment of the existence of a fact in issue, let alone meet the higher threshold set down in section 3. The focus on women's and girls' behaviour also runs counter to the core tenet of rape law that consent must be given freely on each occasion with each sexual partner.³⁶¹ Arguments canvassed in this report that rely on inferences based on the complainant's activities with others, or on separate occasions with the defendant, run counter to this. If such arguments are being accepted, and if judges are allowing evidence to be adduced based on an arguments that the defendant's honest belief in consent flowed from what previously happened between them, or between the complainant and third parties, women who have (ever had) sex are at risk of being excluded from the protection of the criminal law.

The report also made findings in relation to the operation of section 3, focussing on late notice and the role of the separate legal representative. It showed that applications are often being made with late notice, close to the start of a trial, on the eve of, or on the first day of the trial before the jury is empanelled. Although section 3 applications should be heard at the preliminary hearing stage, and despite the best efforts of Mr Justice Paul McDermott in the Central Criminal Court, problems of late

³⁶¹ Most obviously through the statutory definition of consent in s48 Criminal Law (Sexual Offences) Act 2017 but also through appellate judgments on sentencing in rape and sexual assault, and public campaigns such as those run by Cuan and the Department of Justice Home Affairs and Migration regarding consent: see www.gov.ie/consent.

prosecutorial disclosure³⁶² and workload are creating systemic issues that mean that applications cannot be made earlier. Late notice places the Legal Aid Board under considerable pressure to find a Separate Legal Representative (SLR) for the complainant and brief them. Most importantly, late notice impacts the complainant's ability to fully engage with the section 3 application. This raises questions about how effective the consultation with the SLR can be.

The report noted that the SLR role was essential to the proper functioning of the section 3 regime. It requires a particular set of skills that are honed in the crucible of criminal trial advocacy. The report found that the quality of SLRs varies considerably and that some SLRs do not have the necessary experience of sexual offences trials needed to effectively represent the complainant's interests. This is a concerning finding that raises fundamental questions about how well section 3 can work, especially given that the main source of submissions countering the defence's application will be the SLR. The report also noted the need for greater training opportunities for SLRs.

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This report is not arguing that defence lawyers are consciously exploiting rape myths that they know to be false in their cross-examination of witnesses. That would be a misunderstanding of what rape myths are, and how they circulate and are sustained.³⁶³ Rape myths are part of society and culture. They infuse longstanding formal legal rules that have only changed relatively recently, such as the mandatory corroboration rule. Many of the arguments made about the admissibility or relevance of sexual experience evidence are ones that lawyers (both prosecution and defence) have been trained to understand as appropriate and even integral to the notion of a fair trial. Cross-examination can be directed to matters such as 'the type of person' a complainant is, and 'the history of a sexual relationship' because they are part of the defence lawyer's playbook, not because individual lawyers are on a mission to keep 'rape culture' alive.³⁶⁴ In the 'relatively sealed world of the courtroom'³⁶⁵ defence lawyers have a particular role to play that is essential to the fair administration of justice. They must also follow their client's instructions, and he may wish to raise speculative arguments about an honest belief in consent being based on a series of text messages, for example. Furthermore, it would be unrealistic to expect defence lawyers to suddenly stop using every tool at their disposal in pursuit of an acquittal. Indeed, it must be remembered that the majority of participants were barristers who work in both defence and prosecution. The sincerity of all lawyers who participated in this research was apparent throughout each interview; their commitment to the fundamental constitutional right to a trial in due course of law shone through. This cultural awareness of the importance of the right to a fair trial is something that must be cherished. However, this essential commitment to accused person's rights does not preclude important conversations about what kinds of evidence are put in front of the jury, and what is or what is not required by a fair trial.

It is the structure of the rape shield itself that requires attention; as currently framed it is facilitating rather than prohibiting the entry of rape myths into the courtroom. Defence counsel making a section 3 application should be required to clearly state the probative value of the evidence and the purpose for which it is being adduced (credibility, consent or belief in consent, rebuttal of the prosecution's case, bias, motive to lie, etc).

³⁶² Including third party disclosure.

³⁶³ This point is made in the Australian context by Quilter and McNamara above n.106 at 167.

³⁶⁴ Ibid.

³⁶⁵ Paul Rock, *The Social World of an English Crown Court* (Clarendon Press 1993) at 34.

Extended reflection is also needed by prosecution lawyers, separate legal representatives, defence counsel and trial judges on what the current admissibility test requires. This research suggests that there are a number of questions to be answered, including:

- (1) What is it that the evidence actually shows?
- (2) How does that relate to the facts in issue? For what purpose is it being adduced? Has any assertion been made about the complainant's sexual experience or lack thereof? Has it been tied to a key issue in the case such as consent? Judges must be alert to the risk of defence counsel making vague claims about the need for context. Such claims may in fact be an attempt to cast the complainant as not credible because of her sexual experience, something that is prohibited by the shield. Instead, there should be a clear evidential and rational basis for saying that the prosecution has actively created an impression of sexual inexperience and ignorance (i.e. merely not mentioning anything about the matter will not be enough) and that that impression is tied to the issue of credibility or consent. If there is an assertion of lack of experience, does the evidence sought to be adduced actually contradict this assertion, or is it simply indicative of a general interest in sex, in which case its probative value is reduced to nothing? Where the defence argues that the prosecution or complainant has created a certain impression that must be corrected through the introduction of sexual experience evidence, the judge must be vigilant not to allow assumptions about young people being ignorant of sexuality and sex to factor into their decision.
- (3) Could the evidence make a difference between guilt and innocence? If not, it should not be admitted because it risks diverting the jury.

The power of sexual experience evidence to distance a complainant from the status of a legitimate victim is a strong argument for broadening the rape shield's scope to cover prosecution evidence, including any evidence that the complainant had no sexual experience. Such a reform would protect the jury from unnecessary and distracting arguments about assertions of virginity and the associated dangers of indirectly invoking rape myths.

Legislative clarification of the meaning of sexual experience would also be helpful. It should be defined as broadly as possible to ensure the greatest protection, particularly for young people who are more likely to be subject to challenges to their credibility based on activities that are far removed from what might usually be defined as sexual experience.

The recommendations aim to address the issues raised in this report. They include replacing section 3 with a new provision. Key features of the proposed new rape shield include:

- a statement of the purpose of the rape shield to orient all decisions as to admissibility
- expanding the shield to cover prosecution evidence/questions
- introducing a statutory definition of sexual experience to include digital evidence of online sexual communication
- a requirement to apply in writing stating the reasons for the application.³⁶⁶

The recommendations also include other proposals aimed at the trial process and at the criminal process more generally. For ease of reference, these are presented together with the executive summary at the beginning of this report.

³⁶⁶ This echoes the requirements when counsel is applying for disclosure under the section 19A application regime.

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Sample Information Sheet and Consent Form



INFORMATION SHEET FOR RESEARCH PARTICIPANTS

Information Sheet

Purpose of the Study. I am Dr Sinéad Ring, an academic, in the School of Law and Criminology, Maynooth University. I am undertaking a research study as part of my research funded by the Irish Research Council.

The study is concerned with the views of court accompaniment workers, rape crisis counsellors, and lawyers on the admission of evidence of a victim's previous sexual history in trials.

I am assisted in this study by my research assistant Ms Ashleigh Pillay, MA.

Who has approved this study? This study has been reviewed and received ethical approval from Maynooth University Research Ethics Committee. You may have a copy of this approval if you request it.

What will participating in the study involve? The study will involve taking part in an interview with Dr Sinéad Ring. It should last around an hour. You will be asked your views about the current law and procedures around applications to allow the victim's previous sexual history into evidence.

What information will be collected? You will be asked to answer questions about your experience of applications during a rape trial to admit evidence of a victim's previous sexual history into evidence.

You will be asked to reflect on your experiences and speak about their impressions of how the law is operating in practice and whether it should be reformed, and if so, how.

You will be asked if there are other changes needed to legal practice in this area, beyond reform of the legal rules governing previous sexual history evidence.

You should not mention any case that is ongoing.

Why have you been asked to take part? You have been asked to take part because you have experience of taking part in or observing applications to adduce previous sexual history evidence.

Do you have to take part?

No, you are under no obligation whatsoever to take part in this research. It is entirely up to you to decide whether or not you would like to take part. If you decide to do so, you will be asked to sign a consent form and be given a copy of this and the information sheet for your own records. If you decide to take part, you are still free to withdraw at any time without giving a reason and/or to withdraw your information up until such time as the research findings are anonymised [01 October 2024]. A decision to withdraw at any time, or a decision not to take part, will not affect your relationships with Maynooth University or Rape Crisis Network Ireland.

Will your participation in the study be kept confidential? Yes, all information that is collected about you during the research will be kept confidential. No names will be identified at any time. All hard copy information will be held in a locked cabinet at the researchers' place of work, electronic information will be encrypted and held securely on MU laptop or servers and will be accessed only by Dr Sinéad Ring and her research assistant Ms Ashleigh Pillay and the transcriber.

No information will be distributed to any other unauthorised individual or third party. If you so wish, the data that you provide can also be made available to you at your own discretion.

Your participation will be confidential, however, I must inform you in some circumstances, confidentiality of research data and records may be overridden by courts in the event of litigation or in the course of investigation by a lawful authority. In such circumstances the University will take all reasonable steps within law to ensure that confidentiality is maintained to the greatest possible extent. If you tell me that you or another person is at risk of harm, I may have to report this to the relevant authority and cannot guarantee confidentiality or anonymity in these situations.

What will happen to the information that you give? All the information you provide will be kept at Maynooth University in such a way that it will not be possible to identify you. On completion of the research, the data will be retained on the Maynooth University server. You can access your data up to the point of anonymisation on 1 October 2024 by contacting Dr Sinéad Ring. After ten years, all data will be destroyed by Dr Sinéad Ring. Manual data will be shredded confidentially and electronic data will be reformatted or overwritten by Dr Sinéad Ring in Maynooth University.

What will happen to the results? The research will be written up and presented as a final report to Rape Crisis Network Ireland and will be launched at a public launch. The findings will be presented at national and international conferences and may be published in academic journals. A copy of the final report will be made available to you upon request.

What are the possible disadvantages of taking part? It is possible that talking about your experience may cause some distress, in which case I have identified practical supports in the next section.

What if there is a problem? At the end of the interview, I will discuss with you how you found the experience and how you are feeling. If you experience any distress following the interview you may contact the Dublin Rape Crisis Centre helpline on 1800 77 8888 or consult this website: www.rapecrisishelp.ie for information about the professional support services available.

Any further queries? If you need any further information, you can contact me: Dr Sinéad Ring, my email address is sinead.ring@mu.ie

If you agree to take part in the study, please complete and sign the consent form.

Thank you for taking the time to read this information sheet.

Consent Form

I agree to participate in Dr Sinéad Ring's research study titled *On Relevance and Consent: Interrogating the Uses of the Victim's Previous Sexual History in Serious Sexual Offences Trials*.

Please tick each statement below:

- ☐ The purpose and nature of the study has been explained to me verbally & in writing. I've been able to ask questions, which were answered satisfactorily.
- ☐ I am participating voluntarily.
- ☐ I give permission for my interview with Sinéad Ring to be audio recorded or (if on MS Teams) video-recorded)
- ☐ I understand that I can withdraw from the study, without repercussions, at any time, whether that is before it starts or while I am participating.
- ☐ I understand that I can withdraw permission to use the data right up to data anonymisation on 01/10/2024.
- ☐ It has been explained to me how my data will be managed and that I may access them on request
- ☐ I understand the limits of confidentiality as described in the information sheet.
- ☐ I understand that I should not discuss any ongoing cases in my interview
- ☐ I agree to quotation/publication of extracts from my interview.

OR

- ☐ I do not agree to quotation/publication of extracts from my interview.

Signed Date

Participant Name in block capitals

I the undersigned have taken the time to fully explain to the above participant the nature and purpose of this study in a manner that they could understand. I have explained the risks involved as well as the possible benefits. I have invited them to ask questions on any aspect of the study that concerned them.

Signed..... Date

Researcher Name in block capitals

If during your participation in this study you feel the information and guidelines that you were given have been neglected or disregarded in any way, or if you are unhappy about the process, please contact the Secretary of the Maynooth University Ethics Committee at research.ethics@mu.ie or +353 (0)1 708 6019. Please be assured that your concerns will be dealt with in a sensitive manner.

For your information the Data Controller for this research project is Maynooth University, Maynooth, Co. Kildare. The Data Protection office is located in Room 27, Rye Building, North Campus, Maynooth University, which can be contacted at dataprotection@mu.ie. Maynooth University Data Privacy policies can be found at <https://www.maynoothuniversity.ie/data-protection>.

Sample Interview Schedule

Group: Barristers

A. Introduction

1. How long have you been a practising barrister?
2. What do you like about being a barrister?
3. What do you dislike about being a barrister?
4. How much of your work involves acting for the prosecution and how much is defence work?
5. Have you ever worked with the legal aid board as a victim's representative on a s3 application?

B. Attrition

1. In your experience, why do some victims of sexual assault and rape not report to the police?
2. In your opinion why do some victims of sexual assault and rape withdraw from the criminal process after having made a complaint?
3. In your view, does a fear of having the previous sexual experiences discussed in a trial stop victims from reporting to the gardaí or cause victims to withdraw from the criminal process?
 - a. If so, why do you think this is?

C. Applications to admit PSHE

1. In your experience, how do defence lawyers argue that victim's previous sexual history with persons other than the defendant should be admitted?
 - a. Is the idea of relevance used in these arguments?
2. In your experience, how do defence lawyers argue that previous sexual history with the defendant should be admitted?
 - a. Is the idea of relevance used in these arguments? How do they think about the threshold test in section 3?
3. In your experience are judges more or less likely to allow a victim's previous sexual history into evidence than 5 years ago? Why?
4. Which kind of evidence/questioning is most frequently sought to be admitted/allowed?
5. Thinking about your own practice, has how you approach s3 applications changed over the last 5 years?
6. Has the introduction of preliminary hearings changed how s3 applications are run and if so, how?

7. Should a statutory definition of sexual experience evidence be introduced? How wide should it go?
(for prosecutors)

1. What kinds of arguments are made by defence counsel about the relevance of previous sexual history evidence in s3 applications?
2. How do you counter these arguments? What arguments do you make/do others make about relevance?
3. Would you ever feel it was necessary to adduce evidence of previous sexual history evidence?
4. Are there times when you might not vigorously oppose a s3 application? Why?
5. Has how you approach s3 applications changed over the last 5 years? Why?
6. In your experience are judges more or less likely to allow a victim's previous sexual history into evidence than 5 years ago? Why?
7. When you are making submissions opposing a section 3 application do you ever refer to the judge's obligations under the EU Victims' Directive to protect a victim from repeat victimisation and to regulate questioning about a victim's private life?
8. Has the introduction of preliminary hearings changed how s3 applications are run and if so, how?
9. Should a statutory definition of sexual experience evidence be introduced? How wide should it go?

Offer a comfort break

D. PSHE and Cross-Examination during the Trial

1. is it important that a separate lawyer is tasked with representing the victim's interests in the cross-examination? Why?
2. Under s3(2)(d) even if leave has been given, a judge can direct that a particular question is not asked or if asked is not answered until a further application is made. Is that power used and is it effective?

E. General

1. . If you could improve one thing about the law on PSHE what would that be?

Concluding Section

Thank you so much for your thoughts on this, it has been very valuable to hear your opinions and experiences. Before we wrap up, is there anything else you would like to say that you feel has not been covered?

Thank you again.