



**Previous Sexual History Evidence and Separate
Legal Representation:
RCNI Position Paper
May 2012**

Previous sexual history and Separate Legal Representation: Practical and Theoretical Issues

Rape Crisis Network Ireland

Rape Crisis Network Ireland (RCNI) is a specialist **information and resource** centre on rape and all forms of sexual violence with a proven capacity in strategic leadership. The RCNI role includes the development and coordination of national projects including expert data collection, using our expertise to influence **national policy and social change** and supporting **Rape Crisis Centres** to reach best practice standards. We are the representative umbrella body for our member Rape Crisis Centres who provide **free advice, counselling and support** for survivors of **sexual abuse** in Ireland.

Based on our ongoing experience of listening to survivors across our Network, and on the evidence contained in our recent publication Rape and Justice in Ireland¹, RCNI remains concerned about the traumatic impact of bringing evidence of prior sexual history into criminal trials for survivors of sexual crime.

Rape and Justice in Ireland recommends at Recommendation 21, that *"...if the prosecution is to be permitted to continue to introduce such evidence, the complainant must be consulted in advance of any such introduction"*. The RCNI has taken on a strategic leadership role to build an informed consensus among the relevant stakeholders in order to recommend action to achieve this, and in order to achieve significant improvements for survivors in the way in which such evidence is approached in our courts.

Previous Sexual History² Evidence and Attrition: A Problem for the Legal System

There can be no doubt that the prospect of being subjected to character assassination at the hands of defence barristers, based on their previous sexual history, deters some victims of sexual crime from continuing with a prosecution, or even from making a report to An Garda Síochána in the first place. This fear contributes significantly to the attrition of sexual violence complaints from the earliest stage immediately after the crime, right up to and including the trial itself. Not only is it very unpleasant for the victims themselves, but it is also a problem for the legal system, as it means that prosecutions which might otherwise succeed are likely to be abandoned. This means in turn that the risk is increased that some accused of sexual crimes who should be convicted and sentenced as sex offenders, are not. It seems clear that attrition based on fear of having to undergo extremely unpleasant cross-examination is something which should be avoided if at all possible, because it means that some guilty offenders will not face the possibility of conviction and therefore, that the criminal justice system will have failed the victims of those offenders.

¹ "Rape and Justice in Ireland" (2009), Hanly & ors, Liffey Press ("RAJI"). See RAJI Executive Summary via online link at <http://www.rcni.ie/uploads/Exec-Summary.pdf>

² When a person suffers the crime of sexual violence, the term commonly used to refer to evidence of their sexual experience before that is "previous sexual history", so that term will be preserved for clarity throughout this paper. However, "other sexual experience" is the term used in the relevant statutes. "Other sexual experience" refers to sexual activity with any person including with the accused other than that which is the subject of the charge before the court, so that whenever the term "previous sexual history" is used in this paper, it should be understood to refer to other sexual experience of the complainant including **with the accused**. Finally note that the term "prior sexual history" is also used by some authors and speakers to describe this kind of evidence (less commonly).

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To be cross-examined on one's sexual history is intrinsically unpleasant, invasive, and for many people, a trauma just as devastating as the initial attack itself, so that it is not possible for supporters to offer much in the way of reassurance to victims who are reluctant to make or continue with a complaint because of their fear of this cross-examination. If at all possible, such additional trauma - and the fear of it - should be avoided in the interests of the welfare of these victims. Can this be done under our system? This paper will examine whether it is in fact necessary at all, and if it is, how the impact of the previous sexual history issues on the victim might be minimised in the court process.

A Note on Attrition Itself:

In this paper, the term "attrition" is used to describe the process by which sexual violence complaints are lost to the criminal justice system over time. Conor Hanly in "Rape and Justice in Ireland"³ distinguishes between "Proper attrition" as being ".. attrition that reflects the evidential requirements of the criminal justice system, and "Improper attrition", that is, "... attrition that arises from non-evidential, illegitimate grounds.....includes all cases that are pushed out of the criminal justice system for any of the following reasons: fear, prejudice, poor investigation or procedures, weariness/frustration or unjustifiable legal rules. Thus, incidents of rape that are not reported because the complainant is **scared of the legal process** [among other examples]..... should be considered examples of improper attrition." (page 366) (emphasis added).

In this paper, concerns are expressed in relation to the **improper** attrition in sexual violence cases caused by the victims' fear of cross-examination on their entire previous sexual history.

Overview of the Current Situation in relation to Previous Sexual History Evidence

At present, the defence must ask for permission from the judge to bring in any evidence of a victim's earlier sexual experience, with the accused and/or anyone else. The defence must also give advance notice of their intention to apply for this permission, or "leave", as it is called. However, it can happen that the notice of intention is not served until the trial itself has already started. The survivor has the right to be represented in Court by a lawyer when the defence application for leave to bring in evidence of previous sexual history is heard by the judge. However, this right does not extend as far as legal representation during the trial itself. The right is commonly referred to as "separate legal representation".

On the other hand, the prosecution does not have to ask for permission from the judge to bring in any evidence of a victim's earlier experience, with the accused and/or anyone else. Occasionally, prosecutors do introduce this kind of evidence, for example where it is relevant to the case and there is a risk that the jury would be misled if it were omitted, or in order to forestall and/or minimise the impact which evidence allowed under a successful Section 3 application might otherwise have upon the jury. Our view is that on balance, the prosecution should be allowed to do this, **provided that** the prosecution advocate ensures that the victim is consulted about the nature

³ "Rape and Justice in Ireland", Hanly et al, (2009), Liffey Press, at page 366, a major study of the causes of attrition in rape cases at the reporting, prosecution and trial stages, commissioned by the RCNI and undertaken by an NUIG research team, led by Conor Hanly BL

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and extent of such evidence **in good time beforehand**.⁴ We recommend that this should be included in the DPP's Guidelines for Prosecutors, and any other formal protocol document, as a requirement.

Is evidence and/or cross examination of the complainant on their previous sexual history sometimes so relevant that in fairness to the accused person, it must be admitted into evidence?

Since the Act of 1990⁵, rape within marriage is an offence. Does that mean that the previous sexual history of any couple, or any complainant, cannot ever be relevant to the issue of guilt or innocence on the particular occasion(s) before the Court? The leading case on this would indicate otherwise:

This is DPP v. G K [2006] IE CCA 99 – see link to online judgment at Appendix 3. In this case, the convictions were quashed and no retrial was ordered. The defence was that the accused had not ever had any form of sexual contact with the complainant, and the case was presented in such a way as to give the impression that the complainant, a girl of twelve at the time of the acts complained of, had been a virgin before these acts took place. There was medical evidence that her hymen was broken, but no evidence given of her previous sexual experience, before the Victim Impact Report appeared at the sentencing stage. This report went into detail about the complainant's previous sexual history; the clear implication to the jury was that the acts complained of were the only possible explanation for the broken hymen, given the complainant's age and the absence of any evidence of previous sexual experience.

*"It is the view of the Court...that the decision...not to permit a limited and carefully monitored form of cross-examination of the complainant... was unfair to the applicant in that the history in question **could have materially affected** the jury's deliberations whether to find him guilty or not guilty", per Kearns J (our emphasis).*

The judgment is at pains to stress however that that her "previous sexual history" does not of itself undermine the complainant's case that she had been abused by the accused. Rather the Court was concerned that the non-disclosure of the previous sexual history

"...in the particular context which obtains in this case [gives] rise to an anxiety that the applicant may not, in the absence of some limited questioning to clarify this issue, have received a fair trial.."

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. The previous sexual history became relevant when it was clear that it provided an explanation for the medical evidence which pointed away from the accused. The judgment is also quite restrictive and directive as to how cross-examination should be conducted: *"Where a form of questioning is allowed, it should be confined only to what is strictly necessary and should never be utilized as a form*

⁴ In "Rape and Justice in Ireland", Conor Hanly recommends that as an alternative to the prosecution being obliged to seek permission to adduce this kind of evidence, that "the complainant must be consulted in advance of any such introduction". (RAJI Executive Summary, p xxxiv)

⁵ Section 5 of the Criminal Law (Rape)(Amendment) Act 1990

of character assassination”, and elsewhere speaks of a “limited and carefully monitored form of cross-examination of the complainant..”

This judgment does not endorse, then, cross-examination at large on a complainant's previous sexual history with no other end than to discredit her character before the jury, but only such examination as is *“strictly necessary”*, and only endorses it in such a case as this because the history in question could have materially affected the jury's decision, or because the Court was satisfied *“that the effect of allowing the evidence...might reasonably have been that the jury would not have been satisfied beyond reasonable doubt of the guilt of the applicant”* – to use the wording of the relevant statute.

It is difficult to argue in this case that the judge ought not to have allowed this evidence to be given. While the facts are quite unusual, there are other more common situations where previous sexual history is likely to be considered relevant to the issues in the case. With regard to previous sexual encounters with the accused, questions in relation to particular sexual practices, or previous consensual sex as a means of reconciliation may be relevant to the issues of fact in the case. With regard to previous sexual encounters with others, evidence providing an alternative explanation for the facts before the court cannot be said to be irrelevant. There is no mandate however in either statute or case law for evidence or cross-examination of the complainant being introduced for no other reason than to intimidate, oppress and/or blacken the moral character of the complainant.

The answer to the question posed at the top of this section, namely “Is evidence and/or cross examination of the complainant sometimes so relevant that in fairness to the accused person, it must be admitted into evidence?” - must therefore be, “yes”.

The Leading Case vis-a-vis the Recent Research

70% of applications to allow such evidence were granted, between 2003 and 2009, in the Central Criminal Court across a sample of 59 cases of rape and/or aggravated sexual assault⁶. The percentage of cases in which the complainants consented to the application to cross-examine is unknown. According to Bacik et al, the three most common *“apparent bases”* on which such applications were made were: consensual sexual relations before the crime, alleged promiscuity/routinely displaying suggestive behaviour, and previous allegations of a sexual nature. Other apparent reasons included use of contraception and being newly single, for which it is difficult to see any justification in terms of the statute⁷.

⁶ “Separate Legal Representation in Rape Trials”: Ivana Bacik, Ciara Hanley, Jane Murphy and Aoife O’Driscoll, presentation made at “Rape Law: Victims on Trial?” Conference, 16th January 2010, available online at [www.ivanabacik.com/wp-content/uploads/Bacik_Rapelaw_ppt_16jan10\[1\]\[1\].ppt](http://www.ivanabacik.com/wp-content/uploads/Bacik_Rapelaw_ppt_16jan10[1][1].ppt)

Note that this presentation is the only published report to date (March 2012) of this research. The phrase “apparent bases” comes from that presentation. The research is confined to cases in which the complainant availed of their statutory right to separate legal representation in relation to the application and was provided with representation through the Legal Aid Board.

⁷ Bacik also refers in her presentation cited at note 4 above, to “...strong criticisms of the rule [allowing the admission of previous sexual history evidence in certain circumstances] which “can perpetuate outdated and sexist myths about rape and sexuality...”

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Bacik also found that notice of intention to apply for leave to have this evidence was generally issued, regardless of whether the application was actually **made** before or during the trial. As she says in her presentation cited above, “Defence may be giving notice of intention to make a section 3 application even where there is little or no real prospect of them doing so”. It seems at least possible that this was being done for no other reason than to intimidate the complainant and discourage her from continuing with the prosecution. This raises concerns, of course, in relation to attrition.

It also seems clear from the wide range of “apparent bases” for granting Section 3 applications cited in the study, that there is great variance among judges themselves as to how they exercise their discretion to allow Section 3 defence applications to adduce previous sexual history evidence and/or cross-examine on it.⁸

Improving the procedure for notification of intention to make an application for leave to adduce evidence of “previous sexual history”:

How should previous sexual history be dealt with so as to minimize the risks of further trauma to the complainant, and to reduce as much as possible the risk of attrition based on the anticipation of such trauma?

Current Legislation:

(A) Section 4A of the Criminal Law (Rape) Act 1981, as inserted by Section 34 of the Sex Offenders Act 2001 – see Appendix 1 for annotated version.

Section 4A (2) deals with “notice of intention” to make an application under section 3. It is quite loosely and vaguely phrased, and does not in fact specify any limits to the time period for this notice of intention to be given. It gives two alternatives, “before” or “as soon as practicable after”, the beginning of the trial, for service of the notice. Subsections (3), (4) and (5) set out the obligations of the prosecution to notify the complainant of the application and her/his right to be legally represented, the judge’s obligation to ensure subsections (2) and (3) have been complied with, and the judge’s obligation to postpone or adjourn the trial if, “in his opinion”, the period between the complainant’s being put on notice of the application, and the application itself, is not long enough to “have afforded [her] a reasonable opportunity to arrange legal representation” – respectively.

Section 4A does not itself set out any details of the procedure to be followed to ensure that the complainant is given sufficient notice of a Section 3 application. This Section is not supplemented by any Rules of Court to fill in any such gaps, and there is no provision within the Section for the making of such Rules. There are no time limits for the performance of any part of this procedure. Likewise, while a trial judge should have a discretion to allow the defence to make an application for leave outside of the time limit, there are no detailed statutory criteria to be considered by a trial judge ruling upon such a late application. The parameters of the separate legal representation are also unsatisfactory: the representation afforded does not extend to the complainant’s legal representatives remaining in court for the entire duration of the complainant’s evidence and for the

⁸ Note also that “Rape and Justice in Ireland”, which found that previous sexual history evidence was introduced into evidence in just under 40% of the trials in its sample, cited with concern one case where “...the decision by one judge to grant an application to admit prior sexual history evidence [was made] because he could see no reason not to do so...” (Hanly & al, Liffey Press, 2009, at page 354).

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hearing of any other evidence that is adduced following a ruling under section 3 e.g. any evidence that is given by a defence witness about a complainant's previous sexual history.

The effect of these gaps in practice is that what happens on a Section 3 application is governed by the judge's directions on the day of the application, or the day of the trial (they may be the same day). A complainant may be put on notice of a Section 3 application for the first time on the day the case is first listed for trial, or even during the course of the trial. The separate legal representative may be instructed at very short notice. While most trial judges adopt a pragmatic approach to the operation of the legislation, a complainant's legal representative may be advised by a trial judge (of his / her own motion or at the request of the defence) that his/her attendance is no longer required after the court has heard on the section 3 application and ruled on the issue i.e. the legal representatives' attendance is not required during the remainder of the complainant's evidence. All this uncertainty makes a difficult process for a complainant even more difficult. There are many criminal law practitioners as well as Rape Crisis Centre advocates who feel there is a definite nexus between this level of uncertainty and rates of attrition.

Note that one unpleasant aspect of this uncertainty is that the complainant may be surprised by a last minute Section 3 application at the beginning or even during, the trial. While this kind of application is sometimes unavoidable, it should never be the norm.

To help remedy these deficiencies, we propose that time limits should be imposed for the giving of notice of the intention to apply to the trial judge for leave to cross-examine the complainant about previous sexual experience and that the law should be amended to include detailed statutory criteria to be considered by a trial judge ruling upon a late application for leave to have such evidence admitted.

(B) Section 3 Criminal Law (Rape) Act 1981 as amended: Gaps which could contribute to attrition:

The critical element of this Section is the test contained in **Section 3 (2) (b)**: *"The judge shall give leave 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 reads as a very stringent test, which would allow only a few applications to succeed. The following subsection (3) allows the judge to restrict further the form of questions which may be asked of the complainant or other witness. However, as indicated above, the available research and our own experience supporting our clients through the criminal justice system tell us that in practice, this test is often interpreted quite broadly.

How could the present situation be improved, in particular to make sure that the victim and her representative have adequate advance notice of a defence intention to apply for leave to bring in previous sexual history evidence?

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In broad terms, the existing legislation does need to be amended, among other things to include a power to make rules of court to supplement the statutory provisions. See below for a detailed list of our proposals.

Proposals

Therefore, RCNI submits that the following rules and amendments could address the deficiencies/gaps identified above:

- (a) The general rule should be that notice of a defence intention to make an application to adduce previous sexual history evidence is in writing and is served on the prosecution and the complainant in advance of trial within a specified time frame;
- (b) The existing law requires that any application for leave to cross-examine and/or adduce evidence of "previous sexual history" of the complainant **must** satisfy the statutory test, that is: "*The judge shall give leave 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*".⁹
This statutory test has been elaborated in DPP v G.K.[2006] IE CCA 99, as indicated above, so the questions should "*be confined to what is strictly necessary*" and should exclude any suggestion that what is intended is in fact a "*character assassination*", to borrow the wording of the judgment. Having regard to the above, there is no reason why the notice of intention should not indicate clearly the categories of questions to be asked, the reasons for asking them, and the parameters of the questions to be asked;
- (c) Court Rules should indicate a time limit within which any notice of intention to make a Section 3 application must normally be served. We suggest a time limit of 28 days before the trial date, at latest. This would reduce uncertainty and resultant stress to complainants;
- (d) It should only be possible to serve notice of intention to make a Section 3 application outside the time limit with the leave of the trial judge, if he/she is satisfied that to do so is in the interests of justice, i.e. there must be a residual discretion to allow a Section 3 application to be made notwithstanding non-compliance with the time limits for service of the notice. Criteria for consideration by a trial judge in relation to a late application to cross-examine should also be prescribed in the legislation.
- (e) At a Pre-Trial Hearing¹⁰ to case manage the issue to be held 21 days before the date on which the case is listed for trial, the prosecution should indicate their position on the application(if known), and the position of the complainant (if known) should also be communicated to the Court. The defence should also attend and indicate whether it intends to proceed to make the Section 3 application. Such early indications will lead to early

⁹ Section 3(2)(b) of the Criminal Law (Rape) Act 1981 as amended, see Appendix for annotated version of full Section

¹⁰ RCNI advocates the establishment of a statutory case management and pre-trial hearing system in all Circuit Court and Central Criminal Court cases in a separate paper. An abbreviated version is available online at: <http://www.rcni.ie/uploads/RCNIPositionPaperOnCaseManagementandPreTrialHearings.pdf>

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identification of trial issues, should cut down on delays and uncertainty, and should lead to shorter, more efficiently run trials where the jury have a clearer “run” at the evidence as there should be fewer interruptions;

- (f) The law should be amended to ensure that the role of the separate legal representative includes legal advice and representation from the time that notice of intention is served on the complainant, before and during the Section 3 application itself and an entitlement to be present in Court throughout the complainant’s evidence and the hearing of all evidence pursuant to Section 3 of the 1981 Act. Our view is that no amendment to the Legal Aid legislation will be necessary to ensure that all these stages are covered by the Legal Aid Certificate issued to the separate legal representatives. However it **would** be necessary to amend the existing Section 4A of the Criminal Law (Rape) Act 1981, as inserted by Section 34 of the Sex Offenders’ Act 2001, because as it is now drafted, it refers only to the complainant’s entitlement to be “*heard in relation to the application and for this purpose, to be legally represented during the hearing of the application*”.
- (g) Instead of the existing Section 4A (1), we recommend the following wording be adopted instead: “*Where notice of intention to make an application under Section 3 is given by or on behalf of an accused person who is for the time being charged with an offence to which this section applies, the complainant shall be entitled to be advised in respect of the notice and to be legally represented during the hearing of any application for leave to cross-examine on and/or adduce evidence of, the complainant’s other sexual experience. The complainant’s legal representative shall be entitled to be present in Court during the hearing of the complainant’s evidence and the hearing of all evidence adduced pursuant to Section 3 of the 1981 Act*”. We anticipate that this wording will cover other occasions where another issue relating to the complainant’s previous sexual history arises, such as but not limited to:
 - a. when the complainant is recalled after her initial examination has concluded;
 - b. Where another prosecution witness is cross-examined on the complainant’s “previous sexual history”
 - c. Where the defence applies to the court to adduce evidence of the complainant’s “previous sexual history” via the proposed evidence of a defence witness
- (h) The complainant should be kept informed of all developments, and the agency for informing her of each of these should be identified clearly.
- (i) Where the prosecution wishes to adduce evidence in chief via another witness of the complainant’s previous sexual history, the complainant should be consulted in advance, and her wishes taken into account, to the extent that they can be accommodated within the overall statutory and prosecutorial obligations of the DPP, and this should be framed as a requirement in the DPP’s Guidelines for Prosecutors, and/or any other formal protocol document relating to the duties of prosecutors;
- (j) We recommend that the ambit of the entitlement to separate legal representation be broadened by statutory amendment to include **all sexual offences**, as this is not the case at the moment. Specifically, sexual assault is not encompassed by the legislation.
- (k) We recommend that “other sexual experience” be broadly statutorily defined and defined to include references to pregnancy, miscarriage, abortion, contraception and other indicia of sexual activity.

Is there a danger that such measures could be seen as unjustifiable, disproportionate, not in the public interest and/or unconstitutional?

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It is a fundamental principle of our law that in an Irish criminal trial, there is no burden placed on the accused to prove anything in order to establish his/her defence. This is often interpreted to mean that the accused has no obligation to disclose any part of his/her defence in advance of trial. However, there are instances in recent times where the Oireachtas has adopted a more nuanced approach, by introducing certain statutory provisions listed below¹¹. The proposals suggested above are proportionate; are further justifiable in terms of fair procedures, and in the public interest. They should also greatly increase the efficiency and smooth running of trials, thus avoiding lengthy periods of time when juries are excluded and or segments of trials delayed. This further promotes the prompt administration of justice in our society.

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- (i) ¹¹ Section 3 of the Criminal Law (Rape) Act 1981 as amended itself introduced the concept of an application for leave before trial, and also set out the basis on which such applications should be made;
 - (ii) Since the enactment of the Criminal Justice Act, 1984, a notice of alibi has to be served by any accused person who wishes to rely on alibi evidence;
 - (iii) Under Part 4 of the Criminal Justice Act, 2007, which became operative on the 1st July, 2007, adverse inferences may be drawn from failure by an accused person to provide an explanation for the presence of incriminating evidence, from the very earliest stages of an investigation;
 - (iv) The Criminal Procedure Act 2010 Section 34 introduced a defence obligation to give notice of their intention to adduce expert evidence. This provision has been challenged as unconstitutional by way of judicial review in the case of DPP vs Markey. The challenge failed, and at the time of writing, we understand that a Supreme Court appeal is pending.

Appendix 1: Relevant Statutory Provisions as Amended – Informal Consolidation

Criminal Law (Rape) Act 1981: “previous sexual history” Evidence – as amended:

3. (1) 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; and in relation to a sexual assault tried summarily pursuant to section 12—
- (a) subsection (2) (a) shall have effect as if the words ‘in the absence of the jury’ were omitted,
 - (b) subsection (2) (b) shall have effect as if for the references to the jury there were substituted references to the court, and
 - (c) this section (other than this paragraph) and subsections (3) and (4) of section 7 shall have effect as if for the references to the judge there were substituted references to the court¹².
- (2)
- (a) The judge shall not give leave in pursuance of subsection (1) for any evidence or question except on an application made to him, in the absence of the jury, by or on behalf of an accused person.
 - (b) The judge shall give leave 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.
- (3) If, notwithstanding that the judge has given leave in accordance with this section for any evidence to be adduced or question to be asked in cross-examination, it appears to the judge that any question asked or proposed to be asked (whether in the course of so adducing evidence or of cross-examination) in reliance on the leave which he has given is not or may not be such as may properly be asked in accordance with that leave, he may direct that the question shall not be asked or, if asked, that it shall not be

¹² S. 3(1) of the 1981 Act was substituted by s. 13 of the Criminal Law (Rape) (Amendment) Act, 1990.

answered except in accordance with his leave given on a fresh application under this section.

(4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

4¹³.

- (1) In a proceeding under Part IA of the [Criminal Procedure Act, 1967](#) , relating to—**
- (a) the dismissal of a charge of a sexual assault offence, or**
 - (b) the taking of a person's evidence by way of deposition in the case of a sexual assault offence.**

then, except with leave of the judge conducting the proceeding, evidence shall not be adduced and a question shall not be asked which, if the proceeding were a trial such as is mentioned in section 3(1), could not be adduced or asked without leave in pursuance of that section.

- (2) On an application for leave the judge shall—**
- (a) refuse leave unless he is satisfied that leave in respect of the evidence or question would be likely to be given at such a trial, or**
 - (b) give leave if he is so satisfied.**

(3) Section 3(3) shall apply to an application under subsection (2) of this section.

4A¹⁴. **(1) Where an application under section 3 or 4 is made by or on behalf of an accused person who is for the time being charged with an offence to which this section applies, 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.**

(2) Notice of intention to make an application under section 3 or 4 shall be given to the prosecution by or on behalf of the accused person before, or as soon as practicable after, the commencement of the trial for the offence concerned or, as the case may be, the commencement of the proceeding concerned referred to in section 4(1).

(3) The prosecution shall, as soon as practicable after the receipt by it of such 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.

(4) The judge shall not hear the said application without first being satisfied that subsections (2) and (3) have been complied with.

¹³ S. 4 of the 1981 Act was substituted by s. 15 of the Criminal Justice Act, 1999.

¹⁴ S. 4A of the 1981 Act was inserted by s. 34 of the Sex Offenders Act, 2001.

- (5) If the period between the complainant's being notified, under subsection (3), of his or her entitlements under this section and the making of the said application is not, in the judge's opinion, such as to have afforded the complainant a reasonable opportunity to arrange legal representation of the kind referred to in this section, the judge shall postpone the hearing of the application (and, for this purpose, may adjourn the trial or proceeding concerned) for a period that the judge considers will afford the complainant such an opportunity.
- (6) This section applies to a rape offence, “, an offence under the *Criminal Law (Sexual Offences) Act 2006*”, an offence under [section 6](#) of the [Criminal Law \(Sexual Offences\) Act 1993](#), and any of the following, namely, aggravated sexual assault, attempted aggravated sexual assault, aiding, abetting, counselling and procuring aggravated sexual assault or attempted aggravated sexual assault, incitement to aggravated sexual assault and conspiring to commit any of the foregoing offences.”.

Note the following applications:

Criminal Law (Sexual Offences) Act 2006

Section 6 (1): Sections 3 and 4 of the Act of 1981 shall apply in relation to an offence under this Act subject to the modification that references in those sections to “ sexual assault offence” shall be construed as including references to an offence under this Act.

Criminal Law (Sexual Offences) (Amendment) Act 2007

Section 3 (2): References in section 3 of the Act of 1981 to jury shall, in the case of summary proceedings for an offence under section 6 (inserted by [section 2](#)), be construed as references to court.

Section 3(3): Sections 3, 4, 6, 7 and 8 of the Act of 1981 shall apply to an offence under section 6 of the Act of 1993 subject to the modification that references in any of those sections to—

- (a) sexual assault offence shall be construed as including references to an offence under section 6 of the Act of 1993, and
- (b) rape offence shall be construed as including references to an offence under section 6 of the Act of 1993.”

Appendix 2: Link to Ivana Bacik’s presentation on p s h research at DRCC Conference, 16th January 2010

<http://www.drcc.ie/report/ivana%20Bacik.ppt>

Appendix 3: Leading case on “previous sexual history” Evidence, DPP v GK, 5th July 2006:

Link to Judgment:

<http://www.courts.ie/Judgments.nsf/597645521f07ac9a80256ef30048ca52/6c5e112aec09a7f9802571a2003cc07d?OpenDocument>

RCNI Position Paper on Previous Sexual History Evidence in Criminal Trials

Appendix 4: Speech by DPP at DRCC conference 16 January 2010 (link)

[http://www.dppireland.ie/filestore/documents/Director's_Speech_at_'Rape_Law -
_Victims_on_Trial'_Conference_-_16_Jan_2010.pdf](http://www.dppireland.ie/filestore/documents/Director's_Speech_at_'Rape_Law_-_Victims_on_Trial'_Conference_-_16_Jan_2010.pdf)

Appendix 5:

The Sexual Offences (Criminal Procedure and Evidence) (Scotland) Act 2002, referred to in DPP's speech at note 2 of Appendix 4

<http://www.legislation.gov.uk/asp/2002/9/contents>

Previous Sexual History Evidence

January 2012