The Operation of YJCEA 1999 section 41 in the Courts of England & Wales:

views from the barristers' row

An independent empirical study commissioned by the Criminal Bar Association

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NB: this study was conducted before changes to the Criminal Practice Directions were introduced in April 2018 to tighten up the procedural requirements for section 41 applications, and its findings regarding procedure must be evaluated in that light.

FOREWORD

This study constitutes the largest empirical study of the use of previous sexual behaviour evidence in sexual offence trials in the courts of England and Wales ever conducted. It is impossible to understand how such evidence is handled in trials merely from reading reported judgments, because these reflect only cases which the defence has appealed to the Court of Appeal on the basis that such evidence was wrongly excluded by the trial judge, since the prosecution does not have an equivalent right to seek leave to appeal.

The data collected from criminal barristers examines, in depth, 377 cases involving 565 complainants, which proceeded to trial in 105 Crown Courts centres in the 24 months immediately prior to November 2017.

[1] BA (Hons History), MA (History), JD, BCL, MA (Oxon); Associate Professor of Law, University of Oxford, Senior Research Fellow, Wadham College, Oxford, and Barrister, Red Lion Chambers. Disclosure: Professor Hoyano is a member of the Criminal Bar Association, but the data analysis and the conclusions drawn therefrom were compiled entirely independently of the CBA, and no fee was paid by the CBA for her work, which consumed many months. This survey was designed with the advice of the CBA Working Party on section 41: Sarah Vine (Chair), Mary Aspinall-Miles, and Alisdair Williamson QC. The valuable assistance of Nikita Nicheperovich in quantification and depiction of the data was generously funded by the Oxford Law Faculty's Research Support Fund.

This study is unique in collecting data on applications to use previous sexual behaviour evidence in respect of all sexual offences, not just rape, and without any restrictions on complainants as to gender or age. Many children and adolescents feature in the sample. So too do many historical complaints, and many cases involving multiple complainants.

Perhaps most importantly, it is unique in eliciting information from the 179 anonymous barristers who were directly involved in prosecuting or defending these cases in the sample, and who know best what happened, not only in the public court room but also in the closed court room and in the robing room. They in turn are highly unusual in adversarial legal systems in 'walking both sides of the street', possible only due to the existence of the independent Bar, available to be instructed by the Crown Prosecution Service or by the defence in any case. They therefore have a uniquely balanced view of the criminal justice system. Their dedication to the administration of criminal justice in the courts where they practise is revealed by their cooperation with this survey, which required a great deal of time and reviewing of diaries and case papers to refresh memories. I am deeply indebted to them.

I am grateful to Angela Rafferty QC, the Chair of the Criminal Bar Association 2017-2018, whom I persuaded to commission empirical research in the wake of the controversial Ched Evans judgment,[2] so that any law reform proposals could be evaluated in light of current practice. The CBA section 41 Working Party, consisting of Sarah Vine, Mary Aspinall-Miles, and Alisdair Williamson QC, have been unfailing in their enthusiasm and support for the project. I am also very grateful to the anonymous research auditor for helpful comments.

Since the Evans case there has been widespread public disquiet about averted and potential miscarriages of justice in sexual offence cases due to failures in police and CPS disclosure, such as in the Liam Allan, Isaac Itary and Petruta-Cristina Bosoanca cases, which led to the CPS conducting an immediate nationwide review of all live rape and

[2] *R v Evans (Chedwyn)* [2016] EWCA Crim 452, [2016] 4 WLR 169, [2017] Crim LR 406.

sexual assault prosecutions.[3] In reflecting on the complex evidence and interests in play in these cases, it is important to ensure that any revision to the gateways in section 41 of the Youth Justice and Criminal Evidence Act 1999 permits such exculpatory evidence as highlighted in these cases to be admissible. The defendant's right to a fair trial, whilst ensuring that the complainant is not subjected unnecessarily to humiliating cross-examination, remain the essential overarching objectives in every case. They are not incompatible in practice, as this study demonstrates.

Laura Hoyano
Oxford, Michaelmas 2018

[3] Metropolitan Police Service and Crown Prosecution Service, *A Joint Review of the Disclosure Process in the Case of R v Allan* (January 2018), critiqued by Tom Smith, 'The "Near Miss" of Liam Allan: Critical Problems in Police Disclosure, Investigation Culture and the Resourcing of Criminal Justice' [2018] Crim LR 711. Smith describes many more recent cases of prosecution disclosure failure in sexual offence cases. Importantly, defence counsel receive no legal aid payment to review 'unused material' (on which the prosecution does not rely), which can be critical to the defence case..

OVERVIEW

Methodology and description of sample

1. A link to an online survey of 122 questions was circulated in October and November 2017 to the full membership of the Criminal Bar Association (3,880 members), as the practice areas of the membership are diverse and fluid. A total of 179 barristers responded, of whom 166 indicated that their practice had included sex offences within the previous 24 months.

2. 140 barristers provided their views as to whether section 41 was working in the interests of justice. Of these, 83 (52.29%) considered that in general it was, with 66 thinking it need not be amended. However, 50 (35.71%) thought it did require amendment because the wording of the provision was too complex or too restrictive, and no longer reflected the case law, in particular the interpretive requirement to ensure that the defendant had a fair trial. Not a single respondent thought that the provision should be more restrictive and should intercept more evidence of previous sexual behaviour.

3. 140 barristers responded to a set of questions (Annex B) requesting detailed analysis of the use (or absence of use) of section 41 in their most recent sex offence cases within the previous 24 months, with a maximum of 10. This produced a sample of 377 cases. This sample, unlike all previous empirical studies of section 41,
    - encompassed all sexual offences triable in the Crown Court;
    - included all genders of complainants;
    - was not restricted by age of complainant;
    - included cases tried in Crown Court centres across England and Wales.

4. The case sample reflected the following balance of briefs:
    - 92 (65.71%) of respondents had been instructed by the CPS and by the defence
    - 38 (27.14%) of respondents had been instructed by the defence
    - 10 (7.14%) of respondents had been instructed by the prosecution.

It is very likely that most of the barristers in the latter two categories performed the opposite role in sex offence trials outside the sample. That said, that 68.71% of barristers in just 10 cases of their practice in the past 24 months performed both professional roles marks one of the distinctive strengths of the English and Welsh Criminal Bar: most barristers both prosecute and defend, and consequently have a uniquely balanced perspective on the operation of the criminal justice system and its evidential and procedural rules.

5. A total of 105 Crown Courts across England and Wales featured in the sample; section 41 applications were brought in 45 Crown Courts (Annex C), and no applications in the other 60 in the sample (Annex D).

6. The data yielded the following profile of the complainants::
    - 565 complainants, many in multi-complainant indictments;
    - of whom 434 (76.81%) were female, and 131 (23.19%) were male;
    - with the following age profiles as of the date of trial (there being many historical complaints in the sample)
        - 18 and over: 407 (72.0%)
        - 16 and 17: 55 (9.73%)
        - 14 and 15: 50 (8.84%)
        - 13 and under: 53 (9.38%).

Findings

7. Of the total of 565 complainants in the sample:
    - 179 applications were considered; and
    - 144 (25.49%) applications were made. Of these 144 applications:
    - 67 (45.83%) were either agreed between counsel (25, or 27.08%) or granted in full, and 39 (27.08%) were granted in part, for a total of 105 (72.91%) applications with successful outcomes for the defence.

Therefore approximately **18.58%** of complainants in the sample were the subject of section 41 agreements or orders. This falls well short of the persistent claim that

sexual history evidence is adduced in "around one third of trials",[4] but exceeds that claimed by the CPS in extrapolating from a dip sample of rape cases in December 2017 of 8%.[5]

It is essential to appreciate that the ratio of wholly or partially successful applications to complainants is likely to be ***overstated***, due to the conservative counting conventions adopted in the data analysis and described in detail in the Report.

8. The Report provides detailed analysis of the application data in terms of gender split (as identified by counsel), age groups and success rates.

9. Frequently counsel were able to agree either to have the evidence led by the prosecution as part of its case, or introduced by the prosecution in its opening speech, or adduced through an agreed statement of facts. These strategies successfully averted the complainant being confronted with the evidence. The prosecution did this when the evidence was clearly admissible under section 41, and in the interests of ensuring that the defendant had a fair trial, as required by the House of Lords' ruling in *R v A (No. 2)* (2002).[6] This is in accordance with Crown counsel's constitutional role as a minister of justice, and Criminal Procedure Rules and Practice Directions.

10. Most successful applications were on narrow points which could be covered very briefly, and did not authorise wide-ranging cross-examination on previous sexual behaviour.

11. Because of the complexity of the drafting of section 41, it was commonplace for more than one gateway to be invoked in an application. Moreover, different pieces

[4] Clare McGlynn, 'Challenging the Law on Sexual History Evidence: a Response to Dent and Paul' [2018] Crim LR 216, pages 220-221.

[5] Ministry of Justice and Attorney General, *LImiting the Use of Complainants' Sexual History In Sex Cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: the Law on the Admissibility of Sexual History Evidence in Practice* (Cm 9547, December 2017).

[6] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45.

of evidence in an application would be apt to fit through one gateway rather than another, and the data did not allow this to be differentiated.

12. The highest number of applications (71, or 49.3%) cited the gateway of *relevance to an issue other than consent* (section 41(3)(a)), and so were not targeted at the first of the conventional 'twin myths' which most 'rape shield' legislation is designed to intercept, that an unchaste woman would be more likely to consent to sexual activity on the occasion charged. 50 of these applications were allowed in whole or in part, and so constitute the bulk of the successful applications.

13. The second highest number of applications (36, or 25%) were specifically directed at *rebutting evidence led by the prosecution* under section 41(5), a gateway which should be uncontroversial to any fair-minded observer. 26 (72.22%) of these applications were allowed in whole or in part.

14. The evidence disclosed that counsel did not make section 41 applications lightly. Moreover, trial judges and prosecuting counsel very carefully scrutinised the grounds for section 41 applications, as demonstrated by the number of applications which agreed or allowed some but not all proposed questions.

15. It is highly significant that, in a practice which is invisible to academic commentators who tend to rely upon reported appellate judgments, a defendant's right to a fair trial, introduced as an essential gloss under the Human Rights Act 1998 on the interpretation and application of section 41 by the House of Lords in 2002 in *R v A (No 2)*, was a constant backdrop to the resolution of admissibility issues. This makes section 41 work in the interests of justice, in the view of the majority of the respondents in this study.

INTRODUCTION

1. Allegations of criminal sexual assault frequently become contests of credibility.[7] Culpability is distinctive amongst criminal offences, turning (in the case of persons above the age of legal consent) upon not just the subjective mental state of each of the complainant and defendant as to whether each consents to sexual relations with the other person, but also on what the defendant honestly and reasonably believes is the state of mind of the complainant, i.e. whether s/he consents and has the freedom and capacity to consent. The legal issue, of great practical significance, then becomes what evidence is relevant to the trier of fact in evaluating the credibility of the conflicting accounts of the complainant and defendant. This is a matter of enduring controversy in all common law jurisdictions using the adversarial mode of trial.

2. "[R]oaming cross-examinations as to the credit of complainants"[8] were first statutorily restricted by Parliament in 1976. Section 2 of the Sexual Offences (Amendment) Act 1976 required previous leave of the judge before any evidence could be adduced, or any questioning in cross-examination could be asked, at the trial on behalf of the defence about "any sexual experience of the complainant with a person other than that defendant". The judge could grant 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".

3. Before section 2 came into play, however, the courts first had to find that the question was relevant under the common law rules of evidence so as to indicate unworthiness to be believed under oath, which was very rarely the case if the questions merely sought to establish that the complainant had had sexual experience with other persons.[9] There was vigorous academic and political debate as to how effective section 2 of the 1976 Act was in protecting complainants from irrelevant questioning. *Speaking Up for Justice* considered the issue against the background of a high attrition rate in rape

[7] In *R v Funderburk* [1990] 1 WLR 587 (CA) it was observed that the distinction between questions going to an issue in the case and questions going to the credibility of a witness is "reduced to vanishing point".

[8] Ibid at 486.

[9] *R v Viola* [1982] 1 WLR 1138 (CA).

cases, and concluded that there was “overwhelming evidence” that the legislation was not working, and that a frequent defence ploy was to besmirch the complainant’s character in a way which did not relate to the issue of consent.[10] Many judges and advocates vehemently contested this conclusion.[11] Nevertheless the Government accepted the Report’s recommendation that the legislation should prescribe the circumstances in which sexual history evidence could be admitted, whilst rejecting the Scottish model which incorporated a residual inclusionary discretion.[12]

4. The new model adopted by the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999), Part II, Chapter III takes a radically different approach from the 1976 Act. It is very complex in its wording, and intentionally rigid in its structure. Annex A maps the provisions.[13] Subsections 41(3) and (5) establish a closed list of four relevant evidential targets, commonly known as gateways, for which the evidence *might* properly be adduced. These four gateways are:

41(3)(a) the evidence is relevant to an issue which is not an issue of consent, such as the defendant’s belief in consent (under section 42(1)(b));

41(3)(b) it is an issue of consent and the sexual behaviour of the complainant is alleged to have taken place at or about the same time as the event which is the subject matter of the charge;

[10] 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* (June 1998) at [9.62], [9.64].

[11] See Lord Bingham, then the Lord Chief Justice, in the second reading of the Bill, House of Lords, *Hansard* 15 December 1998 Vol. 327, col. 1272; N Kibble *Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999*, pages 15–23 (June 2004, summary published as ‘Judicial Perspectives on the Operation of s. 41 and the Relevance and Admissibility of Prior Sexual History Evidence: Four Scenarios’ [2005] Crim LR , pages at 190 and at 263). See also Baroness Mallalieu QC, *Hansard* HL Deb vol 598 Col 16 (8 March 1999) stating that “the days of insensitive judicial comment and the permitting of unjustified cross-examination, which was irrelevant, insulting and gratuitously intrusive, are, in my personal experience, ones which relate to a bygone age.”

[12] *Speaking Up for Justice*, above n 10, Recommendation 63. Lord Bingham lamented that it would be "a melancholy reflection on parliamentary confidence in the judiciary of England and Wales" to deny them a similar very limited and carefully defined discretion to that in the Scottish legislation: *Hansard*, House of Lords, 15 December 1998 Vol. 327 col. 1272.

[13] Taken from Hoyano & Keenan, *Child Abuse Law and Policy across Boundaries* (OUP, updated 2010 edition), diagram 17, page 764.

41(3)(c) it is an issue of consent and the sexual behaviour of the complainant is in any respect so similar to

(i) any sexual behaviour of the complainant which took place as part of the event charged, or

(ii) to any other sexual behaviour of the complainant taking place at or about the same time as the event

that it cannot reasonably be explained as coincidence;

or

41(5) specifically rebuts or explains any evidence adduced by the prosecution about any sexual behaviour of the complainant.

5. Of particular note are the following features:[14]

- Subsection 41(4) forbids evidence if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked would be to establish or elicit material for impugning credibility of the complainant *as a witness*. The subsection thus seeks to prevent questions or evidence to impugn credibility which otherwise the court would have viewed as relevant to the issues being tried,[15] as relevance to a fact in issue is a precondition to the admissibility of all evidence tendered by any party.
- Unlike the 1976 Act, the restrictions apply to previous sexual behaviour with the defendant charged, as well as with any third party.
- The only gateways which are *not* predetermined in terms of the substance of the evidence are those which apply where the target does *not* relate to consent. In other words, Parliament has definitively prescribed the situations where other sexual behaviour is to be treated as relevant to consent, regardless of the other evidence in the trial. Subsection 41(5) is triggered by the way in which the prosecution has framed its case.

[14] For more detailed analysis, see HHJ Peter Rook QC and Robert Ward QC, *Rook & Ward on Sexual Offences: Law & Practice* (5th edn, Sweet & Maxwell 2016), chapters 20, 26, and, in respect of children and adolescents, Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy across Boundaries* (2007, updated paperback edn, OUP 2010), pages 762-767.

[15] *R v Martin* [2004] EWCA Crim 916, [2004] 2 Cr App R 22 [18]; *R v Floyd Charles Darnell* [2003] EWCA Crim 176 [39].

- A trial judge has no general discretion to exclude or limit the evidence of sexual behaviour which is related to a relevant issue in the case; it *must* be allowed to pass through the applicable gateway. The only additional filter is subsection 41(4) (evidence is deemed irrelevant if the main purpose is to impugn the complainant's credibility *as a witness*).[16] This absence of exclusionary discretion can be misunderstood by non-practitioners criticising specific judgments.
- The prohibition on evidence of 'sexual behaviour' applies *only to the defence* (as did section 2 of the 1976 Act). The prosecution, without seeking leave of the court, can adduce evidence of the complainant's previous sexual behaviour, a feature which the CBA Study shows happens not infrequently to ensure a fair trial. Conversely, the Court of Appeal has suggested that the trial judge should exercise his discretion to exclude evidence under the Police and Criminal Evidence Act section 78, if the use of previous sexual experience evidence by the prosecution would render the trial unfair to the defence.[17]
- The statutory prohibition applies not just to the cross-examination of the complainant, but also to any evidence elicited by the defence from *any witness*, including from the defendant himself when testifying.
- Moreover, section 41 applies only to defence evidence relating to the complainant's *'sexual behaviour',* which is further defined by subsection 42(1)(c) as including 'other sexual experience' whether it involved the defendant or any other person (and so could apply to solitary, online, or nonconsensual sexual activity). Therefore an important issue often is whether the proposed evidence of conduct constitutes 'sexual behaviour', such as text messages and Facebook postings, which may in turn depend upon the specific factual context. If defence counsel contends that the question is not directed at the complainant's sexual behaviour, s/he still has a professional obligation to apply for a ruling that section 41 is *not* triggered,[18] although the CBA Study shows that this is often agreed with prosecution counsel.

[16] *R v F* [2005] EWCA Crim 493, [2005] 2 Cr App R 13.

[17] *R v Naveed Soroya* [2006] EWCA Crim 1884, [28] (*obiter*).

[18] *R v MH; R v RT* [2001] EWCA Crim 1877, [2002] 1 Cr App R 22, [41].

- The House of Lords in *R v A (No 2)*[19] held that the interpretation of section 41 is subject to the guarantee of the Human Rights Act 1998 that the defendant has a right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). A balance must be struck between the probative value of the evidence of sexual behaviour and its potential prejudice in diverting the jury from the real issue.[20] Lord Steyn observed that the concept of a fair trial requires the court to take account of "the familiar triangulation of interests of the accused, the victim and society", and in this context proportionality has a role to play.[21] The House of Lords in *R v A (No 2)* held that the UK courts must interpret the 'similarity/coincidence' gateway in s 41(3)(c) sufficiently broadly (by subordinating the "niceties" of the statutory language of "similarity "and "coincidence")[22] to ensure that evidence is admitted where it is "'so relevant to consent that to exclude it would endanger the fairness of the trial" under the ECHR Art 6(1).[23] Consequently the 1999 extension of the prohibition on questioning on previous sexual behaviour to previous sexual contact with the defendant had to be read flexibly, so as not to mislead the jury by "disembodying" the narrative through withholding evidence of a previous consensual sexual relationship.
- The application is to be made to the trial judge in a preparatory hearing,[24] and the defendant may appeal an adverse ruling on an interlocutory basis to the Court of Appeal and the UK Supreme Court.[25]

6. Notwithstanding the strictures of section 41, campaigners in the field of sexual assault contend that it is still too lax, for example in contemplating the admission of evidence of previous sexual behaviour with third parties; they also claim that it is routinely

[19] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45.

[20] Ibid, [55] (Lord Hope), adopting the Supreme Court of Canada's stance in *R v Seaboyer* [1991] 2 SCR 577 (SCC), 634.

[21] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, above n 19, [38].

[22] Ibid, [45] (Lord Steyn).

[23] ibid, [46] (Lord Steyn).

[24] Criminal Procedure and Investigations Act 1996 ss 29, 31.

[25] i.e. before the trial commences: ibid ss 35, 36.

flouted in the courts of England and Wales.[26] Two empirical studies in particular are cited in support of this proposition, conducted by LimeCulture and by Vera Baird QC, the Police and Crime Commissioner for Northumberland. The methodology of these studies is critiqued in the next section. In reliance upon these studies, Dame Harriet Harman QC, a former Solicitor General in a Labour government, proposed an amendment to section 41 which would have prohibited all questioning on previous sexual behaviour of a complainant. Section 41 would have read as follows under this Bill:

> *If at a trial a person is charged with a sexual offence, then—*
>
> *(1) no evidence may be adduced, and*
> *(2) no question may be asked in cross-examination,*
>
> *by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.*

7. Subsequently, in January 2018, after the data for the CBA study was collected, a cross-party group of MPs led by Harriet Harman QC MP proposed a more modest package of reforms,[27] which would:

- prohibit evidence of a complainant's sexual activity with anyone other than the defendant as evidence to show consent;
- give the complainant a right to participate and be represented in the hearing of any section 41 application; and
- require that no judge could hear a 'rape case' without having attended the sexual violence training course.

8. This study was commissioned by the Criminal Bar Association to evaluate these claims that section 41 in its current form is not working as intended by Parliament, through an empirically rigorous survey of actual cases in which its members were involved as counsel for the prosecution or for the defence. The specific methodology of the CBA study is described below in paragraphs 44-46.

[26] e.g. Clare McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence' (2017) 81 JCL 367.

[27] Harriet Harman QC MP, *New Cross-Party Coalition Launches Challenge to Attorney General and MoJ on Use of Rape Complainants' Previous Sexual History in Court* (29 January 2018).

PREVIOUS EMPIRICAL STUDIES

9. As the CBA study was designed to respond to previous empirical studies on the back of which the 2017-2018 reform proposals were formulated, it is necessary first to review their findings and research methodology, and to identify any difficulties in relying on them as representing current practice in the courts of England and Wales.

Liz Kelly, Jennifer Temkin & Sue Griffiths, *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Report: London, 2006)[28] (hereafter "the 2006 Home Office Study")

10. This study was commissioned by the Home Office from three established academic researchers, well-known for their critical-legal approaches to sexual assault prosecutions, including to sexual history evidence.[29]

11. The research was carried out during 2003 and the first half of 2004,[30] albeit not reporting until 2006. The study involved several empirical methodologies (the present author's comments appear in parentheses):

- secondary analysis of Home Office statistical data for rape offences proceeding to magistrates' courts and Crown Courts in 1998-2002, to calculate conviction rates (part of the data therefore predating the commencement date for YJCEA 1999 section 41 of 27 July 1999, and the remainder representing the implementation and bedding-in period); [31]
- critical analysis of 13 recent reported legal cases, delivered up to mid-2004;[32]
- prospective tracking of all rape cases coming before Crown Courts in England and Wales during a three-month period in 2003, with court

[28] Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006).

[29] Liz Kelly, Jo Lovett and Linda Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293, Feb 2005); Jennifer Temkin, *Rape and the Legal Process* (Sweet and Maxwell 1987); Jennifer Temkin, 'Sexual History Evidence: the Ravishment of Section 2' [1993] Crim LR 3; Jennifer Temkin, 'Sexual History Evidence -- Beware the Backlash' [2003] Crim LR 217; Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: a Question of Attitude* (Hart 2008).

[30] Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006) page 4.

[31] The authors found little useful data from this secondary analysis: ibid, page 6.

[32] Decided after *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45.

managers expected to complete a pro forma on section 41 and third party disclosure applications; this yielded a sample of 63% of all trials during that period (n = 236);

- analysis of 40 to 50 CPS case files from each of four areas: Greater Manchester, London,[33] Newcastle and Sussex (n = 170);
- observation of trials involving single complainants and single defendants, listed for up to 5 days, in Greater Manchester, four Crown Courts in London, and in Newcastle (n = 31); however only 23 of these 31 cases went to full trial;[34]
- interviews with judges (17), barristers (7) and CPS lawyers (9);
- interviews with complainants (19), police officers (40) and Sexual Assault Referral Centre (SARC) staff (10) (it is unclear why so many more persons in these categories were interviewed than judges and lawyers);
- Questionnaire returns from Rape Crisis Centres (16), Victim Support (39) and the Witness Service (18).

12. Kelly, Temkin and Griffiths concluded that there were problems with the legislation and procedure, as follows (the present author's comments appear in parentheses):[35]

- the lack of definition of the terms "sexual behaviour" and "sexual experience" caused uncertainty among practitioners as to the scope of section 41 (this specific problem has been largely resolved through later appellate caselaw);
- the vast majority of applications were made at trial and presented verbally, making the procedural and substantive requirements "more easily evaded"[36] (no reasons were given by the researchers as to why the applications in the case sample were made late, so they seem to have assumed their conclusion that this was, in their words, a deliberate

[33] Only 20 files were made available for examination from the whole of London: Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006), page 7.

[34] Ibid, page 8.

[35] Ibid, page vii.

[36] Ibid, pages vii, 36-37.

avoidance or flouting of the rules;[37] they also inferred no written application had been made from its absence on the CPS file,[38] but reliance on CPS filing practices may not be a reliable indicator);[39]

- these oral applications disadvantaged the prosecution, as counsel did not have the opportunity to consult with the CPS or the complainant about possible objections (no empirical evidence being offered as to that disadvantage in the case sample);
- defence counsel appeared to time applications to come just before or during cross-examination, the researchers assuming that this was intended to "create the most pressure on the complainant"[40] using "devious tactics"[41] (however, again the reasons for the timing do not seem to have been explored by the researchers with either defence or prosecuting counsel, so this seems speculative, as they often arise from developments in the trial[42]);
- the authors attributed the ignorance of CPS lawyers of the Crown Court Rules governing section 41, including those with lead responsibilities on rape, partly to the failure of the defence to follow them[43] (a rather odd finding);
- sexual history material was introduced without reference to the legislation at all, judges either failing to notice or failing to sanction the defence for the breach;
- sexual history matters were often resolved by agreement between the prosecution and defence; in the researchers' view such agreements did not necessarily adhere to section 41;[44]

[37] Notwithstanding that one of the barrister interviewees stated it was because there was no payment for pre-trial preparation and very low fees for appearances at pre-trial hearings (ibid, page 56).

[38] Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006), pages 31, 32, 36.

[39] Ibid, pages vii, 24, 36-37, 70. Applications may be recorded generically as "legal argument", or may not be noted at all.

[40] Ibid, pages vii, 47.

[41] Ibid, page 48.

[42] See ibid, pages 43, 47.

[43] Ibid, page 36.

[44] Ibid, pages 54-55.

- sexual history evidence was raised in some cases involving minors, raising concerns that, irrespective of the exploitative nature of the past events, children were more often represented as sexually active rather than sexually vulnerable (however, the researchers did not consider the reasons for the particular relevance previous sexual abuse may have in child abuse prosecutions);[45]
- the researchers castigated judges for allowing evidence of a motive to lie "even though this related to credibility"[46] (but section 41 does not prohibit all evidence going to the complainant's credibility, and the absence of such evidence is frequently relied upon by the prosecution;[47] moreover claims that a particular allegation of sexual assault is false cannot be generalised as necessarily being based on myths); and
- there was a statistically relevant association (90%) between a section 41 application being granted in respect of an adult complainant, and an acquittal[48] (whilst this figure is initially startling, the granted applications consisted only of 29 of 136 cases in a small research sample,[49] such that a causal connection should not be inferred as a general conclusion; nonetheless the researchers seemed surprised when there was a conviction where an application had been granted, placing undue stress on a tenuous statistical relationship).[50]

13. The authors misinterpreted the previous empirical study by Neil Kibble commissioned by the Criminal Bar Association as concluding that section 41 was

[45] Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy across Boundaries* (2007, updated paperback edn, OUP 2010), pages 767-777.

[46] Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006), pages 73

[47] Discussed further below, para. 19, 10th bullet point.

[48] Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006), page 27, Table 4.10. This statistical significance was identified for the tracked prospective Crown Court cases but was not identifiable in the CPS records (pages 35, 36 and Table 5.3), nor for the 23 trial cases observed by the researchers (page 47).

[49] As conceded by the researchers: ibid, page 28. 75% of defendants were acquitted in the nine cases where section 41 applications had been made and refused.

[50] See the examples relating to child complainants ibid, pages 32,44, 46.

"fundamentally flawed" because it allowed the admission of irrelevant evidence;[51] on the contrary, Kibble's conclusion was that section 41 was fundamentally flawed due to its rigidity.[52]

14. The researchers made several substantive recommendations for amendment of section 41, and for changes to the procedure, including prohibiting the prosecution from tendering sexual behaviour evidence, (the unexpressed premise being that it is always irrelevant), permitting complainants to be present at hearings of applications so the previous conduct allegation could be "tested"[53] during the application (the manner of such testing being unspecified), and giving the prosecution a right of appeal against decisions admitting sexual behaviour evidence. None of these recommendations has been adopted by successive Governments.

15. The Home Office 2006 study is the strongest of those considering section 41 in practice in terms of empirical methodology. However, there are several limitations in terms of its current relevance to the ongoing debate over section 41:

- the researchers focussed on adult female complainants and stereotypical assumptions about them[54] (page vii), whereas section 41 is applied to sexual assault complainants of all genders and ages;[55]
- the sample of cases was restricted to alleged rape offences, and then only of females;
- the research report was based upon field research carried out in 2003 to mid-2004, and thus relied upon data from the initial court experiences with section 41; since then there has been extensive training of judges and of barristers on the trial of sex offences, including section 41;

[51] Ibid, page 4.

[52] Neil Kibble, 'Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999' [2005] Crim LR 190 and 263, page 274. That this interpretation of his finding is an error was confirmed by Dr Kibble in personal correspondence on 20 September 2018.

[53] Liz Kelly, Jennifer Temkin and Sue Griffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006) pages viii, 77.

[54] Ibid pages vii, 1-4.

[55] In the CBA study male complainants comprise 23.2% of the sample; see Figure 9.

- appellate caselaw has served to provide greater guidance to trial judges and to advocates as to the meaning of terms in section 41 such as “sexual behaviour”, and to measure the breadth of the four gateways;
- successive Crown Court Compendia[56] have considered how trial judges should address the stereotypes about which the researchers were concerned, such as delayed complaint, the absence of injury, rape between acquaintances etc.;
- the Criminal Justice Act 2003 section 100 has been enacted which greatly restricts cross-examination of witnesses other than the defendant on their alleged bad character, which has been interpreted as requiring an evidential foundation before allegedly false previous allegations of sexual assault may be put to a complainant;[57]
- an ethos of active case management infuses the Criminal Practice Rules and Criminal Practice Directions instituted since that research, and all applications, even those made mid-trial; must be made in writing and list the proposed questions;
- all prosecuting advocates must be accredited on a CPS Rape and Serious Sexual Offence (RASSO) panel and undergo initial and regular refresher training; and
- within the CPS, rape prosecutions are supposed to be handled by experienced lawyers embedded in RASSO teams.

16. Notwithstanding these developments since 2003-4, the study by Kelly, Temkin and Harris is still being cited in 2018 in academic literature as being representative of the

[56] The most recent being Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018) see in particular chapter 3-1, section 3-1A, suggesting the trial judge in a sex case might give directions at the outset to counter stereotypes and myths (delayed complaint, absence of physical resistance or verbal protest, the need to take into account the age of the witness, consent and submission); and example directions in chapters 10 (delayed complaint) and 20 (danger of assumptions, new complaints in testifying, consistent and inconsistent accounts, lack of or show of emotional distress whilst testifying; provocative clothing; intoxication; previous consensual sexual activity between parties on same or previous occasions; fear and absence of force or threats of force; historical allegations, etc.)

[57] Thereby removing one of the conclusions in the report (question 7, page 73): *R v Alan David C and Julie B* [2003] EWCA Crim 29 [27]; *R v TW* [2004] EWCA Crim 3103; *R v Abdelrahman* [2005] EWCA Crim 1367; *R v Lee Archer* [2003] EWCA Crim 2072 (CA) [14]; *R v Stephan H* [2003] EWCA Crim 2367 [30]-[31].

current situation in England and Wales.[58] There is always a danger in relying upon older empirical studies as representing the current position, not least because the underlying assumption is that those studies and other evaluations have had no impact whatever in influencing a change in culture, nor on law reform through judicial interpretation and Criminal Practice Directions.

Vera Baird QC (Northumbria Police & Crime Commissioner) et al, *Seeing Is Believing: The Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16*[59]

17. This study was wholly reliant upon the observations of 12 lay observers[60] of 30 trials in a single Crown Court in Newcastle, Northumbria. The trials were restricted to rape cases involving adults, and took place over about two years. The observers reported that questioning they regarded as falling within section 41 took place at 11 of the 30 trials.

18. The justification for using volunteer lay observers was stated by the authors to be that "the best people to observe the courts on behalf of the public, under the auspices of an elected Police and Crime Commissioner, are the public themselves".[61] This justification, however laudable, is illogical because it assumes that lay observers are capable of observing and understanding everything about a trial, including what occurs without the public and the jury being present, and involving complex issues of statutory and case law.

[58] Sharon Cowan and Liz Campbell, 'The Relevance of Sexual History and Vulnerability in the Prosecution of Sexual Offences' in Peter Duff and Pamela Ferguson (eds), *Scottish Criminal Evidence Law* (Edinburgh University Press 2018), fn 4; Clare McGlynn, 'Challenging the Law on Sexual History Evidence: a Response to Dent and Paul' [2018] Crim LR 216, fn 43.

[59] Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017).

[60] Of those observers, only three were male.

[61] Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017), page 4.

19. The questionnaire included as Appendix 1 to the report shows that the observers were being asked to record highly subjective impressions[62] of the performance of the trial judge and of counsel during the trial, in public, without a thorough understanding of the adversarial trial, the rights of the defence, the legal framework of the Sexual Offences Act 2003 nor of the relevant rules of evidence. It is very unlikely that they would have had access to the indictment, so might well have difficulty identifying evidence that pertained to the charges being tried. Nor could they know of the extensive discussions which are expected by the Criminal Practice Rules and Directions to take place between counsel before and during the trial outside the court room, in order to resolve issues and to expedite the trial. The report concludes "what they have seen has happened".[63] More accurately, what they *think* that they have seen *may* have happened.

20. There are significant limitations on this study, particularly in relation to the lay observers' and the researchers' understanding of the application of section 41, and of the criminal justice system in general.

- No information is provided of the content or depth of the "training" regarding the relevant law provided by CPS lawyers (who do not deal themselves with section 41 applications by the defence).
- Crucially, the report's authors themselves did not understand section 41. They described it as providing that:

> … previous sexual conduct may not be used if its purpose/main purpose is to impugn the complainants [*sic*] credibility EVEN if it '*relates to a relevant issue in the case'* (ss3) and EVEN IF the material is such that its exclusion '*might have the result of rendering unsafe the conclusion of the jury'* (ss2b)." (All forms of emphasis in the original).[64]

[62] e.g. Question 9 "What is your opinion on the empathy the Judge demonstrates when asking the complainant to take the stand to give her evidence?" Question 11 "Comment on cross-examination: is it a fair putting of the defendant's case or is it an attempt to undermine the complainant by being aggressive/demeaning/undermining her confidence/suggesting things to her discredit?" Question 21 "Did the defence open the case? If so were there any rape myths, attacks on the complainant as opposed to reasoned argument about the facts?" Question 29 "Comment overall on the conduct of the case and the treatment of the complainant and all parties. What is your judgment on the strength of the case and the outcome and the performance of all the criminal justice agents and how they contributed positively or negatively?" (ibid, page 44).

[63] Ibid, pages 37, 41..

[64] Ibid, page 39. This description also contradicts the preceding paragraph in which it is asserted that not relevant if its purpose or main purpose is impugning the credibility of the complainant as a witness.

Subsection 41(4) prohibits previous sexual behaviour evidence if it is used merely to suggest that by virtue of that previous sexual conduct, the complainant is to be considered not credible *as a witness*, i.e. the second of the 'twin myths'; that crucial qualifier was omitted by the researchers in the Northumberland Study.[65] The Court of Appeal has ruled that the identification of another relevant issue falling to be proved by the prosecution or the defence is to be construed generously.[66] A court cannot exclude relevant evidence where that ruling would render the verdict unsafe, as that would infringe the defendant's right to a fair trial at common law and under the Human Rights Act 1998. As the Law Lords held in *R v A (No 2)*, section 41 must be construed by trial judges "subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of [the ECHR] should not be treated as inadmissible".[67]

- The authors assumed that no case arose in the sample which called for the application of the principles in *R v A (No 2)* because no case involved a previous consensual cohabiting relationship between the parties.[68] This is incorrect, as one of the cases in the sample involved estranged spouses.[69] This assertion also disregards the fact that the judgment extended well beyond the specific facts of that case, to interpreting section 41 to comply with the right of the defendant to a fair trial under the Human Rights Act 1998 and Article 6 of the European Convention on Human Rights, as was held by the Court of Appeal in 2007.[70] It is not stated whether the lay observers were told to be alert to the fairness concepts in *R v A (No 2)*, nor

[65] Identified by the Supreme Court of Canada in *R v Seaboyer* [1991] 2 SCR 577 (SCC) (above n 20), the first myth being that an unchaste woman is more likely to have consented to the alleged sexual activity with the defendant. The twin myths are incorporated into the general prohibition in section 276(1) of the Criminal Code of Canada.

[66] *R v Martin* [2004] EWCA Crim 916, [2004] 2 Cr App R 22 [33].

[67] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 [45].

[68] Although even this is unclear, as cases T23 and T26 seemed to fall into this category: Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017), page 11.

[69] Case T14 (confirmed by counsel in the case to a member of the CBA Working Party).

[70] *R v Hamadi* [2007] EWCA Crim 3048 [18].

how they were expected to identify whether it was being invoked in argument or in a ruling.

- From the recommendations it appears that little if any attention in the training of observers may have been given to the rights of the defence to a fair trial in reality and not just in theory. Nor did they understand the role of the advocate for the defendant. Defence counsel was criticised for adopting a strategy in cross-examination to "discredit [the complainant] in the eyes of the jury", and for not offering "specific refutation of the facts [*sic*] of the case" in cross-examination beyond the defendant's denials.[71] There is no such evidential burden on the defence.
- An example of disregard for defence rights was the observers' concern that a trial was adjourned for a month because the defendant's barrister was ill,[72] whereas the trial judge was respecting the defendant's right under ECHR Article 6(3)(c) to be represented by counsel of his choosing. The researchers in turn recommended that judges instruct court staff not to give paramountcy to the availability of defence counsel in listing or relisting a trial. This presented a similarly obvious difficulty in terms of defence rights, and ignored the numerous other factors influencing the initial listing and any adjournments, many of the most common having nothing to do with the availability of defence advocates, such as the unavailability of Recorders, courtrooms, and prosecution witnesses. There are so many competing demands for expedited trials that listing officers cannot accommodate all of them, as might be theoretically desirable.
- The lay observers did not attend any pre-trial proceedings[73] and so apparently were not in a position to know whether an application under section 41 had been notified at a PTPH, nor made at a subsequent hearing, nor whether a ruling had ensued. If they were informed by others, that is not stated, as it should have been. So the lay observers appear to have leapt to a conclusion that in seven of the 11 cases where there was questioning

[71] Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017), page 23.

[72] Ibid, page 25.

[73] Ibid, pages 8, 9.

which the lay observers concluded came within the ambit of section 41, "the correct rules of procedure were not followed",[74] when this was not necessarily the case. In two (possibly three) cases the observers seem to have skipped days of "legal argument" at the outset of trials, when this would have been the occasion for sexual behaviour evidence to be addressed with the trial judge.[75] In another they criticised a judge for allowing an application without "full argument", when it seems from the context that it was unopposed.[76]

- The observers also criticised defence counsel for making late applications in three trials "in disregard of the Rules", assuming that counsel had been in a position to make the application earlier, and then criticised the prosecution for not objecting to the lateness of the applications. It appears that they did not know of the problems of late disclosure or issues arising from the testimony of previous witnesses or of the complainant, which the CBA Study shows frequently cause late applications. They did not criticise the trial judge for having granted the applications although the implicit assumption was that the applications should have been denied. The researchers recommended that the CPS remind barristers that they are "required" to challenge all late applications,[77] apparently regardless of the circumstances, and that judges be more robust in denying such applications on the ground that they were out of time, notwithstanding that the material was important to the defence.[78] Again, ECHR Article 6 issues were not pondered by the authors, a surprising omission given the centrality of Article 6.
- The lay observers were also not in a position to know whether agreement had been reached between the prosecution and the defence as to the admissibility of previous sexual behaviour evidence, and so seem to have assumed that any such questions were in breach of section 41.

[74] Ibid, page 8.

[75] Ibid, cases T20 and T23, page 10, and possibly T29 (page 11).

[76] Ibid, case T1, page 10.

[77] Ibid, page 9.

[78] Ibid, pages 11, 35.

- The lay observers criticised prosecuting counsel for not objecting to applications where the observers thought the evidence was irrelevant. Since the order was granted, it is very likely that they did not understand the basis of the application, showing the limitations of this methodology.[79]
- The report also wrongly asserted that the reasons for a complainant making a false allegation, revenge, constituted a "rape myth",[80] whereas this is a matter which the defence must raise under the Criminal Justice Act 2003 section 100 (on the basis of evidence if it pertains to a previous allegation). Moreover, the motive for a false allegation in the case being tried is a standard question put by the prosecution in cross-examining the defendant (and left with the jury for consideration), and so defence counsel is required pre-emptively to put that case to the complainant under the rule in *Browne v Dunn*.[81] Similarly some of the evidence ascribed by the observers to rape myths were relevant to setting up reasonable belief in consent under the Sexual Offences Act 2003, and also had to be put to the complainant.
- In some instances the observers seem to have confused the identities of prosecution and defence counsel, or other basic aspects of trial procedure, assuming that the judge should "support" the complainant.[82] In others they (and the authors) assumed that an order was contrary to section 41,[83] not understanding that an order was properly made under another statutory provision,[84] or did not understand the relevance of the evidence to a fact in

[79] This is borne out by some of the notes of the observers recorded in the report expressing puzzlement at the relevance of evidence which, when collated with evidence elsewhere in the report, becomes clear (e.g. case T20). In one of the cases observed, T14, counsel confirmed to a member of the CBA Working Party that the observers misconstrued the reason the evidence was considered both relevant and admissible (under CJA 2003 section 100 because the complainant had lied about her infidelity); the report stated that this was "an area of questioning clearly intended to fall within the Section 41 provisions" (page 8; also page 11). This is incorrect in law.

[80] Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017), page 28.

[81] *Browne v Dunn* (1894) 6 R 67 (CA).

[82] Eg cases T1, T13, described by Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017) at pages 10, 25.

[83] Ibid, cases T12 and T14 (lies about sexual activity with third parties), page 11 and recommendation 4.

[84] Ibid, case T14, page 8.

issue because they had not collated the evidence in the prosecution case.[85] They seem to have regarded any evidence undermining the credibility of the complainant as impermissible, even where that assertion had been set up by the complainant's previous testimony, and where it did not relate to previous sexual behaviour, such as disruptive behaviour after (and attributed by prosecution witnesses to) the alleged incident, violence, and alcohol dependency potentially affecting memory, or subsequent text messages to the defendant.[86] They blamed barristers for solicitors' mistakes, labelling the former as "totally incompetent".[87] Some observations simply did not make sense, e.g. "'[The prosecutor] asked a lot of leading questions. He did not steer the victim (*sic*) most of the time."[88] In another the observers criticised the prosecution after a section 41 order for not calling the complainant's teenage children about whether their mother had committed adultery with two men.[89] The observers also thought it improper that the defence be allowed to adduce evidence of his own good character,[90] and the authors recommended that prosecutors in their opening speeches be "required" to "address and dispel rape stereotypes relating to … rape defendants".[91]

- Some lay observers assumed that bad character evidence ruled admissible as being of "substantial probative value" to a matter in issue of "substantial importance" to the case as a whole, under CJA section 100, nonetheless should have been barred by YJCEA section 41;[92] this was not so as the

[85] E.g. Ibid case T20, page 11 (explained why the complainant was present at the scene), and case T6 (complainant upset by father's illness as alternate cause of deteriorating behaviour).

[86] E.g. cases T6, T9, T22, T26, T6, ibid, pages 23, 27, 30.

[87] Ibid, case T24, pages 28-29.

[88] Insertion of "the prosecutor" in the original report: ibid, page 21.

[89] Ibid, page 32.

[90] *R v Vye; Wise; Stevenson* (1993) 97 Cr App R 134 (CA).

[91] Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017), page 29.

[92] *R v Vye; Wise; Stevenson* (1993) 97 Cr App R 134 (CA), cases T1, page 9 (alleged lies), T12 (drugs and shoplifting), T14 (professional suspension from work, alcoholism, arrest).

evidence did not concern "sexual behaviour".[93] It seemed that they regarded any questions at all which discredited the complainant as barred by section 41. Thus they misunderstood the essence of what is contested in a typical rape trial, the credibility of the conflicting narratives of the parties.

21. The quality of the analysis of the data was impaired by a misunderstanding of the fundamental roles of prosecuting counsel and the trial judge to ensure that the defendant has a fair trial. Thus the authors expected the CPS to instruct prosecuting counsel to "robustly oppose" *all* section 41 applications, even those made in accordance with the rules and the provisions of section 41.[94] This recommendation is obviously contrary to the intent of Parliament which was to allow relevant evidence through the four gateways, as well as to the ethical obligations of the prosecutor as a minister of justice not to block the defence from presenting relevant and admissible evidence.

22. In any event, in only 11 trials observed (36%) was there questioning or evidence about previous sexual conduct of the complainant. Moreover, in two of the 11 cases, the trial judge intervened to stop questioning in the absence of a section 41 application, reducing the overall number to nine of 30 trials (30%). This does not suggest that section 41 is routinely misused in Newcastle Crown Court, although the lay observers and authors claimed that it was misused in four cases (misstating the provisions of section 41 in so doing).[95]

23. The study acknowledges that the findings do not qualify as a scientific contribution to academic literature, and cannot be extrapolated nationwide,[96] but nonetheless makes sweeping recommendations for changes to the adversarial system of trial, especially to the role of prosecuting counsel which would undermine their role as ministers of justice

[93] HHJ Peter Rook QC and Robert Ward QC, *Rook & Ward on Sexual Offences: Law & Practice* (5th edn, Sweet & Maxwell 2016), paras. 20.151-20.152.

[94] Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017) page 11.

[95] Ibid, page 39.

[96] Ibid, page 42.

under the Farquharson Guidelines.[97] The Northumberland Study provides a very slender and unstable empirical basis for those particular recommendations.

LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)*[98]

24. This report, dated September 2017, was conducted by (or on behalf of — it is not stated) a private organisation which trains Independent Sexual Violence Advisors. Its findings are endorsed by Baroness Newlove, Victims' Commissioner for England & Wales in a Foreword.

25. The data collected claimed that the 36 ISVAs who responded had attended over 550 trials in the period from April 2015 to April 2017.[99] It claimed that "significant numbers of trials" included questioning the 'victim' about their previous sexual history,[100] going on to say that:

> Given that the presumption built into s 41 YJCEA 1999 that a complainant's sexual behaviour will not be admitted into evidence, it is interesting that only 25% (one quarter) of the ISVAs who took part in the survey report that none of the cases they were present at included questioning the complainant about previous sexual history. Conversely, 11% of the ISVAs who responded said that more than half of the case of that they were present at included questioning the complainant about previous sexual history.[101]

26. Seven ISVAs claimed that in over 75% of the cases they attended the 'victim' was not aware that there would be questioning about previous sexual history, which the study found "most concerning".[102] Eleven respondents claimed that the complainant's sexual behaviour "is often introduced by the defence without making a proper application to do

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[97] *Farquharson Guidelines: the Role of Prosecuting Advocates* (1985) available on the CPS website at https://www.cps.gov.uk/legal-guidance/farquharson-guidelines-role-prosecuting-advocates.

[98] LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)* (September 2017).

[99] Ibid para 14.

[100] Ibid para 16.

[101] Ibid para 16.

[102] Ibid para 23.

so",[103] and that in such cases "this is not always stopped by the judge or challenged by the prosecution"[104] – thus assuming that intervention was required because the legislation had been breached. Many respondents said they felt the previous sexual behaviour "can never, or can only rarely, be of relevance",[105] showing an apparent bias against the current law.

27. The validity of the study's findings is undermined by some significant flaws in empirical methodology.

28. Firstly, it is clear from the LimeCulture report that its (unnamed) authors were seriously misinformed about the scope of section 41. Their description of its scope in para. 6 completely overlooked gateway (a), which is broader than the other gateways, as it allows relevant evidence of sexual behaviour to be admitted if it is relevant to an issue other than consent. The data from the CBA section 41 survey show that gateway (a) is the ground most commonly invoked in section 41 applications, concerning a very wide range of evidence, including anything relevant to the defendant's reasonable belief in consent.[106] Moreover, the authors failed to note that section 41 applies only to defence evidence, instead describing it as a blanket prohibition on all sexual behaviour evidence; accordingly it is entirely possible that some of the cases reported by the respondents related to evidence adduced by the prosecution, which the CBA Study shows is a common occurrence. Since LimeCulture surveyed only its own former students whom that organisation had trained, the inference is open that they had been misinformed about the scope of section 41 in their training, just as the authors were, and applied their erroneous knowledge to the survey questions.

29. Secondly, there is no reference to the rights of the defence to a fair trial in the LimeCulture report. The authors do not refer to the seminal judgment of the House of Lords in *R v A (No 2),*[107] which stressed that a court in interpreting and applying section

[103] Ibid para 26.

[104] Ibid para 27.

[105] Ibid para 28.

[106] See below, Figure 17.

[107] [2001] UKHL 25, [2002] 1 AC 45.

41 must consider the defendant's "absolute and fundamental right" under ECHR article 6(1) to a fair trial, assessed by reference to the overall fairness of the proceedings:

> … due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, **the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial** under [ECHR, Article 6].[108] (emphasis added)

This raises unanswered questions about the knowledge of the anonymous researchers and of the ISVA respondents of the relevant law.

30. Thirdly, the very nature of the functions of the ISVA means that they are unlikely to have the necessary background knowledge to be able to judge whether questions asked in cross-examination of the complainant breached section 41. According to the CPS, the role of the ISVA includes:[109]

- understanding the views, wishes and concerns of the victim;
- providing support and information through interviews and court hearings;
- familiarisation with the court and its procedures and guidance on Special Measures;
- accompanying the victim on a pre-trial visit to court and while they give evidence in court or the live link room (where the court approves this);
- acting as a key liaison point with family members, friends;
- liaising with legal, health, education and social work professionals and those offering therapy and counselling prior to a criminal trial; and
- arranging links with experts if there are specific vulnerabilities.

None of these functions requires the ISVA to attend court when the complainant is not present, in particular for a Plea and Trial Preparation Hearing (PTPH) which is where a section 41 application is typically indicated, and a timetable set down for the application, nor for the separate section 41. They would not have had access to the indictment so

[108] Ibid, at [46] (per Lord Steyn).

[109] Crown Prosecution Service, *Speaking to Witnesses at Court* (CPS, revised 27 March 2018) para. 5.6 (https://www.cps.gov.uk/legal-guidance/speaking-witnesses-court).

might well have difficulty identifying sexual behaviour evidence that pertained to the charges being tried.

31. Whilst a central function of the ISVA is to accompany the complainant to court, section 43(1) requires that the application be heard in private and in the absence of the complainant,[110] so the likelihood that an ISVA would be present during an application is virtually nil (and indeed the defence advocate would be justified in asking that the ISVA also be excluded from court during oral argument, since the public is also not allowed to attend, and the ISVA would not be fulfilling any assigned function).

32. Accordingly it is very improbable that the ISVA would have any idea what was discussed between counsel and with the court on a section 41 application, and in particular whether, for example:

- the application was ruled to fall outwith section 41 and instead was permitted through another route, such as the bad character provision of CJA 2003 section 100 (for example, evidence of a previous false allegation of sexual assault, which a nonlawyer observer might understandably interpret as relating to sexual behaviour);
- the court had ruled that the question(s) should proceed through gateway (a) as not involving an issue of consent (such as the defence of reasonable belief in consent, or of previous abuse to explain the prematurely sexualised behaviour of a very young complainant, or as background evidence to explain the previous sexual relationship between the parties);
- the court had ruled that the evidence was necessary to rebut prosecution evidence, which the ISVA would not have heard, under the fourth gateway; or
- the matter had been agreed between opposing counsel; rather, the description of the law in the report leaves the impression that the

[110] Although the ruling must be pronounced in open court but in the absence of the jury (YJCEA 1999 s 43(2)).

prosecution *must* oppose any section 41 application, which is incorrect under the prescribed procedural rules.[111]

33. Furthermore, the report does not comply with empirical research conventions in that it does not set out:

- the names and qualifications of the researchers;
- the questions asked;
- the method of selecting respondents;
- the number of ISVAs sent the survey so that the response rate can be calculated;
- any survey software used;
- the methods of calculation of the data;
- the raw data for some questions; for example it is meaningless to be told that 25% of the respondents estimated that in more than 50% of the cases sexual behaviour evidence was admitted, without indicating how many cases each of those respondents had observed; nor
- how ambiguous answers were handled.

34. It appears that the respondents were asked to estimate what percentage of the trials they had attended involved questioning 'victims' about previous sexual history within quartiles, but these figures were then treated as being specific and definitive.[112] The report does not state, for example, how many trials were actually attended by the four ISVAs who claimed that such questioning occurred in 50-74% of trials. There is no indication as to whether the respondents were asked to tick boxes and/or provide discursive answers. The sample size is very small (only 37 respondents), and the coverage is very thin, with only one ISVA reporting experience from metropolitan London,

[111] The relevant passage of the Report reads: "The defence must make an application which should be carefully considered by the prosecution *and a full and proper reply formulated, setting out the objections to the defendant's application*." (para 8) This information originates in the CPS Rape and Sexual Offences Guidance chapter 4, but does not have any basis in Criminal Practice Rule 22 which applied at the time of the research. There were no applicable Criminal Practice Directions until 1 April 2018 ([2018] EWCA Crim 516, para 22A.1 of which states simply "Should the prosecution wish to make any representations then these should be served on the court and other parties not more than 14 days after receiving the application." The CPS's established practice is not to object to applications which clearly can proceed through a gateway or fall within *R v A (No 2),* as the CBA Study demonstrates.

[112] LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)* (September 2017) para 15.

one ISVA from the entire South West of England, and two from the North East. It is impossible to say that the results are representative in any sense of practice across the courts in England and Wales (there being no response from any Welsh ISVA). The results are presented in a confusing and even opaque form (resulting in much misreporting in the media), making it impossible for the reader to evaluate the soundness of the unexplained methodology of the study.

35. The report does not state how the ISVAs were able to determine that the questioning on other sexual activity came within YJCEA 1999 section 41, as opposed, for example, to introduction of that evidence as necessary background by the prosecution, or through the bad character provisions of the CJA 2003 section 100. It is possible that the ISVAs assumed that the only route to admission of evidence of a sexual nature was section 41, which is incorrect in law (as explained further below).[113]

36. Finally, the report is incorrect in its description of criminal procedure in Canada (which it recommends be adopted), suggesting that Canadian complainants have the right to legal advice in applications to admit previous sexual history;[114] on the contrary, complainants only have such a right in relation to applications for disclosure of records from third parties.[115]

37. As such, the LimeCulture Report cannot be relied upon as an empirical foundation for abolishing all questions about the complainant's previous sexual behaviour, nor as a basis for concluding that there is widespread breach of the constraints and procedures

[113] See below, para 114.

[114] LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)* (September 2017) para 33.

[115] Criminal Code of Canada ss. 278.4(2) and 278.4(2.1), the latter requiring the judge to inform the complainant or witness and the controller of the document of their right to counsel. The relevant provisions in relation to the admissibility of evidence of the complainant engaging in "sexual activity" with the accused or any other person, ss 276-276.5, do not provide for legal representation of the complainant. For further analysis of the limited provision of legal representation for complainants in Ireland, Canada, France, Germany, Italy, Belgium and Norway, see Laura Hoyano, 'Reforming the Adversarial Trial for Vulnerable Witnesses and Defendants' [2015] Crim LR 105, pages 115-119.

required by section 41.[116] Indeed it should not be cited in support of any assertion in relation to the operation of section 41.

CPS dip sample: *Limiting the Use of Complainants' Sexual History in Sex Cases* (December 2017)

38. In December 2017, the Attorney General and Lord Chancellor published a study of CPS files, *Limiting the Use of Complainants' Sexual History in Sex Cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: the Law on Admissibility of Sexual History Evidence in Practice.*[117] The methodology consisted of a random dip sample of two files flagged as rape charges, for each month in 2016 in each of the CPS areas, which yielded a sample of 309 cases finalised in 2016.

39. According to the dip sample:[118]

- in 92% of cases no evidence of the complainant's sexual history was permitted to be introduced by the defence;
- Section 41 applications were made by the defence in only 13% (n = 40) of cases;
- 8% (n = 25) of applications were granted by the court;
- 1.6% (n = 5) of applications were refused by the court;
- in another five applications the outcome could not be determined;
- the prosecution opposed 35% (n = 14) of applications in whole or in part, but in 27.5% (n = 11) of cases it was not possible to ascertain the prosecution's position;
- the prosecution agreed or partially agreed to the application in 30% (n = 12) of cases;
- in a further three cases the proceedings were concluded before the prosecution was required to respond;

[116] As Baroness Newlove, the Victims' Commissioner for England & Wales, concludes in her Foreword to the LimeCulture Report, stating "this report clearly highlights that application of section 41 is not being delivered as was intended, and that as a result victims are not being protected as they should be." (LimeCulture Community Interest Company, *Application of Section 41 Youth Justice and Criminal Evidence Act 1999: a Survey of Independent Sexual Violence Advisors (ISVAs)* (September 2017).

[117] Ministry of Justice and Attorney General, *LImiting the Use of Complainants' Sexual History In Sex Cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: the Law on the Admissibility of Sexual History Evidence in Practice* (Cm 9547, December 2017).

[118] Ibid, page 14 Tables.

- 70% of applications were made in 'acquaintance rape' cases (n = 14) and 'domestic rape' cases (n = 14). Nine applications (22.5%) were made in child abuse cases and two applications in 'stranger rape' cases (2.5%). There was some overlap in categorisation;[119]
- in the majority of cases (unquantified) the evidence related to the complainant's sexual history with the defendant; in 20% of cases it was not possible to ascertain with whom the activity was alleged; and in 24% of cases the evidence related to activity with a person other than the defendant.[120]

40. The Government concluded that:

> We are now confident that the introduction of sexual history evidence by the defence is exceptional. The data provided by the CPS audit of rape case files demonstrates that this is very rarely permitted: in just 8% of cases a section 41 application was granted. Moreover, defence counsel are not routinely making section 41 applications: they were made in only 13% of cases. This is a compelling basis for asserting that the starting point in sex offence trials is that sexual history evidence should not be used by the defence.[121]

41. Whilst dip sampling is a recognised empirical methodology, its limitations (not acknowledged in the Government's report) are apparent here:

- only two cases were harvested from each of the 13 CPS areas in each month. This sample of 24 cases per area only skimmed the surface of the number of cases processed by RASSO teams in that period, as according to the CPS's own , prosecutions ranged from a low of 243 to a high of 846 per CPS area in the overlapping 12 months from 2016-2017;[122]
- the sample was restricted to rape cases, because the CPS only flags rape files, whereas section 41 applies to all sexual offence charges;
- the study confined itself to a review of the paper file, and hence was restricted by the detail in which the CPS case worker had recorded decisions. Hence, the grounds for the applications and the reasons for

[119] Ibid, page 9.

[120] Ibid, page 8.

[121] Ibid, page 11. The CPS data tracked the financial year (Annex 2, page B9).

[122] Crown Prosecution Service, *Violence against Women and Girls Report: 10th Edition, 2016-17* (30 May 2018), page B5.

accepting or rejecting them by the CPS and by the court were not reported in this study;

- the study has been criticised with some justification for assuming that no section 41 application had been made when there was no record of one on the file, which again depends upon the assiduity of the hard-pressed CPS case worker in recording and filing, especially since there is no requirement that section 41 applications to be recorded on the CPS file.[123]

42. In summary, the previous empirical studies are entirely or largely unreliable as a picture of section 41, because they are very outdated, or unduly restricted in their scope (to rape and/or female complainants), or rely upon shallow dip sampling of paper files, or rely upon lay observers watching open court proceedings (or having extremely limited access to court proceedings in the case of ISVAs) and guessing what has happened. None of them can be relied upon to reflect current practice in the courtrooms of England and Wales.

RESEARCH OBJECTIVES

43. In commissioning the present study, the CBA aimed to acquire a much more rounded and better-informed quantitative and qualitative view of the actual operation of section 41 in the courts of England and Wales. In contrast to the previous empirical studies discussed above, this CBA study set out to:

- cover all sexual offences to which section 41 applies, not just rape, unlike the CPS, Northumberland, and 2006 Home Office studies;
- cover all complainants of all genders and ages to whom section 41 applies, so as to provide a more realistic picture of the operation of the provision;
- elicit data from Crown Courts in all areas of England and Wales;
- obtain a larger sample size analysed in substance and in depth by those with direct knowledge of and involvement in the issues, the evidence and the decisions taken;

[123] Harriet Harman QC MP, *New Cross-Party Coalition Launches Challenge to Attorney General and MoJ on Use of Rape Complainants' Previous Sexual History in Court* (29 January 2018), Notes to Editors, Note 2.

- uniquely, base its analysis wholly on data from the legal professionals directly participating in the pre-trial and trial process, rather than on paper file review and/or observation of part of courtroom proceedings by academic or lay analysts;
- explain the evidential and procedural context for the section 41 application and any ruling made; and
- explain the background, including discussions between counsel, and any agreements reached such as including the material in agreed statements of fact.

SURVEY DESIGN AND METHODOLOGY

The survey was constructed with the advice of the three barristers specialising in prosecuting and defending sexual offence cases on the CBA Section 41 Working Party. The questions in the survey appear in Annex B to this report. The questions allowed the respondent to choose from a series of responses, but most of them also invited further commentary, and many respondents availed themselves of that opportunity. Those comments are quoted in this report where they were representative or particularly illuminating.

44. The survey was conducted using Survey Monkey software. The data was analysed using that software, but also was subjected to a manual analysis, both across respondents and vertically through individual cases described by the respondents. The respondents were asked whether their practice had included sexual cases within the past 24 months, and if it did not then they were asked to note this and then log out of the survey. The remainder were asked how many cases they had conducted in the previous 12 months, and then were asked to answer a set of questions for each of the previous 10 (or fewer) cases they had most recently conducted. There were certain limitations to this methodology, as for complete accuracy members would have had to go back through their diaries, and it is likely that many responded based on their memory. The request to provide profiles of the most recent 10 cases was aimed at obtaining a roughly realistic snapshot of the number of cases involving section 41 consideration or applications, but this necessarily is subject to the vagaries of memory and, to a certain extent, confirmation bias.

45. A link to the survey was circulated on several occasions by the CBA to its membership by the then CBA Chair, Angela Rafferty QC, in her weekly email circular to members.

DATA ANALYSIS

Approach to Interpretation of the Data

46. Any ambiguity in any answer (such as where there were multiple complainants) was attempted to be resolved through analysis of all of the respondent's answers in relation to that case. If it could not be resolved, then this is either highlighted in the tables below, or a conservative approach was taken to disregard that answer in the computation. See also the counting rules below, paragraphs 68 to 71.

Overview of Responses

47. A total of 179 barristers responded to the survey from a membership of 3,880, for a response rate of 4.6%. Given the diversity of practice areas amongst members of the CBA, this is considered to be a reasonably representative response rate, and certainly far exceeds the sample size of any previous study on this topic.[124] Of these 179:

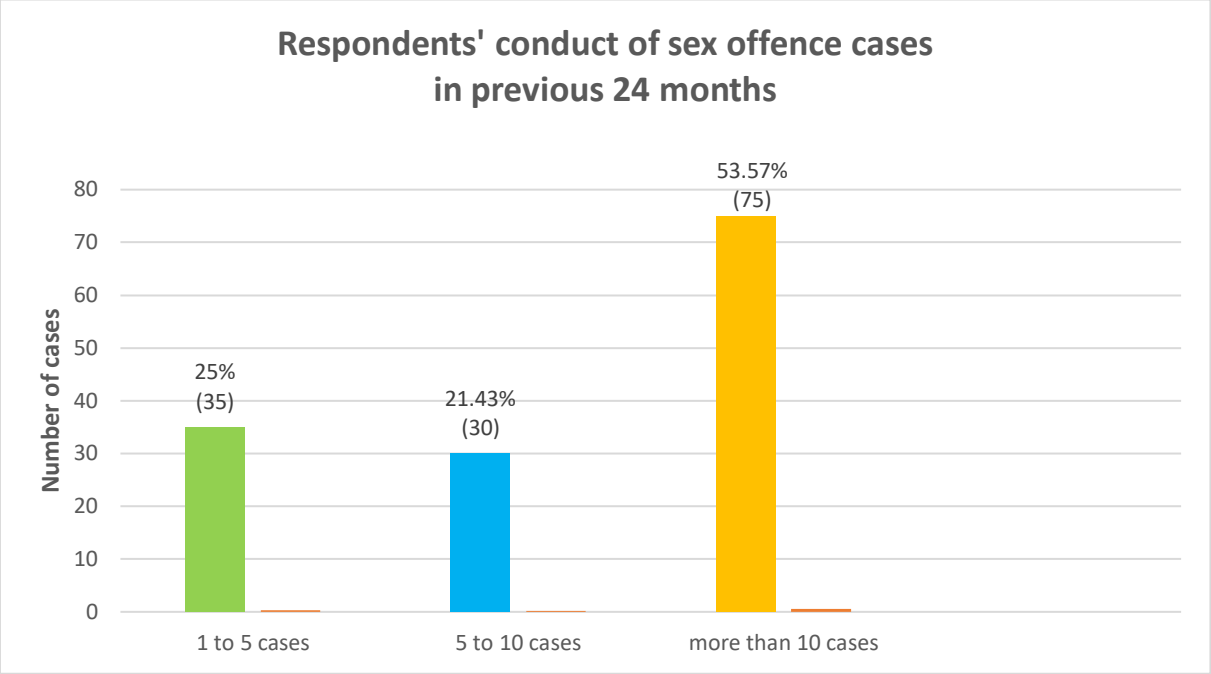
- 92.74% (n = 166) indicated that their criminal practice had included sex offences within the previous 24 months,
- whereas 7.26% (n = 13) indicated that they had not handled any sex offence cases within that period; these 13 respondents complied with the instruction to submit the survey at that point.

Extent of practice in sexual offences (Q2)

48. A total of 140 respondents indicated one of three choices as to the number of sex offence cases they had handled in the previous 24 months:

[124] Unfortunately, the Crown Prosecution Service would not accede to the Working Party's request as to the number of barristers on its Rape and Serious Sexual Offences (RASSO) accredited panel of advocates, which would have provided another guide to the response rate.

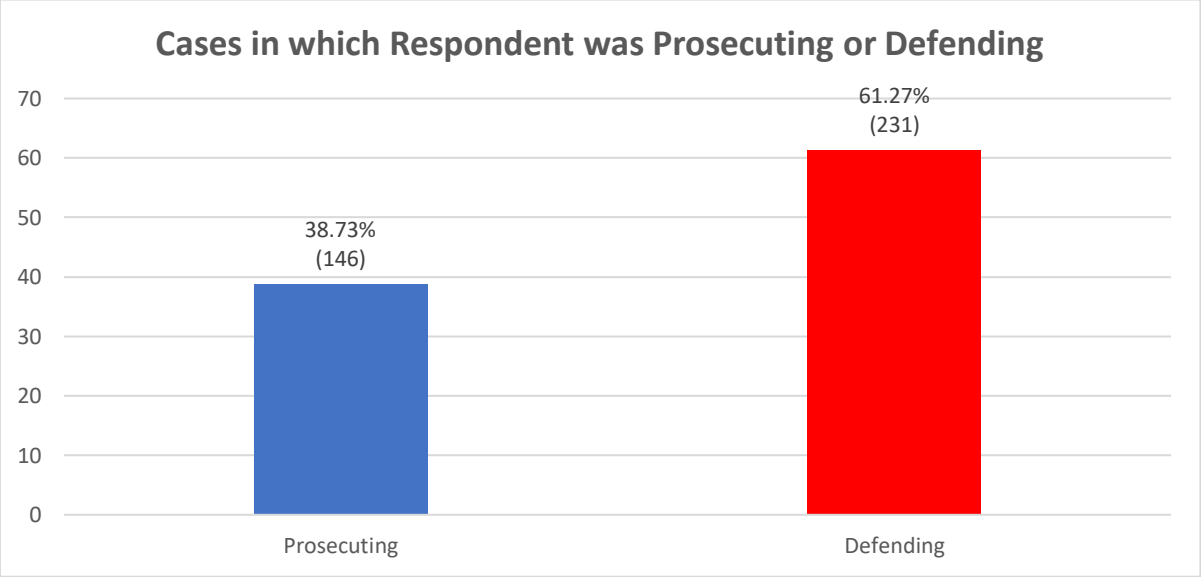
Figure 1



49. Therefore for the majority of respondents sex offences constituted a significant part of their practice, and so they possessed a depth of practical experience in relation to the issues which can arise in the course of a trial.

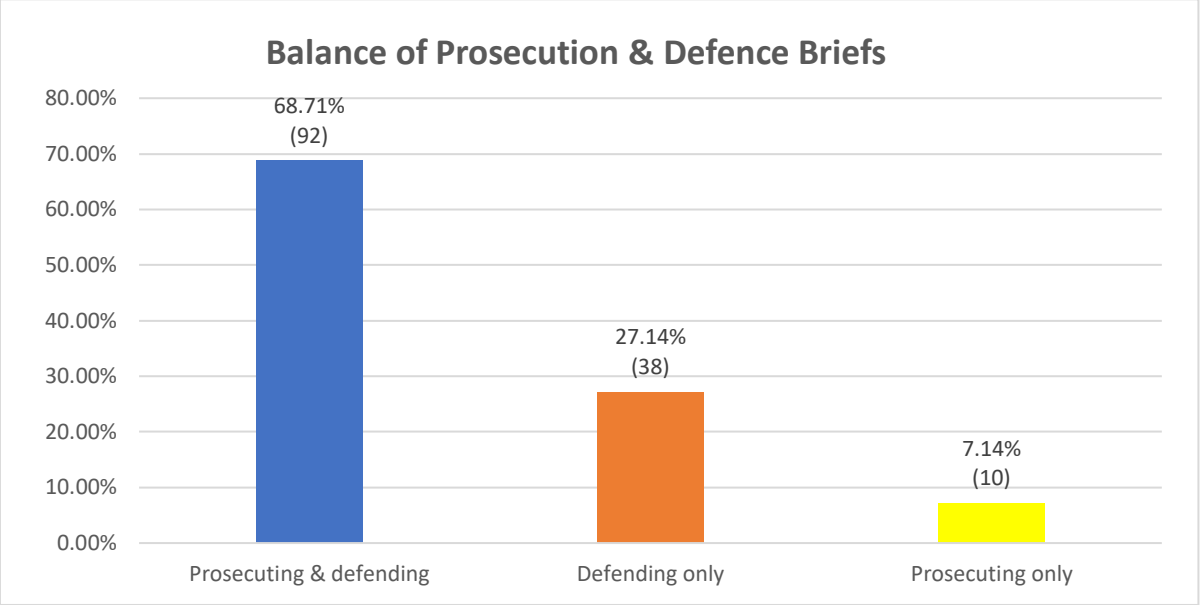
50. In the 377 cases in the sample, the professional role played by the 179 respondent advocates was as follows:

Figure 2



51. Moreover, there was a highly significant balance of defence and prosecution work amongst the 140 respondents who provided the 377 cases in the sample:

Figure 3

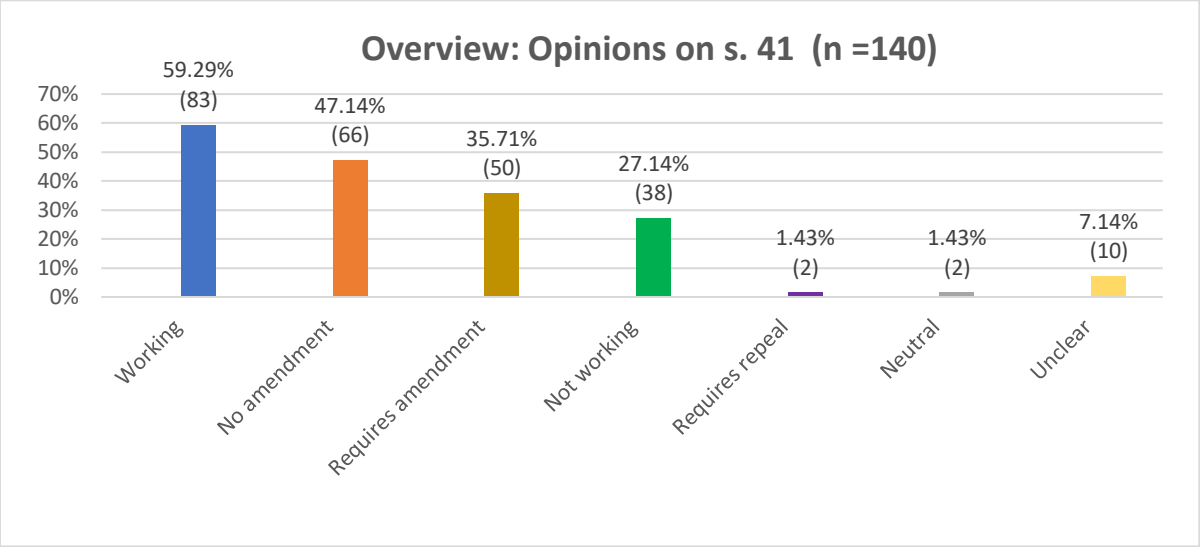


It must be emphasised that those advocates identified above as 'defending only' or 'prosecuting only' may well perform the opposite role in other cases, as these roles were identified here only in respect of the case sample. Nevertheless, the 68.71% of barristers who in just 10 cases of their practice in the past 24 months performed both professional roles indicates one of the distinctive strengths of the English and Welsh Criminal Bar, unlike most adversarial jurisdictions: that most barristers both prosecute and defend, and consequently have a uniquely balanced view of the operation of the criminal justice system, and of the rules of evidence and procedure. This balance is reflected in the ethos of the Criminal Bar Association.

Evaluation of the operation of s 41 (Q3)

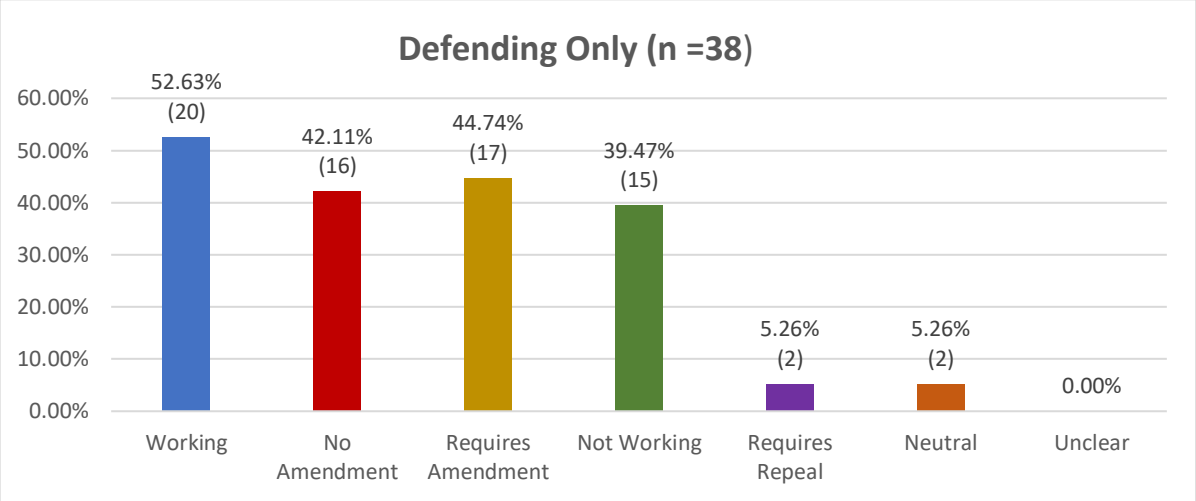
52. Respondents were asked to give their opinion as to whether section 41 was working in the interests of justice, or whether it requires amendment. 140 responses were received to this question. Because respondents were invited to give discursive comments, many responses fell into several categories. This table provides a general overview:

Figure 4



53. Those barristers who had done only defence work in the sample of recent cases they provided expressed the following views:

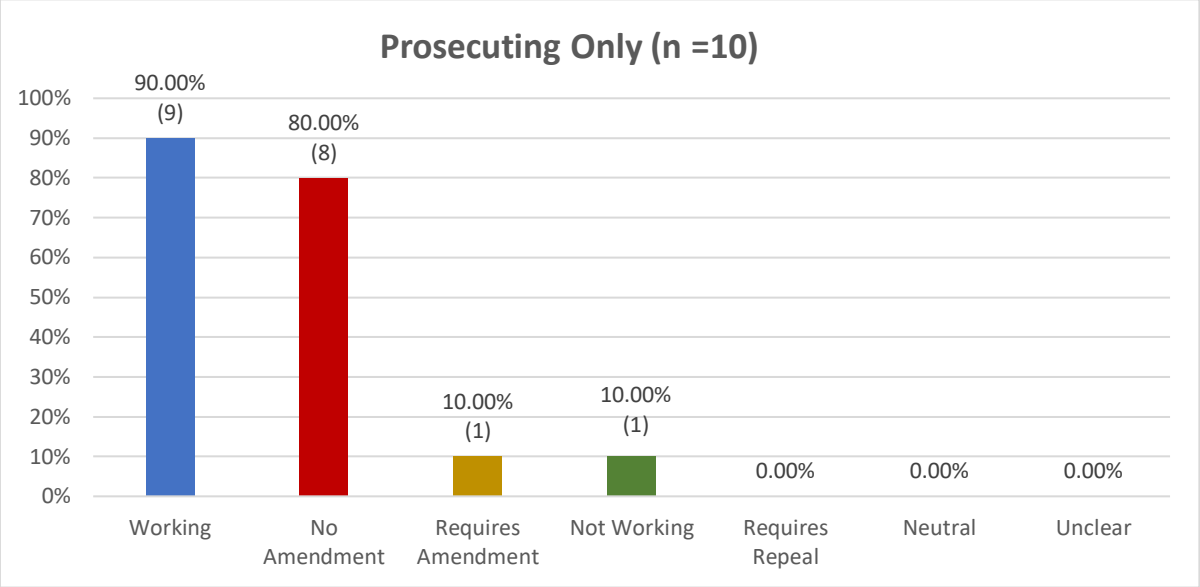
Figure 5



54. Thus a margin of 13.16% considered that section 41 was working in the interests of justice over those who believed it was not, with a significant number nonetheless feeling that amendment would be beneficial.

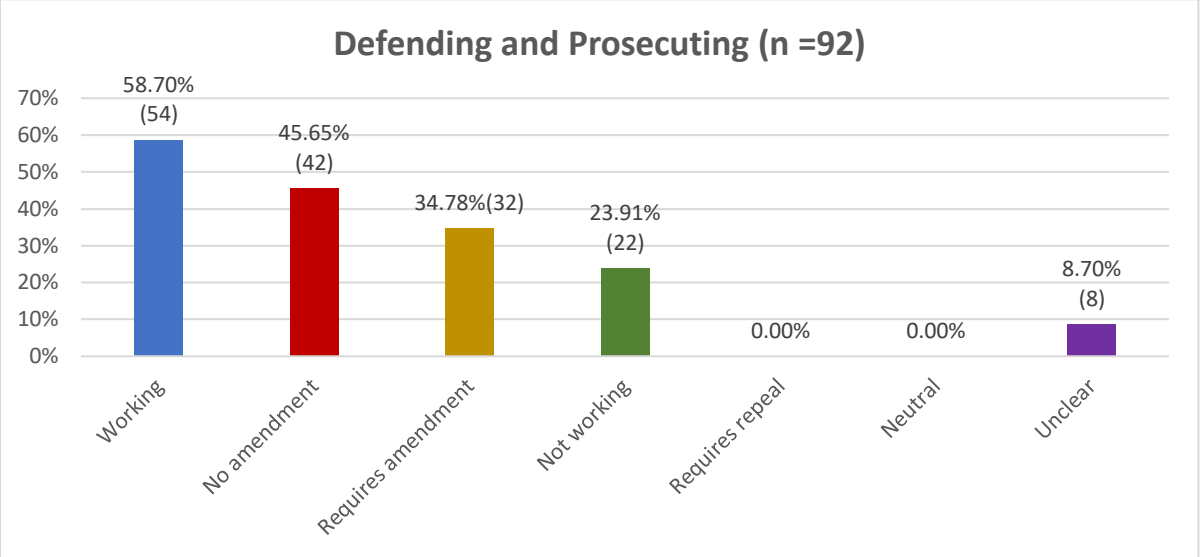
55. For the 10 barristers who had taken only prosecution work in their most recent cases offered in the sample, their views more emphatically supported the view that section 41 was working in the interests of justice:

Figure 6



Perhaps most significantly, those receiving both prosecution and defence briefs in their most recent work concluded by a margin of 34.79% that section 41 was working in the interests of justice, but 34.78% believed that amendment would be beneficial:

Figure 7



56. Representative comments from respondents considering section 41 was working broadly in the interests of justice were:

> "There is nothing wrong with the way s 41 is being currently interpreted and applied. I speak as a full-time CPS prosecutor."
>
> "It is working and Judges are being robust."
>
> "It works if it is applied properly: I have not experienced Judges applying anything other than a proper approach to the statute based on the application of principle to the facts."
>
> "It is working perfectly well and is applied responsibly by counsel and judges alike."
>
> "Yes – when interpreted in a common sense way. Strict construction is to be resisted."
>
> "Yes – it focuses cross-examination on the issues."
>
> "It works very well, striking the right balance, in difficult cases, between competing fairnesses."
>
> "Applications pursuant to section 41 are made and responded to robustly. The media coverage of how it works in practice is inaccurate."
>
> "The current section, if applied correctly, provides adequate safeguards for both the interests of the Complainant and the Defendant. No further amendment is required."
>
> "When read and followed correctly it appears to work well. If anything, perhaps too strict and capable of causing unfairness to the defence. I have not witnessed s.41 used in favour of a defence application which was not fair and just."

> "Section 41 works well in the interests of justice. Indeed, it is arguable that its scope is perhaps broader than Parliament may have originally intended. At any event, in the last two cases I have conducted in which the question arose, section 41 received careful and anxious scrutiny from the Court."

Only one respondent considered that section 41 was not being applied with sufficient rigour, stating:

> "Seems to be working when applied properly. Some Judges seem to take a rather relaxed approach to it however which is frustrating."

57. Representative comments from respondents expressing concerns about how section 41 is operating were:

> "The laudable aim of preventing inappropriate questioning has been lost in the restrictive way a poorly drafted provision continues to be interpreted in court."

> "If the term 'working' means restricting unnecessary or irrelevant questioning and based on myths, stereotypes/tropes then I agree the legislation works however I feel that at times a strict interpretation of the legislation risks unfairness to the defendant. Certainly I have had questioning that I felt was relevant and fair refused by a judge, although fortunately for the defendants concerned my gripe was ultimately otiose as they were acquitted."

> "It is working to prevent gratuitous slurs. Like everything there is a spectrum of judicial feeling on how it operates and some judges (typically sex ticketed recorders) are too lax in terms of requiring questions to be written in advance and allowing people to ask too many [questions]. Amending the legislation would not alter this."

> "On occasions I feel that s 41 operates against the interests of justice by denying the jury the opportunity to material that might make a material difference to their view of the case and which should be seen by them. I certainly do not feel this provision should be made even more draconian."

58. Of the respondents who considered section 41 was not working, three considered that judicial discretion was necessary to make the provision workable, whilst other respondents raised the need for flexibility in interpretation:

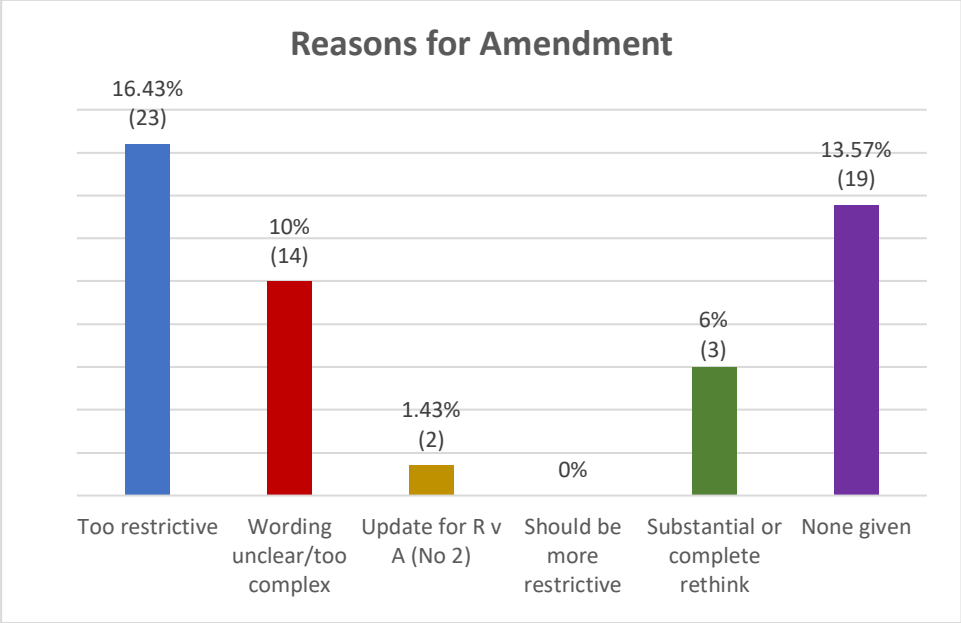
> "In my view S41 is not working in the interests of justice. It fetters the discretion of the judge in what he/she decides is in the interests of justice. It needs to be amended."

> "Absolutely not. It is a bar to the jury being told relevant information. More discretion should be given to Judges."

"It requires amendment but only to increase judicial discretion rather than to narrow it."

59. Eight respondents who considered that section 41 was working nonetheless thought that it would benefit from being redrafted. The following categories of reasons for amendment being desirable were given by the total of 61 respondents in this category:

Figure 8



60. Representative comments from respondents considering section 41 was too restrictive include:

"In complicated cases it is sometimes difficult to fit the justice of the case into the words of the section."

"I think the temporal restraints should be more flexible."

"It is too strong and needs relaxing."

"Requires amendment. It restricts cross examination in situations where fair trial demands the cross examination should be allowed."

"It requires amendment in the sense that it requires clarification. Some Judges are, I feel, far too slavish to the idea that "it has something to do with sex therefore it's inadmissible". Anecdotally, I was recently not allowed to put to a woman the assertion that she had told D that he was not the father of her child (relevant to an issue in the case) because that suggestion, of itself, meant that she would necessarily

have had sex with someone else and therefore section 41 applied. This was surely not the intention of Parliament. I feel that section 41 can be very unfair on Defendants, particularly when implemented in the often rigid and immovable way that it is."

"S41 lacks clarity. The criteria should be made more simple. The division between consent and non consent defences and the consequent tests are not clear."

"It does require some amendment as currently it is too difficult for Defence to introduce highly relevant material about the previous relationship between the parties, which is a significant factor to a jury's consideration of issues of consent or reasonable belief in consent."

"No, it is not working in the interests of justice, and yes, it requires amendment… eg "Evidence of consensual sexual behaviour identical to that alleged by the Defendant was (properly and in accordance with s41) not allowed in evidence. Correct in law and not appealable, but it may have resulted in a wrongful conviction." Further eg: "The Judge was bound by the limitations contained in s41 and could not allow evidence of the Complainant's behaviour which was almost identical to the Defence case on consent."

This barrister after failed section 41 applications in a series of cases s/he was defending decided to decline any further sexual offence briefs, as:

"s41 may be leading to wrongful convictions and needs an overhaul".

61. Representative comments from respondents who considered that section 41 required redrafting for clarity (often in conjunction with concerns about the provision being too restrictive) were:

"It is very difficult to understand and apply it successfully if you want to reduce the behaviour of the [Complainant].

"… It could be made a little less opaque. The terminology is tortuous."

"Wording is far too obscure; should be in ordinary language and say what it means!"

"It requires amendment. It is very difficult to read and distil and even more complex to apply. In its current form it frequently deprives the defendant the opportunity of being able to adduce relevant evidence."

"I think it is much misunderstood and that is why it comes in for media attention."

"It is a highly convoluted section which, whilst successful in preventing purely derogatory / stereotyping cross examination, in my view frequently goes too far and sometimes bars the jury from hearing matters they would consider it helpful and indeed common sense to hear."

62. A comment representative of responses considering section 41 required redrafting to reflect the House of Lords judgment in *R v A (No 2)* was:

> "The section ought be amended so as to comply with *R v A (No 2)* [2002] 1 A.C. 45 so that questioning which is relevant and necessary for a fair trial is permitted."

63. Many respondents (n =11) emphasised that section 41 was workable and fair, when it was applied "correctly", properly", "in a common sense way", or not "harshly".

64. Three respondents volunteered that they thought more training and guidance would be helpful, and two others noted an inconsistency in practice amongst some judges as being a problem:

> "At present it is working appropriately with sufficient safeguards. It may be that clearer guidance to the judiciary and bar is required to ensure a consistency of approach."
>
> "No amendment required. Better training of judges needed."
>
> "I think it would work but for the number of advocates and judges who do not appear to understand it or the process which should be adopted."

ANALYSIS OF THE CASE SAMPLE

Crown Courts centres featured in the sample

65. A total of 105 Crown Court centres featured in the sample.[125] Annex C indicates the 45 Crown Courts where section 41 applications were made, and their outcomes (allowed or denied in full, allowed in part). In addition, two cases were tried in a Court Martial. A further 60 Crown Courts were included in the sample where no section 41 applications featured, listed in Annex D. This provides a nationwide snapshot of the operation of section 41.

66. One respondent included a case in which he or she was defending in the magistrates' Court in an unnamed location. Because the survey had asked about Crown

[125] One respondent provided a list of all the Crown Court centres in which he had had cases, without differentiating them by case sample, so it was not possible to use that data to correlate with section 41 applications.

Court cases, this specific case was removed from the calculations in relation to section 41 data. However, it is of interest that section 41 was considered in a magistrates' court trial, since it is often thought that complex legislative evidential provisions tend to be disregarded in that forum due to the typically lay nature of the bench. In this case, the parties did discuss a section 41 application relating to a female complainant under 18 in relation to recent false complaints, but all advocates agreed that the subject matter belonged under the bad character provisions of the CJA 2003 section 100, and did not constitute previous sexual behaviour under YJCEA 1999 section 41.[126]

Overview of the sample

67. Using the specific figures provided by respondents, 540 complainants featured in the sample. Taking into account the counting rules explained below for imprecise answers, there were an additional 25 complainants, for a total of **565.**

68. In some cases respondents were imprecise, particularly where there were multiple complainants. Consequently some of the data, particularly regarding the number, ages and gender of the complainants, had to be estimated from comments made by the respondents in relation to their case. Numbers were always estimated on the low side (e.g. "many complainants" or "a multitude of complainants" or "a number of complainants" or "all complainants" were treated as being three complainants, and "multiple complainants of both sexes" and "a number of complainants male & female" were treated as being two females and two males). Any approximation of the total number is indicated by a tilde in the data tables. ***This means that the ratio of section 41 applications to complainants very likely will be significantly overstated***.

69. If the number of complaints was stated but they were indicated to be of both genders, with the gender split being unstated, these were evenly split; in the case of odd numbers, the majority was allocated to female as that reflected the overall trend.

70. "Under age" was treated as being under the age of consent, 16 years.

[126] Discussed further in para. 114.

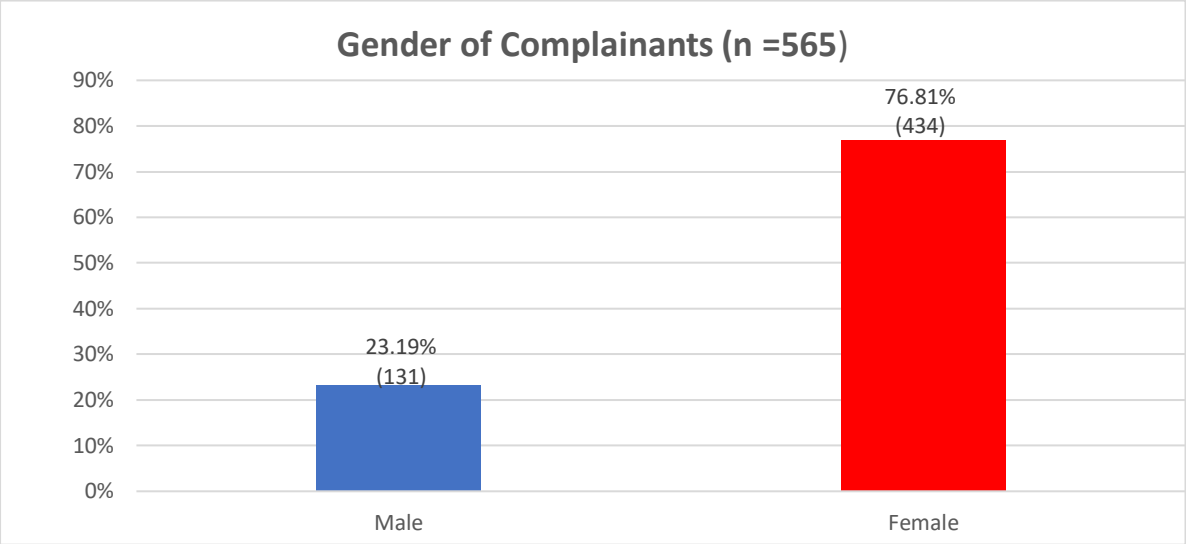
71. For these reasons, in many instances the figures do not add up to 100%, nor do they tally across tables.

72. The highest number of complainants in any one case was 17, involving historical allegations of sexual abuse of boys against a schoolteacher. The defendant pleaded guilty in relation to 11 boys, with allegations relating to 6 other boys proceeding to trial. All 17 have been included in the data. No section 41 application was filed in the case.

Gender of the complainants[127]

73. A breakdown of the complainants indicates that a significant gender mix featured in the sample:

Figure 9



Age distribution of the complainants

74. The Sexual Offences Act 2003 creates a series of overlapping categories of offences depending upon the age of the complainant. Section 41 is not confined to adult complainants or to consensual sexual conduct, as the term "sexual experience" encompasses sexual incidents which are non-consensual in law or in fact, or may not be

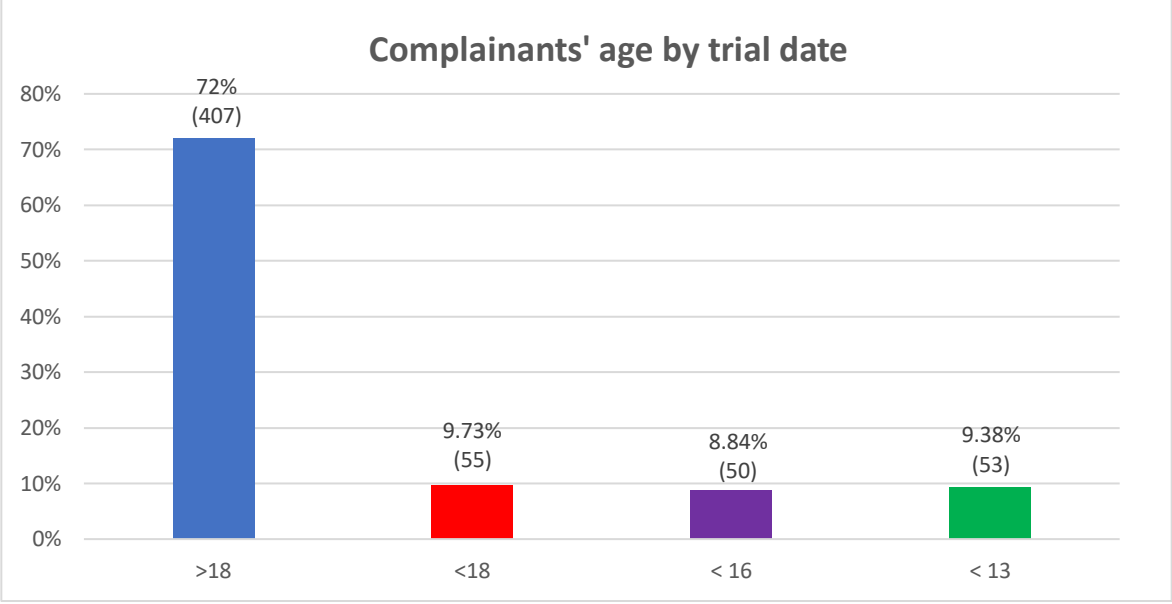
[127] As identified by counsel responding to the survey.

experienced by a child as sexual due to naïveté.[128] Hence child complainants are protected by section 41, and so it was thought useful to collect data on the frequency of section 41 applications concerning complainants under 18 years.

75. Although the question was not directly asked, many respondents volunteered that their cases related to historical allegations of child abuse. There were 121 complainants positively identified as being involved in prosecutions of historical allegations, with a further 21 appearing from the contextual data to fall into that category, for a total of 142. Because the question was not directly asked, the number of historical allegations tried in the case sample may well be understated.

76. Where the complainant was an adult by the time of trial, these were counted as adult witnesses. This made the age distribution of adult and child witnesses as follows:

Figure 10

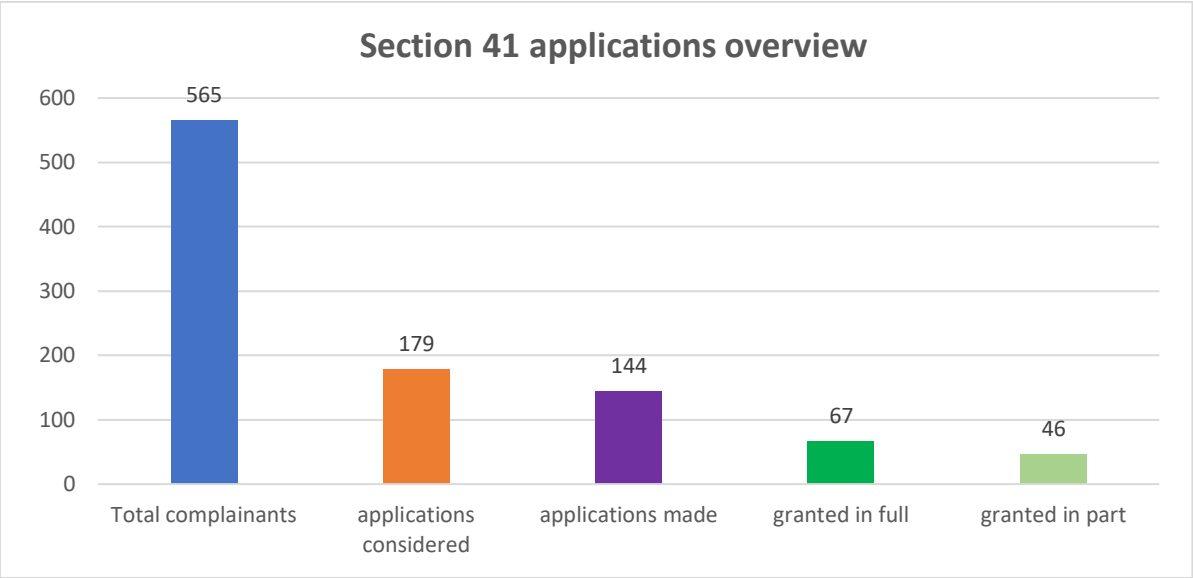


[128] Eg *Dennis Andrew Etches v R* [2004] EWCA Crim 1313; *R v MH; R v RT* [2001] EWCA Crim 1877, [2002] 1 Cr App R 22; *R v Alan David C and Julie B* [2003] EWCA Crim 29. For further discussion of the relevance of section 41 to child complainants, see Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy across Boundaries* (2007, updated paperback edn, OUP 2010), 760-779.

OVERVIEW OF SECTION 41 APPLICATIONS

77. Detailed data was collected on the decisions to make applications under section 41, and their outcome.

Figure 11



78. Not all responses indicated how many complainants in an individual case were involved in an application. All cases in the sample where the respondent indicated that there was more than one complainant were checked to see if more than one section 41 application might have been made. This was stated or implied to be the case in only three instances, for a total of seven complainants, which were consequently counted as seven applications (two denied, two allowed in part, three granted after being unopposed by the prosecution). Therefore, in the four other cases where a section 41 application was made in a case involving multiple complainants, from the context it was considered justified to assume that the application concerned only one complainant.

Potential Section 41 applications considered by the defence

79. In 179 cases the defence considered making an application under section 41. After this consideration, the defence concluded there was no basis for any application in 35 cases.

Section 41 applications made by the defence

80. A total of **144** applications were made, i.e. in respect of **25.49%** of the 565 complainants in the sample. Of these 144 applications, 67 (**45.83%**) were either agreed or granted in full (with one ruling pending at the survey date), and 39 (**27.08%)** were granted in part, for a total of **105** (**72.91%**) successful applications. Counsel for the defence and prosecution were able to reach agreement in respect of 25 (**17.36%)** applications in whole or in part before the oral application was formally made to the trial judge. In several instances where partial agreement had been reached by counsel that some questions would be allowed, the application was made respecting the remainder of the material, which was refused by the trial judge. Subject to the further explanations below, this meant that approximately **18.58%** of complainants in the sample were the subject of section 41 orders. Due to the conservative counting rules explained below, and the inclusion of solutions agreed by counsel, ***this ratio is very likely to be significantly overstated***. Nevertheless, it falls well short of the persistent claim that sexual history evidence is adduced in "around one third of trials",[129] but exceeds that claimed by the CPS in extrapolating from its dip sample of rape cases of 8%.[130]

81. Included in the statistics as successful applications are two cases where the prosecution agreed to adduce the evidence in question as part of its case, such was its materiality to the facts in issue in the trial. Therefore, technically section 41 was not invoked, but they are included because the defence achieved their objective. In three other cases the applications remained incomplete and have been excluded from the calculation of the success rate. Of these three cases, in one, the defendant pleaded guilty before the application was made, in another the prosecution called no evidence and the complainant was prosecuted for perverting the course of justice, and in a third the application after filing was deemed to be more appropriately brought under the bad character provision of the CJA 2003 section 100.

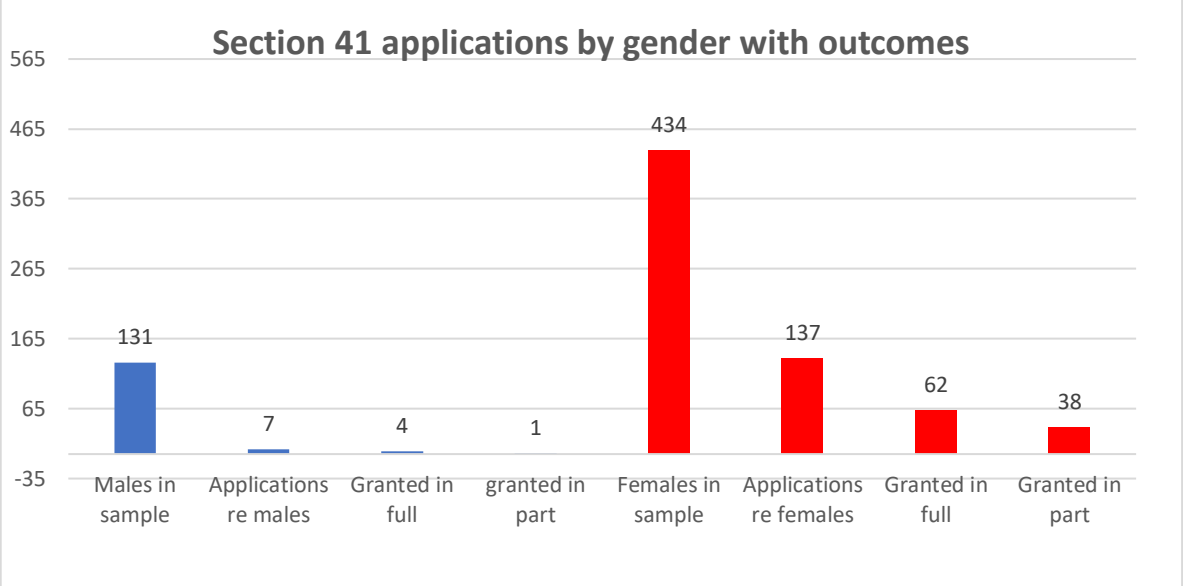
[129] Clare McGlynn, 'Challenging the Law on Sexual History Evidence: a Response to Dent and Paul' [2018] Crim LR 216, pages 220-221.

[130] Ministry of Justice and Attorney General, *LImiting the Use of Complainants' Sexual History In Sex Cases: Section 41 of the Youth Justice and Criminal Evidence Act 1999: the Law on the Admissibility of Sexual History Evidence in Practice* (Cm 9547, December 2017).

Section 41 applications made by the defence disaggregated by gender of complainant, with outcomes

82. There was a marked differential between the number of applications made respecting male complainants and female complainants. This may be explicable in part because of the number of historical abuse complaints involving many male child complainants, in respect of whom previous sexual behaviour is less likely to arise as an issue.

Figure 12



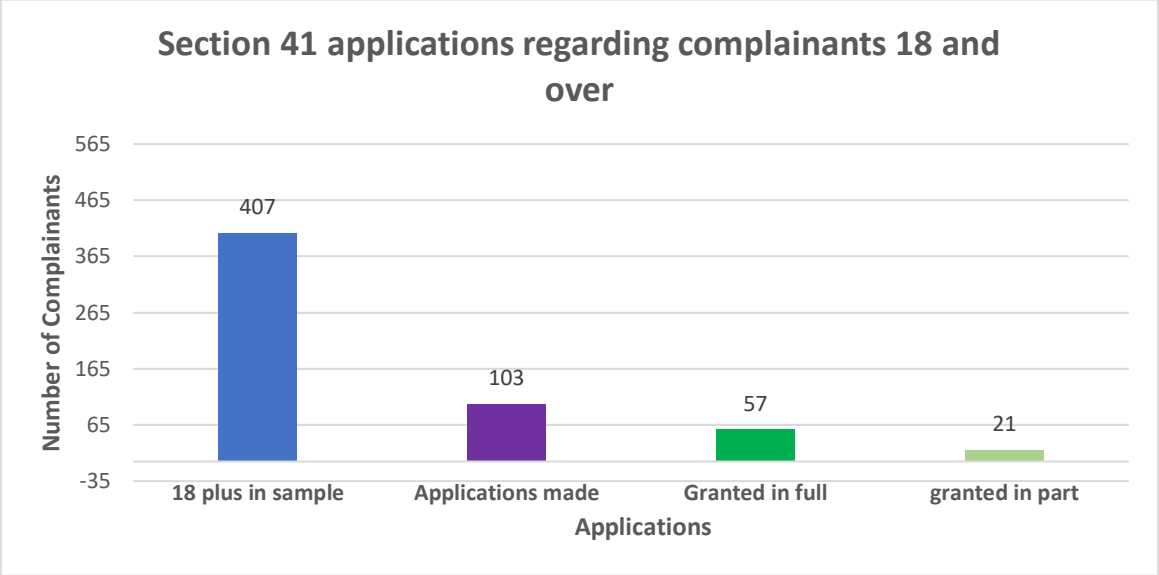
Apart from this, the sharp disproportion between the number of applications pertaining to male complainants and female complainants should be explored in further research, for example regarding police investigation practices or disclosure inquiries concerning discussions of sexual relations on social media, common amongst all genders.

Section 41 Applications Made by the Defence Disaggregated by Age of Complainant, with Outcomes

Adult complainants

83. The substantial majority of complainants were aged 18 and over at the time of trial, although as noted earlier a significant number of complaints involved alleged historical offences.

Figure 13

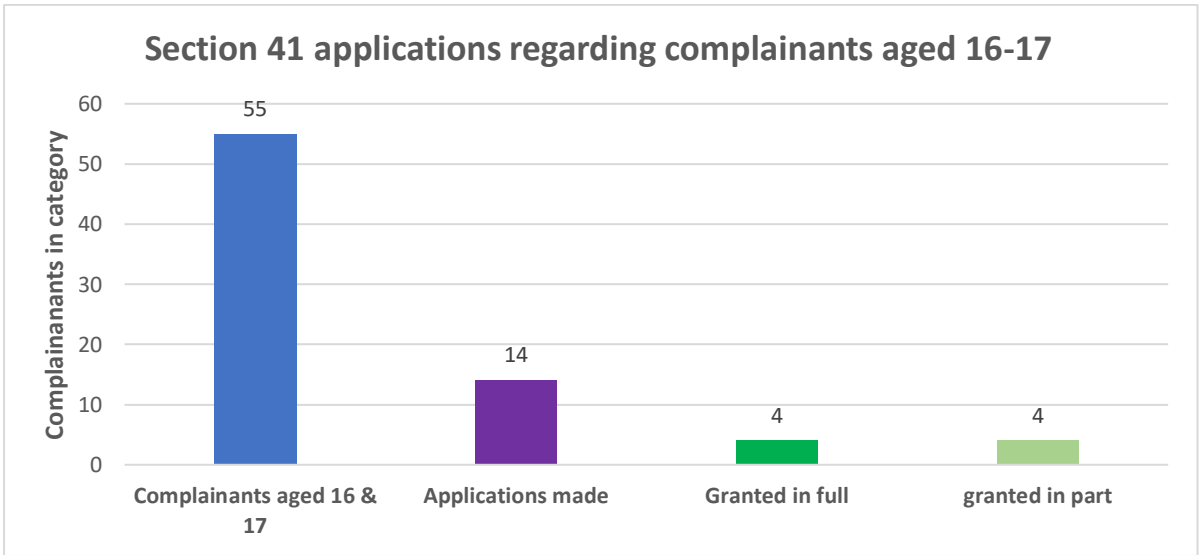


In one case the filing of the application (within the prescribed time) had prompted the prosecution to make further disclosure enquiries from social services' files concerning whether the complainant had blamed the defendant for sexual behaviour with other males; the case was awaiting a CPS decision as to whether to proceed with the trial and consequently the section 41 application had been filed but had not yet been formally made before the court. This explains why there is one more application than there is outcome indicated.

Young complainants aged 16 and 17 years

84. For children above the legal age of consent, the application data was as follows:

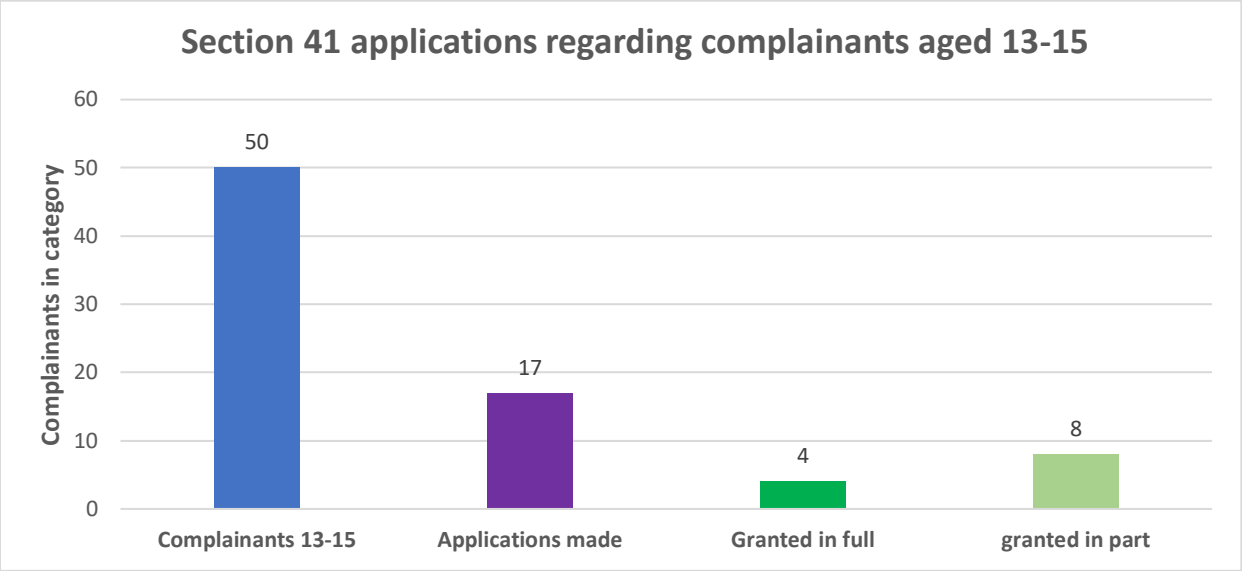
Figure 14



Applications for child complainants aged 13-15 years

85. For adolescents below the legal age of consent, the application data was as follows.

Figure 15

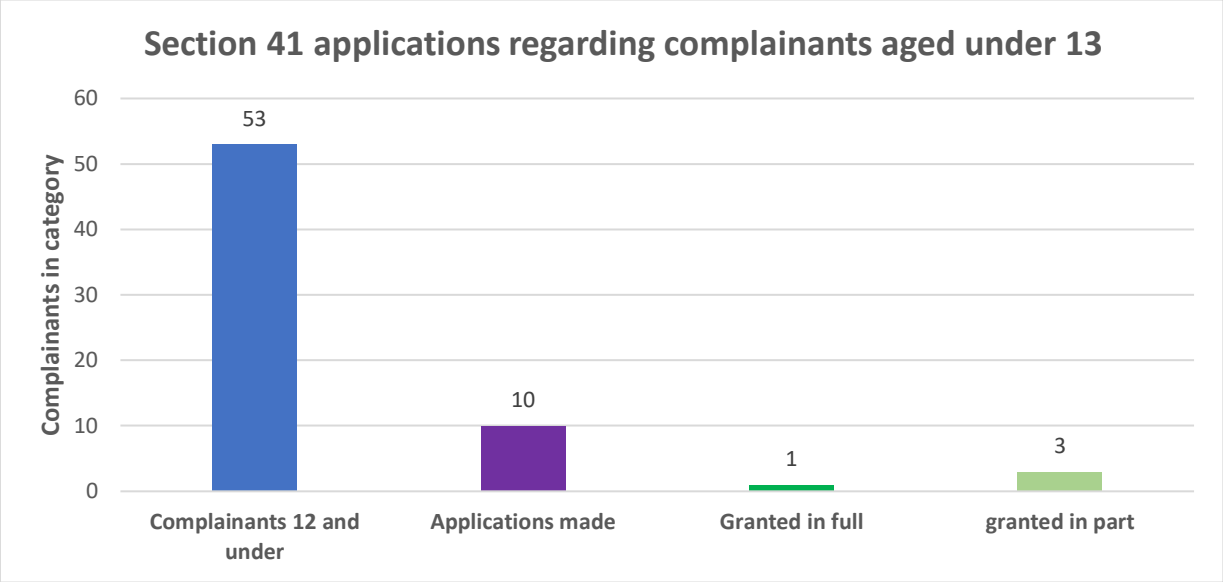


It is noteworthy that the ratio of applications to complainants was roughly the same for the children above the age of consent and for those 13 to 15. One of these applications was resolved by the prosecution deciding to adduce the evidence of part of its case. It is recorded as being granted in full, as the defence had achieved its objective of having the evidence presented to the jury.

Applications for child complainants aged under 13

86. There were also applications respecting young children under 13, regarding whom there is strict criminal liability for sexual activity under the Sexual Offences Act 2003.

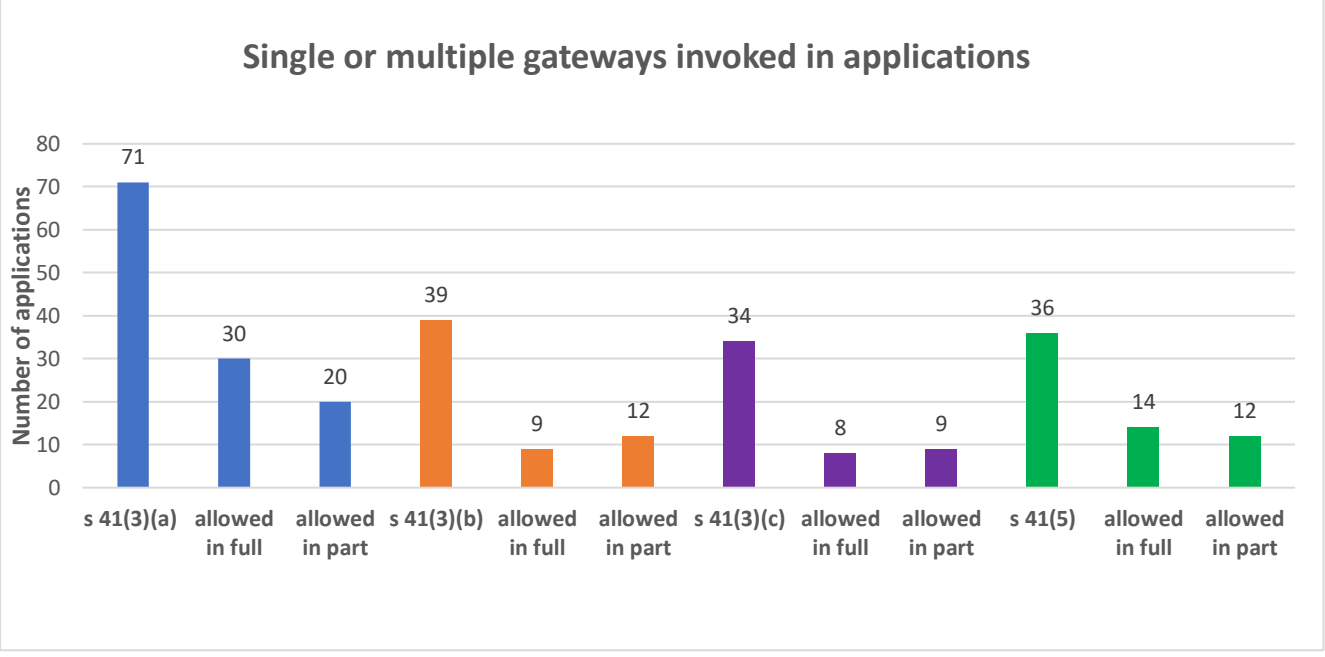
Figure 16



GATEWAY(S) INVOLVED IN SECTION 41 APPLICATIONS

87. Due to the complexity of the drafting of section 41, it is commonplace for more than one gateway to be invoked in an application, as illustrated by the data here. Consequently it is not possible to calculate precisely the success rate of applications through each gateway.

Figure 17



Gateway 41(3)(a): the evidence is relevant to an issue in the trial which is not an issue of consent (hereafter 'Non-consent Gateway')

88. Respondents provided the following examples of applications pertaining to this gateway:

> The prosecution alleged penetration by a prosthetic, so the complainant's experience of real penises was relevant (application granted in full; prosecution did not object).
>
> "Complainant had a pregnancy scare and told friend it was her boyfriend. Later, when making complaints against step-father, said it was defendant step-father's acts that caused pregnancy scare. s.41 was to establish that she had a boyfriend at the time of the 'pregnancy scare' and thus may have been acts of boyfriend not stepfather responsible for the pregnancy scare (i.e. first disclosure about 'boyfriend' was true). It was a very narrow point." (Application allowed in full).
>
> The same issue arose in a separate case: the complainant had been pregnant and at the time asserted that one person was responsible, and then later asserted that the defendant had been responsible (application agreed by counsel and allowed in full by trial judge).
>
> The prosecution's case was that all three complainants had at one point been in a consensual sexual relationship with the defendant, and the application related only to that aspect of the case (agreed by counsel and allowed by the trial judge in full).
>
> Reasonable belief in consent (application allowed in full).
>
> Evidence agreed by counsel as relevant background evidence.
>
> "This was a classic case where the subject of the application [undefined] was critical to the ability of the defendant to have a fair trial" (application allowed in full).
>
> "Complaints made against others of behaviour at similar time as index offence. Sought to introduce as evidence of revision of complainants' behaviour and tendency to see themselves as victims. Also of effect of complainants' behaviour on each other. They were competitive friends and colleagues who knew of each other's behaviour." (Application denied).
>
> The issues in the case were whether the complainant was given a sexually transmitted disease from the defendant or by another person, and whether the complainant had fabricated the allegations against the defendant. The complainant claimed to be a virgin; the questioning related to whether she had had sex with others and thereby contracted chlamydia, and then transposed those events to the defendant, so as to hide the identity of the male responsible for the sexually-transmitted disease. (Application allowed in part).

The questions arose from third party materials: (a) regarding her brother's abuse to see if there were similarities, the timing of his 'disclosure' and whether there was copycat 'disclosure' for attention by the complainant; (b) whether she was abused by a paedophile and transposed that abuse to the defendant; (c) whether she was abused by another 'neighbour' and whether that was transposed to the defendant; (d) whether she was also raped age 11 or whether that was a fabrication. (Application allowed in part; further details not given).

Issues included (a) whether the complainant was a fantasist; (b) whether the complainant made up stories when it suited her, for instance to get attention; (c) whether she experienced sexual abuse as alleged but at the hands of another or others and transposed the events to the defendant; (d) whether she had lied about her sexual knowledge; (d) whether she had opportunities to mention alleged abuse by the defendant, especially in circumstances when she discussed sex with others (application allowed in full).[131]

Complaint of sexual abuse in guise of 'relationship' with male carer. Medical records revealed attraction to, and relationships with, females. (Questions allowed in full; trial judge of the opinion that the behaviour alleged was not captured by section 41 and so no application was necessary.)

"That sexual abuse on her by a family member was a reason she was reporting about historic abuse by the defendant." (Allowed in full).

Failure to disclose the alleged sexual assault by the defendant on an occasion when the complainant had expressed concern about an illegal relationship with an older man (application allowed in part)

Gateway 41(3)(b): the evidence is relevant to an issue of consent and the sexual behaviour of the complainant is alleged to have taken place at or about the same time as the event charged (hereafter 'Consent and Contemporaneity Gateway')

89. Respondents provided some examples of this gateway:

"Concerned text traffic in which AP [Aggrieved Person] expressed enthusiasm for activities which later founded the basis of her allegations."[132] (application allowed in full).

[131] The application was also brought under s 41(5).

[132] The application was also brought under s 41(3)(c).

"Husband and wife [defendant and complainant] marital history and conduct – clearly had some relevance to the case – a campaign of abuse over a number of years."[133] (Application allowed in part).

"Defendant and elderly complainant were in a sexual relationship (says defendant) – which extended physically beyond the alleged offence. Application allowed as the complaint was made by complainant who was 'caught in the act' by daughter, and it would have been unfair to exclude as it explained the cause of complaint (as well as rebutting the implied Crown case that complainant too old to enjoy sexual activity!)

An application was allowed in relation to sexual contact during the same incident on the indictment.

An example of an application which was considered but ultimately not made was one where the issue was whether the complainant had blamed the defendant for sexual behaviour with other males.

Gateway 41(3)(c): the evidence is relevant to an issue of consent and the sexual behaviour of the complainant is so similar to sexual behaviour taking place as part of the event charged or at or about the same time as that event, that the similarity cannot reasonably be explained as coincidence (hereafter 'Consent and Similarity Gateway'.

90. Respondents provided the following examples of evidence pertaining to this gateway:

"The defendant was the complainant's husband (application allowed in full, as required by *R v A (No.2)*)."

"Evidence of consensual sexual behaviour identical to that alleged by the Defendant was (properly and in accordance with s41) not allowed in evidence. Correct in law and not appealable, but it may have resulted in a wrongful conviction." (*Comment by defence counsel*)

"Allegation of rape within a relationship – application concerned other sexual occasions between complainant and defendant, and not third parties" (application allowed in full).

[133] The application was also brought under s 41(3)(c).

Gateway 41(5): the evidence rebuts prosecution evidence about the complainant's sexual behaviour (hereafter 'Rebuttal Gateway')

91. Generally speaking this particular gateway is not problematic, as it is a fundamental precept of a fair trial that the defence be allowed to rebut prosecution evidence. Examples where this occurred provided from the sample include:

> Prosecution had cross-examined the defendant about the lack of use of a condom; the application was to adduce an agreed fact that one complainant had a contraceptive implant (application allowed in full).
>
> It was claimed in the prosecution case that the parties had not had sex for several years. There was evidence in an earlier statement that the parties were in an ongoing sexual relationship; this was used only after evidence to the contrary by the complainant (application allowed in full).
>
> The issue was whether the complainant had boyfriends (and hence sexual experience) when in her ABE [Achieving Best Evidence video] interview she denied having boyfriends. The application was allowed in part to permit a question about a specific boyfriend, not about 'boyfriends' which implied promiscuity.
>
> Application not required as prosecuting counsel agreed that the parties' previous sexual relationship was admissible and had been introduced in the ABE interview.

PROCEDURAL MATTERS

Late applications

92. In 50 cases (34.72% of total applications), the application was not made in accordance with the CrimPD time limit of 28 days after prosecution disclosure which applied at the time of the survey. (The time limit has been abridged since the survey, with effect from 2 April 2018, to 14 days from the date that the prosecutor has disclosed material on which the application is based (CrimPD V para.22A.1[134]).

93. Respondents were asked for the reason for non-compliance, in an open question. The reasons given by those who answered the question were:

[134] Criminal Practice Directions Amendment No. 6 [2018] EWCA Crim 516.

- late prosecution disclosure (n = 5), which is a notoriously endemic problem in the criminal justice system,[135] particularly afflicting the trial of sexual offences;[136]
- late third party disclosure (n = 1);
- the issue arose late in the pre-trial process or in the trial itself, often through the evidence of a witness, so compliance was not possible (n = 3);
- counsel received late instructions from the defendant (n = 3);
- the nature of the material made it unclear whether section 41 applied when the matter was first considered (n = 3). In one case there had been a change of counsel who then realised that an application should be brought;
- counsel had agreed the questions before a retrial (n = 1);
- the reason was unknown (n = 2).

94. Significantly, several respondents (n = 6) volunteered that there had been no prejudice caused to the prosecution because the application still had been made in ample time before the trial. In only one case was the defence directly blamed for the delay by prosecuting counsel, who went on to say that no prejudice or delay to the trial was caused by the late application.

95. This survey provides no evidence to support the contention that late applications are made as a "tactical ploy" or to "manipulate the court process";[137] quite the contrary.

96. In contrast, in one case the prosecution was directly blamed:

> "late disclosure by the prosecution despite defence requests and the matter being raised before the PTPH".

[135] Her Majesty's Crown Prosecution Service Inspectorate and her Majesty's Inspectorate of Constabulary, *Making It Fair: a Joint Inspection of the Disclosure of Unused Material in Volume Crown Court Cases* (HMCPSI, July 2017); House of Commons Justice Committee, *Disclosure of Evidence in Criminal Cases (HC 859)* (11th Report of Session 2017-19, 20 July 2018). The efforts of the CPS and the police to remedy the situation will take a long time to take effect, if at all: Crown Prosecution Service, National Police Chiefs' Council and College of Policing, *Joint National Disclosure Improvement Plan* (January 2018).

[136] Crown Prosecution Service, *Rape and Serious Sexual Offence Prosecutions: Assessment of Disclosure of Unused Material Ahead of Trial* (June 2018).

[137] Terminology used in the 2 April 2018 change to CrimPD V para.22A.1.

97. Consequently, non-compliance seems to have related to the time limit of 28 days. Two respondents commented that the time limits are almost always impossible to meet, especially when the defendant is in custody.

98. It may be anticipated that there will be greater non-compliance now that the time limit has been abbreviated to 14 days as of 2 April 2018 under Amendment 6 to the Criminal Practice Directions 2015, because procedural obstacles to compliance, especially late and piecemeal disclosure by the police and CPS, have not been rectified.

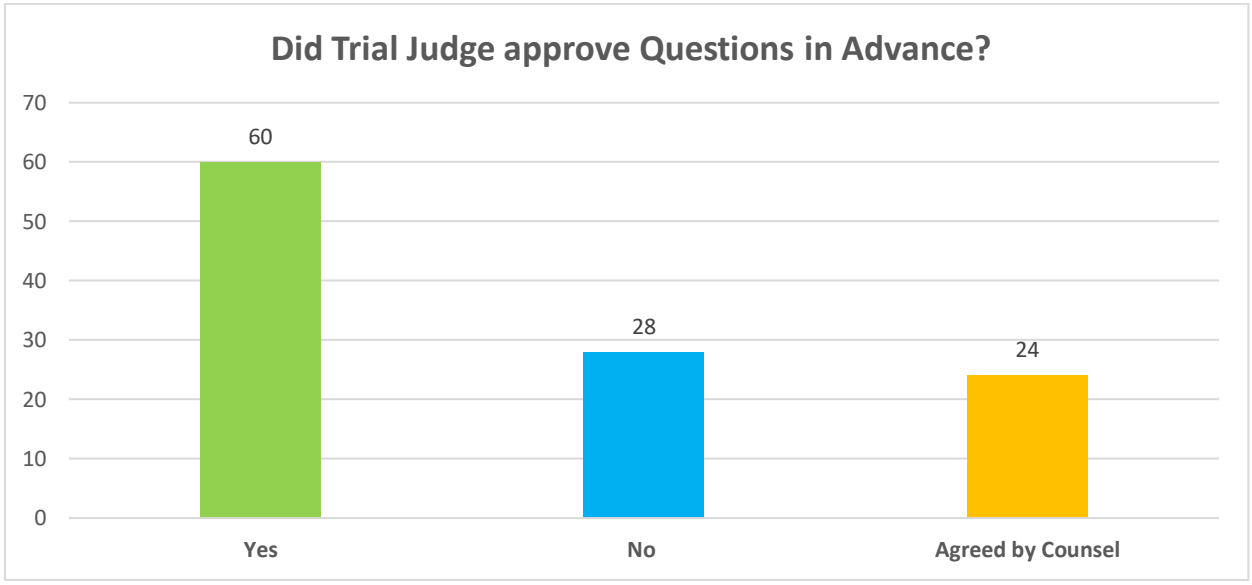
Non-compliance with the substance of the Criminal Practice Direction

99. In only one case was it stated that the application did not contain the necessary information such as draft questions. Because of chronic problems with piecemeal and very delayed prosecution disclosure, a practice has grown up whereby written applications are filed to adhere to the time limit, and then the substance of the application to be made orally is filled in later by defence counsel, to reflect progressive disclosure and, if necessary, developments in the evidence at trial.

Approval of the form of questions in advance

100. It is clear that a robust practice has grown up of discussion as to the appropriate form of the questions to be permitted under section 41.

Figure 18



101. Comments by Respondents included the following:

> Clear from the application what questions would be asked and application granted on that basis (2 respondents).
>
> Prosecution agreed the application, which included a list of proposed questions. Judge then decided application & approved proposed questions.
>
> They [judges] generally let us get on with it given parameters.
>
> By reference to topics rather than precise questions.
>
> Agreed by counsel and then approved by the Judge (2 respondents).
>
> Parameters were discussed. Adduced by way of agreed facts in the end.
>
> Judge knew and trusted counsel.
>
> Not necessary - questions were to establish why V had not mentioned D's name when complaining of previous sexual assaults on previous occasion.
>
> [Judge] approved question that they were in a relationship in which consensual sex had taken place since the first day of the relationship starting.

Cases where defence and prosecuting counsel agreed that the evidence should be adduced

102. In accordance with prosecutors' constitutional and ethical role as ministers of justice, they were prepared to concede that the evidence was admissible where it clearly came within the gateways of section 41, and it was necessary for a fair trial and to avoid misleading the jury on that issue (under section 41(2)(b)). Of the 144 applications in the sample, 17 (11.8%) were resolved in this manner. In such cases the court may be presented with that agreement of counsel, and the trial judge may conclude that it is not necessary to impose upon the court's already strained resources and timetable in order to have a formal application argued. Criminal Procedural Rule r 3.3(2)(c)(ii) encourages counsel to reach agreement wherever possible to maximise the use of the court's time, as part of the case management ethos which counsel are expected to facilitate.[138]

[138] See also Criminal Procedure Rule 3.2(2)(a) and (e), Rule 3.14(1), the Criminal Justice Act 1987 section 9(4) and Criminal Procedure Investigation Act 1996 section 31(6), (7), (9).

Procedurally, different solutions may be deployed to enable the evidence to be put before the court by the defence.

- In one case, evidence relevant through the Rebuttal Gateway and the Consent and Similarity Gateway was agreed by counsel, but the trial judge was asked to rule on the extent of the material to be put to the complainant.
- In another, a form of questions was agreed between counsel to deal with an issue which might otherwise have referred to the complainant's sexual behaviour; in this way section 41 topics were not adduced and the defence's objectives were achieved.
- In another case, counsel were able to agree that questions could be asked about the situation with the complainant which had led to police involvement, without involving questioning about an underage sexual relationship, thereby averting a section 41 application.
- In other instances, a formal application was made by the defence, but the court was informed that the prosecution agreed to it, or to part of it.

When issues are resolved in this way, lay observers in the public gallery or ISVAs might not become aware of what had occurred, and might erroneously conclude that the evidence had been adduced improperly.

103. In several cases in the sample, the prosecution agreed to lead the evidence as part of its own case, so that the defence did not have to do so. Sometimes this was done by agreement in the prosecution's opening speech as background information, for example that the parties had previously been in a relationship, without the complainant being asked any questions on the matter. Relevant material was placed before the jury without the complainant having to be involved, for example:

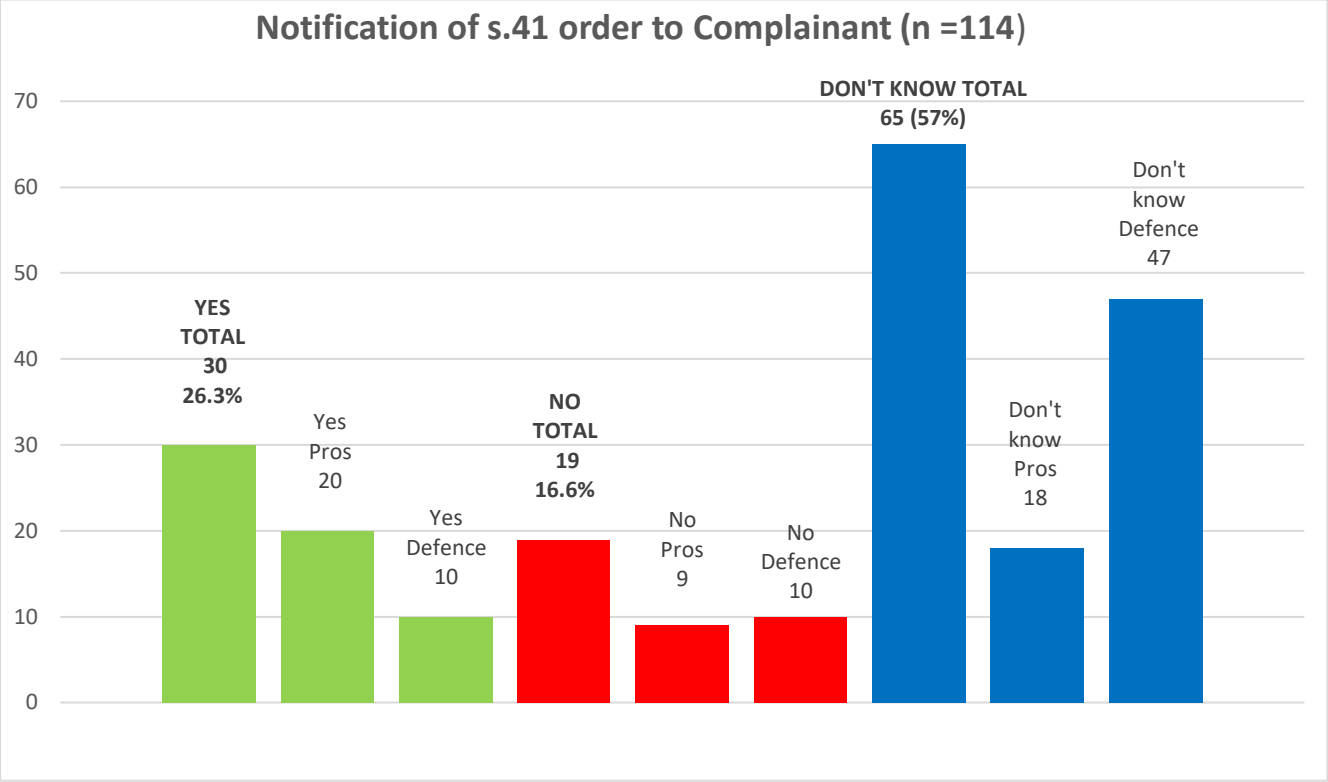
> "[Defendant] and complainant had been in a long standing relationship. Prosecution evidence revealed the details of some of their sex life. However these parts were not controversial and no questions were asked about it."
>
> "Fact that defendant and complainant had been in a sexual relationship was known to the jury. No need for either to speak about the nature of it. The allegation was rape. The other sexual contact was consensual (agreed)."
>
> "Evidence included home videos of the defendant and complainant and so no questions needed about the sex acts between them."

104. In one case in relation to a 17-year-old, the Crown accepted that her behaviour on the night with other men was intrinsic to the allegation (thereby opening the Consent and Contemporaneity Gateway). Most often this seems to have occurred where the parties previously had been in a consensual sexual relationship; in some instances this evidence came out in the complainant's Achieving Best Evidence video interview, and so the evidence was adduced by the prosecution in that form, and no questions were put to the complainant about the matter in court. Again, this practice of adducing evidence by agreement might mislead observers in the courtroom into believing that previous sexual behaviour is being tendered contrary to section 41. However it is clear from the cases in the sample that where this was done by agreement with the prosecution, it was because it was seen as important evidence for the jury, and it was done in such a way as to spare the complainant from having to deal directly with it.

Notification of the complainant

105. This question asked respondents "do you know whether the complainant was notified in advance that section 41 order had been made?" There were then three options offered: yes; no; don't know. In retrospect this question was poorly framed as it is likely that some respondents answered "no" when they didn't know. Consequently the data yielded by this question cannot be considered reliable.

Figure 19



106. Nonetheless, interesting points emerged when the answers were cross-referenced with whether the respondent was acting for the prosecution or the defence in that particular case. It was expected that the defence counsel would not know whether a complainant, a prosecution witness, had been notified of the order. What was not anticipated was the number of prosecutors who did not know (n = 18), or who confirmed that the complainant was not informed (n = 9). Even if, given the ambiguity of the question noted above, the latter figure signifies that those prosecutors did not know (hence n = 27), this may or may not constitute a departure from CPS policy that the complainant be informed before he or she testifies.[139] It is entirely possible that the CPS caseworker or CPS lawyer, or the Officer in the Case (OIC), had already explained this to the complainant. Given the risk that an apprehensive complainant might withdraw without the support of the prosecuting advocate who is best placed to explain the limitations of the permitted line of questioning, it can be important that the advocate be the person to discuss this with the witness.

[139] Crown Prosecution Service, *Speaking to Witnesses at Court* (CPS, revised 27 March 2018).

If no section 41 application was made or was unsuccessful, did the court permit any questions relating to previous sexual experience in cross-examination of the complainant? If so, did prosecuting counsel object? If yes, what was the outcome of the objection?

107. There were 223 cases in this part of the sample.

- In 200 (89.68%) no additional questions were permitted by the court.
- In 13 (5.82%) a line of questioning was permitted.
- In 10 (4.48%) cases some questions were permitted.
- In 16 (7.17%) cases, the prosecution objected to the question, and in one case the court raised the objection first.
- In five (2.24%) cases the prosecution had agreed to those questions being asked without a s. 41 application.

108. It should be noted that as some respondents did not answer all three questions, the totals do not add up, e.g some responded that the prosecution did object, without recording the outcome of the objection. This means that the data presented can only be indicative of the situation prevailing in court.

109. Several respondents explained, or it was clear, that the evidence was not intercepted by section 41:

> "Only about the complainant's conduct over the 2 days of their relationship to show that the complainant was smitten with the defendant (not in issue). It was limited to asking if she had willingly kissed the defendant. There were references by her in text messages to him being a 'good kisser'". [no objection; admissible as background evidence].
>
> They related to her sexual abuse by her father - the defendant asserting that whilst father had abused her he had not [the trial judge approved the questions in advance as coming under CJA 2003 s. 100 as bad character].
>
> "the complainant's account of the evening leading up to the alleged rape was different to the defendant's in terms of the sexual acts taking place between them"; the questions put a slightly different order of events to that alleged by complainant which was the defendant's case.

110. In several instances it was doubtful whether the evidence fell within section 41, for example:

> "that one of the recent complaint witnesses she had been in a relationship with" [no objection; presumably relevant to potential bias].

"There were some agreed questions regarding the general relationship but none about specific sexual behaviour."

111. In eight (3.58%) cases it appears that the evidence should have been the subject of a section 41 application — with the important caveat that the issues can be more subtle and complex than can be explained in a survey of this nature, as the following examples illustrate (author's comments in parentheses).

"Because the Crown's case was that the Complainant [aged 16 or 17] was a virgin." [note: in this case there was no section 41 application; there should have been but the question clearly went through the fourth gateway as of right to rebut prosecution evidence; no answer to question to any objection from prosecution.]

Some Qs allowed concerning sexual experience with another and re online messaging/texts. [In this case a section 41 application had been made and denied in full; it is not clear if these questions had been the subject of the application, which was not indicated by the respondent. The prosecution did not object which suggests that they were not.]

Prosecuting counsel reported: "A formal application was not made but the limits of XX [cross-examination] were discussed and agreed between counsel and approved by the Judge. This was a case in which the [complainant] now adult, had made a detailed recent complaint as a child. A few questions were properly asked to explore the extent of the [complainant's] sexual knowledge and experience at that time. These were necessary in order to explore the issue of whether the [complainant] could have had the information she plainly had then for reasons other than her encounter with the defendant. The defendant would arguably have been denied a fair trial had these questions not been permitted." [This evidence would be admissible through the Non-consent Gateway. [140]]

"The suggestion was that the complainant left her husband (the defendant) for another man and that was why she had made allegations against her husband." [Here, prosecuting counsel reported that no objection was made because it was too late, as the question had been asked and answered already; in that case no section 41 application had been made by the defence earlier.]

"Questions about the background to the relationship, including previous sexual practices between the parties, as the complainant and defendant had been in a long-term relationship." [Defence counsel had considered but rejected making a section 41 application, without explanation; no objection from prosecuting counsel.]

Previous relationship and sexual activity between the AP [Aggrieved Person] and def was relevant to whether she consented to specific sexual acts [prosecutor respondent indicated no objection but without explanation; no previous section 41 application by defence.]

[140] *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45 [78]-[79] (Lord Hope).

One defence counsel commented that counsel for the co-defendant refused to engage with s. 41, yet the court allowed some questions (the subject matter not being indicated) on previous sexual experience, without objection from the prosecution.

One prosecuting counsel, noting that some questions were permitted, explained: "The defence led a witness into a previous complaint by the complainant. It was dealt with very badly and resulted in (forced) admissions which prejudiced the prosecution complainant". The respondent did not explain the reason for not objecting.

112. In four cases the prosecution had led the evidence; in three of these cases it was not necessary for the defence to ask further questions, whilst in one other it was:

"[Three] complainants gave evidence of sexual acts with the defendant beyond the scope of specific counts on indictment - each was cross-examined on the detail of additional allegations." [It appears that this development was not anticipated from disclosure, and the prosecution could not object in the circumstances. The evidence would have been admissible under the Rebuttal Gateway]

"The case involved trafficking and prostitution of boys. Previous sexual contact with others was admitted as part of the Admissions but no cross-examination was required."

"No questions were asked but it was adduced by the prosecution that they had previously engaged in sexual behaviour."

"Jury was aware that the defendant and the complainant were living together as a couple at the time of the incident but there were no questions re their sexual relationship."

113. Importantly, the data disclosed that judges were not lenient in respect of the few cases where section 41 applications should have been made earlier:

"Defence counsel was censured and the judge threatened to report him to the BSB [Bar Standards Board, the regulatory body for barristers];

"The court objected not the prosecution."

In one instance the judge had denied a section 41 application to ask questions showing recent sexual contact with another male, and explaining why the complainant was not dressed at the time of sexual contact with the defendant. The jury then asked the same question, and were told by the judge not to speculate, after the prosecution objected.

Overlap of YJCEA 1999 section 41 and CJA 2003 section 100

114. A complication not addressed by Parliament in 1999 was the intersection between previous sexual history and evidence of the complainant's bad character. The CJA 2003 section 100 abolished the common law licence to attack the character of ordinary

witnesses, instead instituting a general prohibition on admitting evidence of their bad character, subject to three exceptions: (a) where it constituted important explanatory evidence, or (b) had substantial probative value in relation to a matter in issue and was of substantial importance in the context of the whole case, or (c) was agreed by all parties to be admissible. This set up an obvious and unhelpful tension with YJCEA 1999 section 41, to which section 100 did not refer, as it was unclear (and indeed remains unclear) under which provision the defence should apply to cross-examine, for example, about the complainant having been a sex worker, or of having told lies about sex, or having made false allegations against third parties. Many counsel now follow the prudent practice of making applications under both provisions. This did feature in this study:

> "Also related to lies told about fact of a relationship [with a named person]. Crown taking view that even eliciting lies invoked s. 41." (Application allowed in part).

> "The answer is 'no', but it is worth explaining that the matters did not equate to previous sexual 'experience' on the basis of the case law. Rather, it related to the question of why the complainant did not reveal the current matters at the same time as revealing other sexual abuse as a child."

> "Previous allegations of rape documented within third party material as being false or withdrawn." [so the evidence came under CJA 2003 s. 100 as bad character]

In one case the trial judge determined that the behaviour alleged was not captured by section 41 and that no application was necessary.

In another case in the sample the following questions were permitted by the court at trial without a section 41 application, which had arisen through late disclosure:

> "Previous allegations by complainant against defendant that were alleged to be false were permitted as being outside scope of s.41 as [there was an] evidential basis for saying [they were] untrue."

Once again this is an area where the lay observer in the courtroom might well think that section 41 was being breached when in fact the distinct procedures were being adhered to under the CJA 2003 section 100.

LIMITATIONS OF THIS STUDY

115. All empirical research studies have their limitations. We have noted the limitations of the previous studies. In this present study, limitations identified are:

- whilst the survey link was not restricted to CBA members, that was the primary target in terms of invitations to complete the survey; however, the Association's membership does not comprise the entire Criminal Bar in England & Wales;
- a relatively small number of cases in the sample in each Crown Court centre, especially from Wales;
- it is likely that the ratio of section 41 applications to complainants is **overstated**, because of:
    - the counting conventions adopted where the respondent did not specify the number of complainants involved in a particular case; and
    - a significant number of counsel who had indicated they had done five to ten sex offence cases within 24 months only provided a few samples, and it is possible there was an unconscious bias toward remembering and reporting those in which section 41 applications had been made whilst completing the survey.

CONCLUSIONS

Is section 41 working in the interests of justice?

116. The overarching conclusion which emerges from this study is that there is a broad consensus at the Criminal Bar that it is appropriate to have some limitations on cross-examination on previous sexual behaviour. Only 1.43% of respondents thought that section 41 should be repealed altogether, without replacement. This view is a balanced and measured one, given that a substantial majority of respondents (68.71%) both prosecuted and defended cases within the sample of 10 cases they were asked to supply. This gave them a perspective on the issues and interests in play between complainant and defendant which is unique in the criminal justice system.

117. The prevalent view was that section 41 worked in the interests of justice, particularly since *R v A (No 2)* now provides a form of safety valve to ensure that the defendant is not deprived of a fair trial by having the jury deprived of relevant information concerning the situation in which the parties were placed. Significantly, not a single respondent thought that section 41 should be made *more* restrictive.

118. However, the complexity and opacity of section 41 leaves a great deal to be desired, as many barristers emphasised. It is at the same time the most contentious legal issue in sexual assault trials so far as the public and victim support advocacy groups are concerned, and the most inaccessible to the public.

119. So labyrinthine is the legislation that even counsel who prosecute and defend sex cases day in and day out still find themselves constantly going back to reread it. This complexity makes the law exceptionally difficult to explain to lay participants in the trial, much less to lay observers and to those who support complainants.

120. Therefore there was a strong sense amongst the responses that a good case could be made for redrafting the legislation within its current scope, as defined in case law, and for delineating judicial power to go beyond those constraints when in the interests of justice to ensure a fair trial for all participants, in effect codifying the breadth of the so-called 'ECHR gloss' in *R v A (No 2)*. Although the ECHR gloss has been applied only infrequently in appellate case law interpreting the section 41 gateways, it is clear from the

data in this survey that it is a constant backdrop to discussions between counsel and before the court in considering section 41 applications. Given the fluidity, range and variety of evidence potentially under discussion, the findings of this study indicate that it would be unwise to try to prescribe what a fair trial would require by way of relevance in particular contexts.[141] This view is at odds with campaigners and some academics for a complete or extended ban on previous sexual behaviour evidence

How is sexual behaviour evidence handled in practice?

121. The discursive comments of the barristers illustrated the vast variety of circumstances and types of evidence which might have to be funnelled through the gateways in section 41. Fully arguing every application, as academic and lay commentators have urged, would consume unnecessary court time where the prosecution accepts that the evidence should be admitted in the interests of justice. Consequently, counsel have cooperated, as required by the Criminal Procedure Rules, to devise methods to adduce the evidence without a formal ruling, or to submit an agreed form of order to the trial judge without extended argument. These practices can easily be misconstrued by observers in court as not taking section 41 seriously, but are essential given the congestion in court listing, and are accepted – indeed, welcomed – by trial judges.

122. Where the evidence is seen as providing important information to the jury, every effort by counsel and the court is made to minimise any unnecessary distress to the complainant. As the CBA Study shows, the prosecution might introduce the evidence through the opening speech, or through the police interview, or through an agreed statement of facts. If some questions do have to be put to the complainant, then they are typically on narrow points, and are carefully framed and succinctly put.

123. Defence counsel did not make section 41 applications lightly, and they were scrutinised carefully by prosecuting counsel and by trial judges, as indicated by the number of cases where only some questions were permitted. As one respondent who both prosecuted and defended noted:

[141] See {Matt James Thomason, 2018 #12777} and {Findlay Stark, 2017 #12781}

> "I do not have the breakdown of all the sex cases in which I have been involved in the past 24 months. However, I have been engaged in at least 12. In no case has there been a failure to comply with s41, whether prosecuting or defending, nor have there been attempts to try to question the witnesses about sexual matters without leave."

Another stated: "I have not witnessed s.41 used in favour of a defence application which was not fair and just."

And another: "the last two cases I have conducted in which the question arose, section 41 received careful and anxious scrutiny from the Court."

124. There appeared to be a high level of compliance by the Bar with the substantive constraints of section 41, although a number expressed reservations or even deep concerns about those constraints in terms of the right of the defendant to a fair trial due to the rigidity of the Gateways. In only a handful of 223 cases was questioning permitted outside a section 41 application or order where one should have been made.

125. The relatively high complete success (46%) or partial success (31.9%) rates for applications appears on the evidence of this study not to be attributable to lax approaches to section 41 by Crown Court judges, but rather to carefully thought-through and prepared applications, brought on arguable grounds, bearing out Lord Bingham CJ's supposition in 1998 regarding the 1976 Act.[142] The study shows that many counsel considered but then decided not to bring section 41 applications as part of their case preparation.

126. This survey provides no evidence to support the contention that late applications are made as a "tactical ploy" or to "manipulate the court process", phrases used in the new Criminal Practice Direction. Late applications were often due to late prosecution disclosure or to the way that evidence had unfolded at trial, including in examination in chief of the complainant or other prosecution witnesses. Because of the high number of respondents who prosecute, it could be reasonably expected that they would note any significant level of abuse by defence advocates. Only one did note abuse, in respect of just one case in the sample, whilst taking pains to note that there was no prejudice to the Crown's case.

[142] Lord Bingham, *Hansard*, House of Lords, Debate on the Youth Justice and Criminal Evidence Bill, 15 December 1998, Vol. 595, col 272.

127. Previous surveys relying upon in-court observations could not provide reliable assessments as to defence compliance with section 41, for several reasons:

- the observers would not have seen the indictment and so would be unlikely to know the evidential targets for which the evidence was relevant;
- the observers would be unlikely to have attended the pre-trial hearing where section 41 applications are supposed to be made;
- the observers might well have not understood that the evidence was adduced by agreement with the prosecution, and may also have been approved by the trial judge, without a formal section 41 application having been made;
- the observers might well have not understood that the evidence was admissible through a different route than section 41, such as CJA 2003 section 100, notwithstanding that sexual behaviour was somehow involved. From the comments provided in the *Seeing Is Believing* report, it appears that the lay observers viewed any material relating to sex, or indeed other issues of the complainant's credibility, as being intercepted by section 41.

How should the prosecution respond to section 41 applications by the defence?

128. It is concerning that the recommendations in *Seeing Is Believing* seriously misstate the obligations of prosecuting counsel in conducting the case for the Crown. The prosecution acts as an impartial and objective minister of justice, measuring success by justice, not by victory, without playing a fully adversarial role.[143] The Northumberland Report recommends that "[the] CPS ensure that prosecuting counsel *robustly oppose all applications* for the admission of section 41 material and if an application succeeds, further seek to limit the ambit and quantity of such material to the minimum"[144] (emphasis added). This is contrary to all of the ethical and constitutional obligations of prosecuting counsel. Parliament in enacting section 41 did contemplate that sexual behaviour

[143] *R v Lyons* [2002] UKHL 44, [2003] 1 AC 978 [19] (Lord Bingham); *Farquharson Guidelines: Role of Prosecuting Advocates* (Updated 2011, https://www.cps.gov.uk/legal-guidance/farquharson-guidelines-role-prosecuting-advocates (accessed 30 October 2018); Laura Hoyano, 'What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' [2014] Crim LR 4, pages 24-25.

[144] Ruth Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (Vera Baird Police & Crime Commissioner, 2017), pages 11, 34.

evidence could be relevant, admissible and necessary for a safe verdict. If an application is clearly warranted and admissible through one of the four gateways in section 41, then it would be ethically wholly improper for prosecuting counsel to oppose the application.

129. The Northumberland Report also states: "[The CPS] should remind barristers that they are *required* to challenge all late Section 41 applications and *to challenge any 'bad character' applications* which seek to include previous sexual conduct by the complainant"[145] (emphasis added). This is not the law. If there is good reason for the late application, such as late prosecution disclosure, then the Crown ethically should not object to the late application. Moreover, as noted in paragraph 114 above, there is a clear and judicially recognised overlap between CJA 2003 section 100 and YJCEA 1999 section 41, and the mere fact that the bad character evidence pertains to a sexual matter (such as previous false allegations of sexual assault) does not by that fact alone bar its admissibility.[146] Due to the overlap, it is considered prudent practice for the defence to make applications under both of those provisions in relation to the same evidence.[147]

The application of section 41 to children under the legal age of consent

130. The number of applications brought in respect of children under the legal age of consent (Figures 15 and 16) is striking, and the subject matter of those applications warrants further study.

The non-consent and rebuttal gateways as the most travelled

131. Figure 17 is also striking in showing that by far the greatest number of applications (71) were made through gateway 41(3)(a), the Non-Consent Gateway. This indicates that evidence which touches on previous sexual behaviour is most frequently *not* being tendered to try to substantiate the first of the 'twin myths', that an unchaste' woman would be more likely to consent to sexual intercourse with the defendant than one who was chaste. Instead, the reasons given in discursive comments by counsel are revealing as to how these gates work in practice. They also substantiate how critics overlook the

[145] Ibid pages 11, 34.

[146] *R v Mokrecovas* [2001] EWCA Crim 1644, [2002] 1 Cr App R 20; *R v MH; R v RT* [2001] EWCA Crim 1877, [2002] 1 Cr App R 22; *R v V* [2006] EWCA Crim 1901; *R v BD* [2007] EWCA Crim 4.

[147] Advised in *R v V* [2006] EWCA Crim 1901, [25].

emphasis in s.41(4) that the objective is to intercept evidence aimed at showing *only* the second myth, that an unchaste woman is never worthy of credit *as a witness*, but that otherwise it is the proper task of defence counsel to seek to undermine her credibility with relevant evidence (s.42(1)(a), as with any other prosecution witness.

132. Rebuttal of prosecution evidence under section 41(5) was also very frequently invoked (36 applications), and is a gateway which should be uncontroversial. The defence must always have an opportunity to rebut or explain any aspect of the prosecution case.

A causal connection between sexual behaviour evidence and convictions or acquittals?

133. This study did not attempt to identify any causal connection between conviction rates and permission to cross-examine on previous sexual behaviour, and indeed in a system of trial by jury with deliberations in secret, it probably would be impossible to design such an assessment. The Home Office 2006 study notwithstanding, there is no credible evidence to date that cross-examination on previous sexual behaviour which is authorised under section 41 has a deleterious (or any) effect on conviction rates. In fact, the most recent Criminal Justice Statistics for the year ending December 2017 shows that the conviction rate for sexual offence cases has continued to climb, from 59.7% in 2016 to 61.5% in 2017, the highest in the last decade.[148] This increased conviction rate has taken place against a backdrop of an overall decrease in conviction rates for all other offences, and is the largest increase for any category.

The impact of inaccurate information given to the public

134. A significant number of respondents considered that there was misrepresentation in the media, particularly after the Ched Evans case, about the frequency of successful applications under section 41. Concern was repeatedly expressed that this could deter victims of sexual offences from coming forward to the police.

[148] Ministry of Justice and Office of National Statistics, *Criminal Justice Statistics Quarterly, England and Wales, 2017* (18 May 2018), page 17. There is however controversy over what is claimed to be a declining number of sexual assault cases the CPS decides to prosecute, due to a wariness of evidentially weak cases. As a case may be viewed as evidentially weak for a myriad of reasons, this rumour has little if any bearing on the present issue of the operation of section 41 in trials.

Presenting reality whilst stripping out bias: the difficult balance

135. Critics of the Gateways in section 41 have contended that they undercut the right of a person to consent to each and every sexual encounter, regardless of any previous sexual behaviour. Therefore, they assert, what has happened in the past between the complainant and any third party, or between the complainant and the defendant, must be irrelevant. Whilst there is a certain logic to this proposition, it must be remembered that if all context is stripped away from the incident being prosecuted, the jury may well be entirely misled by an artificial scenario.[149] This was the issue addressed in *R v A (No. 2)*:

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[149] In his speech in *R v A (No 2)* [2001] UKHL 25, [2002] 1 AC 45, Lord Steyn dealt with the issue of relevance of such evidence at [31]):

> "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. It cannot, of course, prove that she consented on the occasion in question. Relevance and sufficiency of proof are different things. The fact that an accused a week before an alleged murder threatened to kill the deceased does not prove an intent to kill on the day in question. But it is logically relevant to that issue. After all, to be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue. It is true that each decision to engage in sexual activity is always made afresh. On the other hand, the mind does not usually blot out all memories. What one has been engaged on in the past may influence what choice one makes on a future occasion. Accordingly, a prior sexual relationship between a complainant and an accused may sometimes be relevant to what decision was made on a particular occasion."

Lord Hutton agreed that such evidence may be relevant (at [151]):

> "The second observation is that whilst there can be no dispute that the Minister of State was correct to say … 'The fact that a complainant has consented previously does not mean that she will consent again', it does not follow, in my opinion, where there has been a recent affectionate relationship between a woman and a man, that one cannot say that the fact that she has consented previously is relevant in deciding whether she consented when there was intercourse with the same man a relatively short time later. I consider there is much force in the statement of Professor Galvin, at p.807 of her article, [Harriet R Galvin, 'Shielding Rape Victims in the State and Federal Courts: a Proposal for the Second Decade' (1986) 70 Minnesota L Rev 763] that
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> > 'Even the most ardent reformers acknowledged the high probative value of past sexual conduct in at least two instances. The first is when the defendant claims consent and establishes prior consensual relations between himself and the complainant … although the evidence is offered to prove consent, its probative value rests on the nature of the complainant's specific mindset towards the accused rather than on her general unchaste character.'

As Rook & Ward point out, what the previous consensual intercourse may demonstrate is an affectionate relationship or at least a physical attraction toward the accused (HHJ Peter Rook QC and Robert Ward QC, *Rook & Ward on Sexual Offences: Law & Practice* (5th edn, Sweet & Maxwell 2016) at ¶ 26.108, citing Lord Hutton).

since, on its face, section 41 forbade any evidence that the parties in that case had been in a previous consensual sexual relationship, the jury might well infer that it was a case of a stranger rape. This inference could work to the detriment of both defendant and complainant: for example, the jury might consider that this was a one-night stand if sexual activity followed a meeting at a nightclub, when they might have had a long-standing intimate relationship. This exposes the fundamental tension in statutory provisions attempting to control the admissibility of previous sexual behaviour: should the focus be avoiding prejudiced reasoning along the lines of the twin myths, as in the Canadian legislation,[150] but otherwise trying to present to the jury the situation, and what led up to it, realistically, or should it expurgate from the evidence any information about the complainant's sexual history on the basis that it would undermine his/her liberty to consent or to withhold consent on the specific occasion charged?

136. The CBA Study shows that prosecuting and defence counsel, encouraged by trial judges, habitually work together to find creative solutions to this dilemma, whilst seeking to minimise any unnecessary distress to the complainant.

The impact of inaccurate information given to the public

137. A significant number of respondents considered that there was misrepresentation in the media, particularly after the Ched Evans case, about the frequency of successful applications under section 41, and the type of invasive cross-examination they were claimed to permit. Barristers repeatedly expressed concern that this could deter victims of sexual offences from coming forward to the police.

138. The greatest damage which can be done regarding section 41 is the misinformation which is disseminated in the media and by non-professional participants in the criminal justice system repeating the myths about ferocious cross-examining counsel, the raking over of complainants' sex lives, and defence counsel deliberately flouting the rules, with seeming impunity. The immediate solution is to disseminate accurate information about the circumstances in which previous sexual behaviour may

[150] Criminal Code of Canada, section 276(1). See however the criticism of the "'myth' myth" by Mike Redmayne, 'Myths, Relationships and Coincidences: the New Problems of Sexual History' (2003) 7 E & P 75.

be relevant. Public education might also benefit from redrafting section 41 to achieve clarity and to reflect its interpretation in the case law, with an explicit recognition of the overriding importance of achieving a trial which is fair, and hence is in the interests of objective justice.[151]

139. What this CBA study clearly establishes is that counsel and trial judges strive on a daily basis to ensure that the underlying intent of section 41 is fulfilled, in the infinite variety of narratives of sexual relations recounted on a daily basis in English and Welsh courtrooms. This is the reality which needs to be conveyed urgently to the police, the public and to sexual assault advocacy groups, so that complainants are not deterred from engaging with the criminal justice system.

Appended: to this Report

Annex A Flow diagram of YJCEA section 41

Annex B: Questions in Survey

Annex C: Crown Court Centres in sample where applications were made

Annex D: Crown Court Centres in sample where applications were not made

[151] Laura Hoyano, 'What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial' [2014] Crim LR 4, pages 24-25.