Cross-examination of Sexual Assault Complainants on Previous Sexual Behaviour: Views from the Barristers' Row

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This article summarises 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. 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. 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. It is unique in eliciting information from the 140 anonymous barristers who were directly involved in prosecuting or defending the cases in the sample, and who know best what happened, not only in the public courtroom but also in the closed courtroom and in the robing room. They in turn are highly unusual in adversarial legal systems in being 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 and the operation of its evidential and procedural rules.

Allegations of criminal sexual assault are quintessentially contests of credibility.[1] Culpability is unique amongst criminal offences, turning upon[2] not just the subjective mental state of each of the complainant and defendant as to consent to sexual relations with the other, but also on what the defendant honestly and reasonably believed was the complainant's state of mind concerning consent, and

[*] Whilst the author is also a member of the Criminal Bar Association, the data analysis and the conclusions drawn therefrom were compiled entirely independently of the CBA, and no fee was paid by the CBA for the study. This survey was designed with the advice of the CBA Working Party on s.41: Sarah Vine (Chair), Mary Aspinall-Miles and Alisdair Williamson QC. The methodology and findings were subjected to an independent research audit by an anonymous reviewer. The valuable assistance of Nikita Nicheperovich in calculating and depicting data was funded by the Oxford Law Faculty's Research Support Fund.

[1] *Funderburk* [1990] 1 W.L.R. 587 (CA); [1990] Crim. L.R. 405.

[2] For persons above the age of legal consent.

whether she had 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 their conflicting accounts. This is a matter of enduring controversy in all jurisdictions using the adversarial mode of trial.

"[R]oaming cross-examinations as to the credit of complainants"[3] by the defence were first statutorily restricted regarding "any sexual experience of the complainant with a person other than the defendant" in 1976; leave could be granted only if it would otherwise be unfair to the defendant. There was vigorous academic and political debate as to how effectively the Sexual Offences Act 1976 (1976 Act) protected complainants. *Speaking Up for Justice* 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.[4] Many judges and advocates vehemently contested this conclusion.[5] Nevertheless the Government decided that legislation should prescribe the sole circumstances in which sexual history evidence could be admitted, without any judicial inclusionary discretion.[6]

The new model embodied in the Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) s.41 takes a radically different approach from the 1976 Act. It is very complex in its wording, and intentionally rigid in its structure. It applies to previous sexual encounters with the defendant as well as third parties. 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, which are described later in this article.

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,[7] as relevance to a fact in issue is a precondition to the admissibility of all evidence tendered by any party. Conversely, if the questions are not caught in the subs.41(4) filter and can pass through a gateway, the court has no discretion to exclude the evidence,[8] which is commonly misunderstood by non-practitioners criticising specific judgments.

The prohibition on evidence of "sexual behaviour" applies only to the defence. The prosecution can adduce that evidence without seeking the court's permission, common practice to ensure the defendant a fair trial.

[3] *Funderburk* [1990] 1 W.L.R. 587 (CA); [1990] Crim. L.R. 405, 486.

[4] 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), paras 9.62, 9.64.

[5] Lord Bingham, then Lord Chief Justice, *Hansard* HL Vol.327, col.1272 (15 December 1998). Baroness Mallalieu QC, *Hansard* HL Deb Vol.598, col.16 (8 March 1999) stated 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." N. Kibble, *Judicial Perspectives on S.41 of the Youth Justice and Criminal Evidence Act 1999*, pp.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. L.R. 190, 263).

[6] 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), Recommendation 63.

[7] *Martin* [2004] EWCA Crim 916; [2004] 2 Cr. App. R. 22 at [18]; *Floyd Charles Darnell* [2003] EWCA Crim 176; [2003] 2 WLUK 46 at [39].

[8] *F* [2005] EWCA Crim 493; [2005] 2 Cr. App. R. 13; [2005] Crim. L.R. 564.

Notwithstanding the strictures of s.41, critics contend that it is still too lax, and that it is routinely flouted in the courts.[9] Two reports are cited in support of this contention, conducted by LimeCulture and by Vera Baird QC, the Police and Crime Commissioner for Northumberland. In reliance upon these reports, Dame Harriet Harman QC MP and Dame Vera Baird QC in 2017 proposed to prohibit all questioning on a complainant's previous sexual behaviour. A subsequent more modest proposal in January 2018 by a cross-party group of MPs led by Harriet Harman would prohibit evidence of the complainant's sexual activity with anyone other than the defendant as evidence of consent and give the complainant a right to participate and be represented when the application was heard.[10] Some academics have also called for s.41 to be reformed.[11]

This independent study was commissioned by the Criminal Bar Association (CBA) to evaluate these claims that s.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. As the CBA Study was designed to respond to previous empirical studies on the back of which the 2017–18 reform proposals have been formulated, it is necessary first to describe them and to identify any difficulties in relying on them as representing current practice in the courts of England and Wales. A detailed critique of their findings and methodologies appears in the full Report to the CBA.[12]

L. Kelly, J. Temkin and S. Griffiths, Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials[13]

This study strongly criticised the legislation and its application. Of the studies considering s.41 in practice, its empirical methodology is the strongest (but nonetheless problematic). Its current relevance to the s.41 debate is very questionable:

- the researchers focussed on adult female complainants and stereotypical assumptions about them,[14] whereas s.41 applies to sexual assault complainants of all genders and ages;
- the sample was restricted to alleged rape offences;
- the field research was carried out in 2003 to mid-2004, when s.41 was still bedding down; since then judges must undergo regular intensive training regarding all aspects of sex offences trials;

[9] E.g. C. McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 JCL 367.

[10] H. 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). The proposal would also require that no judge could hear a "rape case" without having attended the sexual violence training course, but judges already are required to undergo that training to obtain what is colloquially known as a "sex ticket".

[11] E.g. F. Stark, "Bringing the Background to the Fore in Sexual History Evidence" [2017] Arch. Rev. 4; M. J. Thomason, "Previous Sexual History Evidence: a Gloss on Relevance and Relationship Evidence" (2018) 22 E & P 342.

[12] See *https://www.law.ox.ac.uk/people/laura-hoyano* [Accessed 18 December 2018].

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

[14] Kelly, Temkin and Griffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006), pp.vii, 1–4.

- appellate judgments have provided guidance as to the meaning of terms such as "sexual behaviour" and have demarcated the gateways;
- successive Crown Court Compendia[15] have advised trial judges on addressing the stereotypes which concerned the researchers;
- an ethos of active case management infuses the Criminal Practice Rules and Criminal Practice Directions; all applications, even those made mid-trial, must be 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;
- within the CPS, rape prosecutions are supposed to be handled by experienced lawyers embedded in RASSO teams;
- all advocates conducting serious sexual offence cases involving vulnerable witnesses are expected to undergo special training[16]; and
- the Criminal Justice Act (CJA) 2003 s.100 greatly restricts cross-examination of witnesses on their alleged bad character, requiring an evidential foundation before allegedly false previous allegations of sexual assault may be put to a complainant.[17]

Notwithstanding these developments since 2003–04, the Home Office study is still cited in current academic literature as representative of the current situation in England and Wales.[18] The underlying, and dispiriting, assumption is that empirical research has had no impact whatever in influencing a change in culture, nor on practice reform through Criminal Practice Directions, nor on judicial interpretation of legislation.

Vera Baird QC et al, Seeing is Believing: The Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16[19]

This report was wholly reliant upon the observations of 12 lay observers of 30 rape trials involving adult complainants, in a single Crown Court in Newcastle, Northumbria. The observers reported that questioning they regarded as falling within s.41 occurred at 11 of the 30 trials, but the trial judge intervened in two, reducing the overall number to nine (30 per cent).

The authors justified using volunteer observers as

[15] Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (June 2018).

[16] Advocacy and the Vulnerable Training Programme, Inns of Court College of Advocacy (*https://www.icca.ac.uk /advocacy-the-vulnerable* [Accessed 20 November 2018]).

[17] Thereby removing one of the conclusions in the report (question 7, p.73): *Alan David C and Julie B* [2003] EWCA Crim 29; [2003] 1 WLUK 620 at [27]; *TW* [2004] EWCA Crim 3103; [2005] Crim. L.R. 965; *Abdelrahman* [2005] EWCA Crim 1367; [2005] 5 WLUK 280; *Lee Archer* [2003] EWCA Crim 2072 (CA); [2003] 1 WLUK539 at [14]; *Stephan H* [2003] EWCA Crim 2367; [2003] 7 WLUK 521 at [30]–[31].

[18] E.g. McGlynn, "Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence" (2017) 81 JCL 367; S. Cowan and L. Campbell, "The Relevance of Sexual History and Vulnerability in the Prosecution of Sexual Offences" in P. Duff and P. Ferguson (eds), *Scottish Criminal Evidence Law* (Edinburgh University Press, 2018).

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

> "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."[20]

This justification, however laudable, is illogical because it assumes that laypeople, after brief and undescribed training by CPS personnel, are capable of spotting and understanding everything about a trial, including what occurs in closed court and outside court, and involving complex issues of statutory and case law. The observers were expected to record subjective impressions of the performance of the trial judge and counsel during the public portions of the trial (such as "empathy"). Their criticisms show that they did not have a thorough understanding of the adversarial trial, defence rights, the Sexual Offences Act 2003, nor the relevant evidential rules. They would not have seen the indictment so might have had difficulty identifying how evidence was relevant to the charges.

Nor could they know of the discussions expected by the Criminal Practice Rules and Directions to take place between counsel before and during the trial, in private, to resolve issues and expedite the trial. They assumed that any questions concerning sex allowed without a ruling they had witnessed must breach s.41. They concluded that in 7 of the 11 cases "the correct rules of procedure were not followed",[21] when this was not necessarily so. They did not attend any pre-trial proceedings where such applications are supposed be notified and made.[22] In two (possibly three) cases the observers 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 presiding judge.[23] In another case they criticised a judge for allowing an application without "full argument", when it seems from the context that it was unopposed.[24]

Crucially, the report's authors did not understand s.41, describing it as providing:

> "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)[25]

This is simply wrong. The House of Lords in *A (No.2)* stressed that the court in interpreting and applying s.41 must consider the defendant's "absolute and fundamental right" under ECHR art.6(1) to a fair trial, and that whilst due regard had to be paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the risk of endangering the fairness of

[20] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), p.4.
[21] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (V2017), p.8.
[22] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), pp.8, 9.
[23] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), cases T20 and T23, p.10 and possibly T29 (p.11).
[24] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), case T1, p.10.
[25] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), p.39.

the trial was the test of admissibility.[26] Moreover, subs.41(4) prohibits previous sexual behaviour evidence if it is used merely to suggest that by virtue of that alone, 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 *Seeing is Believing*.[27] The identification of another relevant issue falling to be proved by the prosecution or the defence to which the evidence is pertinent makes the evidence admissible, and this is to be construed generously.[28]

The lay observers generally disregarded defence rights to a fair trial in reality, criticising counsel for seeking to discredit the complainant in cross-examination, apparently thinking there was an evidential burden on the defence to rebut every aspect of the prosecution case, and attributing all listing delays to defence counsel.[29]

The observers also attacked defence counsel for making late applications in three trials "in disregard of the Rules", assuming that they could have applied earlier, and criticised the prosecution for not objecting. They seem not to have been informed of the systemic problems of late prosecution disclosure,[30] or issues unexpectedly arising from the testimony of previous witnesses or the complainant, which the CBA Study shows frequently cause late applications.

Seeing is Believing wrongly asserted that revenge, as a posited motive for a false allegation, constitutes a "rape myth".[31] This is not so. It is a standard question put by prosecuting counsel in cross-examining the defendant (and conventionally 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*.[32] Similarly some of the evidence ascribed by the observers to rape myths was relevant to setting up reasonable belief in consent under the Sexual Offences Act 2003, and so had to be asked of the complainant.

The observers assumed that the judge should "support" the complainant.[33] Some observations did not make sense, but were not questioned by the authors, e.g. "[The prosecutor] asked a lot of leading questions. He did not steer the victim (*sic*) most of the time."[34]

[26] *A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45; [2001] Crim. L.R. 908 at [46] (Lord Steyn).

[27] Identified in *Seaboyer* [1991] 2 SCR 577 (SCC), 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 s.276(1) of the Criminal Code of Canada, making the objectives of the restriction explicit.

[28] *Martin* [2004] EWCA Crim 916; [2004] 2 Cr. App. R. 22 at [33].

[29] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), pp.23, 25.

[30] 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) (authorised by DCO as this important report came out after the article was submitted): Attorney General's Office, *Review of the Efficiency and Effectiveness of Disclosure in the Criminal Justice System* (HMSO, November 2018), Cm.9735.

[31] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), p.28.

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

[33] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), cases T1, T13, pp.10, 25.

[34] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), p.21.

They (and the authors) assumed that an order was contrary to s.41,[35] not understanding that an order was properly made under another statutory provision,[36] or did not understand the relevance of the evidence to a fact in issue because they had not collated the evidence in the prosecution case.[37] They apparently regarded any evidence undermining the complainant's credibility as impermissible, even where the defence was testing her previous testimony, and where it did not relate to sexual behaviour (e.g. disruptive behaviour after, and attributed by prosecution witnesses to, the alleged incident; violence; alcohol dependency potentially affecting memory; or subsequent text messages to the defendant).[38] Similarly they did not appreciate the relationship between bad character evidence under CJA 2003 s.100 and sexual behaviour evidence under s.41, assuming that evidence ruled admissible under s.100 nonetheless must be barred by s.41.[39] They also thought it improper that the defence be allowed to adduce evidence of his own good character.[40]

The Northumberland Report concludes "what they [the lay observers] have seen has happened".[41] More accurately, what they *thought* that they had seen *may* have happened.

The Northumberland study's findings do not establish that s.41 is routinely misused in Newcastle Crown Court. Whilst the report acknowledges that it does not qualify as a scientific contribution to academic literature, and cannot be extrapolated nationwide,[42] it 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, discussed below. The Northumberland Study provides a very slender and unstable empirical basis for those particular recommendations, much less the radical changes to s.41 in the Harman proposals.

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

This report, dated September 2017, was conducted by[43] a private organisation which trains Independent Sexual Violence Advisors, and was widely publicised in the media. The data claimed that the 36 respondent ISVAs had attended over

[35] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), cases T12 and T14 (lies about sexual activity with third parties), p.11 and recommendation 4.

[36] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), case T14, p.8.

[37] E.g. Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), case T20, p.11 (explained why the complainant was present at scene), and case T6 (complainant upset by father's illness as alternative cause of deteriorating behaviour).

[38] E.g. Durham and others, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), pp.23, 27, 30, cases T6, T9, T22, T26, T6.

[39] *Vye; Wise; Stevenson* [1993] 1 W.L.R. 471; (1993) 97 Cr. App. R. 134 (CA), cases T1, p.9 (alleged lies), T12 (drugs and shoplifting), T14 (professional suspension from work, alcoholism, arrest).

[40] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017).

[41] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), pp.37, 41.

[42] Durham, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), p.42.

[43] Or on behalf of—it is not stated.

550 trials from April 2015 to April 2017.[44] The report claimed that "significant numbers of trials" (unquantified) included questioning the "victim" about their previous sexual history.[45] Eleven respondents claimed that complainants' sexual behaviour "is often introduced by the defence without making a proper application to do so",[46] and "this is not always stopped by the judge or challenged by the prosecution",[47]—assuming this breached s.41. The report concluded, without a stated evidential basis, that

> "[i]t is clear that a failure to intervene could lead to unfair questioning of the complainant about their previous sexual history and therefore undermine the legislation and indeed the presumption that it includes in order to protect the complainant."

Many respondents said they felt the previous sexual behaviour "can never, or can only rarely, be of relevance",[48] indicating an apparent bias against the current law.

The validity of the report's conclusions is undermined by some significant flaws in empirical methodology and computation of the data. It does not comply with empirical research conventions, and contains errors described more fully in the complete CBA Report.

For present purposes, it suffices to point out that, first, its (unnamed) authors were seriously misinformed about the scope and interpretation of s.41. Their description of the legislation completely overlooked gateway (a), which is broader than the other gateways as it admits evidence of sexual behaviour that is relevant to an issue other than consent. Data from the CBA Study shows that gateway (a) is the ground most commonly invoked in s.41 applications, involving a very wide range of evidence.[49] Moreover, the authors failed to note that s.41 applies only to defence evidence, describing it as a blanket prohibition on all sexual behaviour evidence; some cases witnessed by ISVAs may have related to prosecution evidence, a common occurrence. Since LimeCulture surveyed only its former students, the respondents may have received incorrect training about the parameters of s.41. The absence of any reference to *A (No.2)* also raises questions about the knowledge of the researchers and ISVA respondents.

Secondly, the very nature of the ISVAs' functions in any trial means that they are unlikely to have the necessary knowledge to be able to judge whether questions asked in cross-examination breached s.41. According to the CPS,[50] the role of ISVAs includes such matters as understanding the views and concerns of the "victims"; liaising with legal, health, education and social work professionals, therapists and counsellors; providing support and information through interviews

[44] 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.14.

[45] 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.16.

[46] 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.26.

[47] 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.27.

[48] 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.28.

[49] See Table 2.

[50] 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* [Accessed 20 November 2018]).

and court hearings; familiarisation with the court and its procedures; guidance on Special Measures; and accompanying them on a pre-trial visit to court and whilst they testify.

None of these functions requires the ISVA to attend court when the complainant is not present, in particular for a PTPH or separate s.41 hearing. Section 43(1) requires that applications be heard in private, in the complainants' absence,[51] so the likelihood that an ISVA would be present during an application is virtually nil (and the defence advocate could justifiably request that the ISVA be excluded from court as having no assigned function). The ISVA would not have access to the indictment so might well have difficulty identifying questions about sexual behaviour during examination-in-chief or cross-examination which pertained to the charges being tried.

Given the fundamental flaws in methodology, legal and data analysis, the LimeCulture report should not be cited in support of any assertion in relation to the operation of s.41.

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

Apparently prompted by the renewed controversy over s.41, the Attorney General and Lord Chancellor ordered a review of CPS files,[52] consisting of a random dip sample of two files flagged as rape charges, for each month in 2016 in each of the CPS areas, yielding a sample of 309 cases finalised in 2016.

According to the dip sample[53]:

- in 92 per cent of cases no evidence of the complainant's sexual history was introduced by the defence;
- s.41 applications were made in 13 per cent (n=40) of cases;
- 8 per cent (n=25) of the case sample were granted by the court;
- 1.6 per cent (n=5) of the case sample were refused;
- in another five applications the outcome could not be determined;
- the prosecution opposed 35 per cent (n=14) of applications in whole or in part, but in 27.5 per cent (n=11) of cases it was not possible to ascertain the prosecution's position;
- the prosecution agreed or partially agreed to 30 per cent (n=12) of applications;
- in a further three cases the proceedings were concluded before the prosecution was required to respond;
- 70 per cent of applications were made in "acquaintance rape" cases (n=14) and "domestic rape" cases (n=14). Nine applications (22.5 per cent) were made in child abuse cases and two applications in

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

[52] 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* (December 2017), Cm.9547.

[53] 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* (December 2017), Cm.9547, p.14, Tables.

"stranger rape" cases (2.5 per cent). There was some overlap in categorisation[54];

- in the majority of cases (unquantified) the evidence related to the complainant's sexual history with the defendant; in 20 per cent it was not possible to ascertain with whom the activity was alleged; and in 24 per cent of cases the evidence related to activity with a third party.[55]

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 s.41 application was granted. Moreover, defence counsel are not routinely making s.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."[56]

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

- Only 24 cases per CPS area skimmed the surface of the cases processed by RASSO teams in that period; according to CPS statistics prosecutions ranged from a low of 243 to a high of 846 per CPS area in the overlapping 12 months from 2016–2017.[57]
- The sample was restricted to rape cases because the CPS only flags those files.
- The research was confined to reviewing the CPS file, and hence was restricted to what CPS staff had recorded. The study was conducted over a period encompassing the criminal justice system's difficult transition to the Crown Court Digital Case System, with problems of incompatibility with CPS and police computer systems, paper being used to fill gaps. This fact increases the usual fallibility of any quantitative methodology confined to file review. The grounds and the reasons for accepting or rejecting applications by the CPS and by the court were not reported.
- The study assumed that no s.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 caseworker in recording and filing.[58]

[54] 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* (December 2017), Cm.9547, p.9.

[55] 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* (December 2017), Cm.9547, p.8.

[56] 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* (December 2017), Cm.9547, p.11. The CPS data tracked the financial year (Annex 2, p.B9).

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

[58] Contrary to the understanding expressed by H. Harman QC MP, *New Cross-Party Coalition Launches Challenge to Attorney General and MoJ on Use of Rape Complainants' Previous Sexual History in Court*, Notes to Editors,

In summary, the previous empirical studies are entirely or largely unreliable as a picture of s.41 in practice, because they are very outdated, or unduly restricted in their scope (to rape and/or female complainants), or rely upon shallow dip sampling of files, or rely partly on guesswork by lay observers watching open court proceedings (or having extremely limited access to court proceedings in the case of ISVAs). None can be relied upon to reflect current practice.

Research objectives of the CBA Study

The CBA aimed to acquire a much better-informed quantitative and qualitative view of the actual operation of s.41 in the courts of England and Wales. In contrast to its predecessors, the CBA Study set out to:

- cover all sexual offences to which s.41 applies, not just rape;
- cover all genders and ages of complainants;
- elicit data from Crown Courts in all areas of England and Wales;
- obtain a larger sample size, reported in substance and in depth by those with direct knowledge of and involvement in the issues, the evidence and the decisions taken;
- uniquely, derive its data from the advocates directly participating in the pre-trial and trial process;
- explain the evidential and procedural context for any s.41 application and ruling; and
- explain the background, including discussions between counsel, and any agreements about dealing with the material.

The CBA Study constitutes the largest empirical database of the use of previous sexual behaviour evidence in trials in both open and closed hearings in England and Wales, examining in depth 377 cases involving 565 complainants which proceeded to trial in 105 Crown Court Centres in the 24 months immediately prior to November 2017, as reported by 140 anonymous barristers directly involved in prosecuting or defending those cases.

Overview of the Study[59]

An online survey circulated to all CBA members asked whether their practice had included sexual cases within the past 24 months; if not they were asked to indicate this and log out. The remainder were asked how many sex cases they had conducted in the previous 24 months, and then were asked to respond to a set of questions for each of the previous 10 (or fewer) cases they had most recently conducted. A conservative approach was taken to the numerical data, with ambiguous answers disregarded if they could not be resolved through a detailed analysis of the responses on that case.

A total of 179 barristers responded to the survey from a membership of 3,880, for a response rate of 4.6 per cent. Given the diversity of practice areas at the

Note 2, CPS caseworkers (and advocates) are expected by internal instructions to record s.41 applications, but lack of resources and caseworker support at trial means that gaps in the records are likely.

[59] The complete study (hereafter "the Report") and is available at *https://www.law.ox.ac.uk/people/laura-hoyano* [Accessed 18 December 2018]. This should be consulted for all explanations of data collection and analysis.

criminal bar, this is considered to be a reasonably representative response rate, and certainly far exceeds the sample size of any previous study on s.41. Of these 179:

- 92.74 per cent (n=166) indicated that their criminal practice had included sex offences within the previous 24 months,
- whereas 7.26 per cent (n=13) indicated that they had not handled any sex offence cases within that period.

Overview of Responses

Extent of practice in sexual offences (Q2)

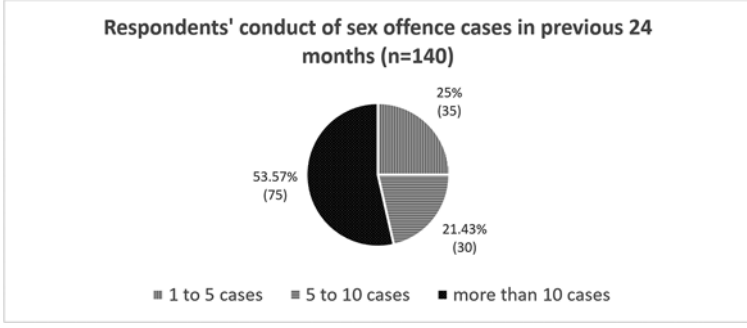

Figure 1

For the majority of respondents, sex offences constituted a significant part of their practice, so they possessed a depth of practical experience concerning the issues arising in the course of these trials.

In the 377 cases in the sample, the professional role played by the 140 barristers was as follows.

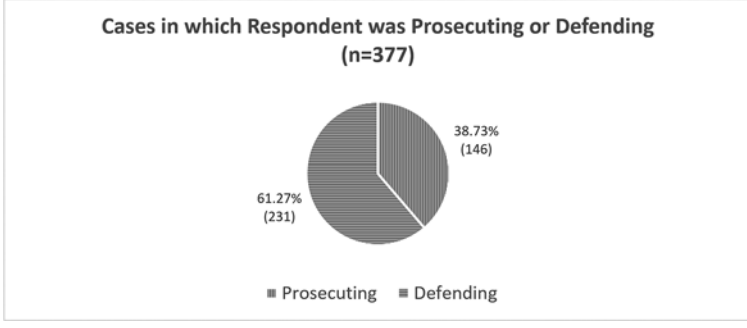

Figure 2

There was a highly significant balance of defence and prosecution work amongst the 140 respondents who provided the 377 cases in the sample:

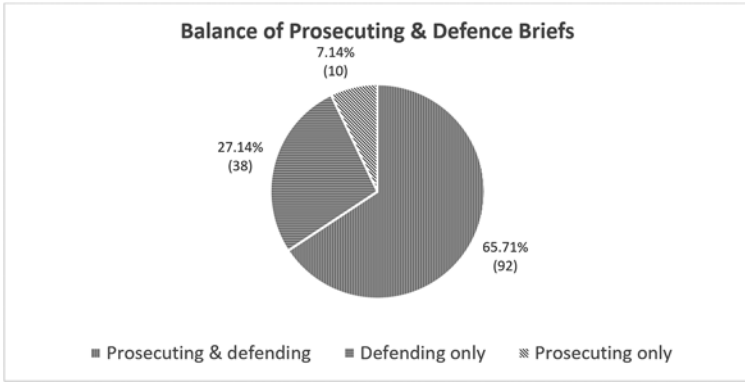

Figure 3

It must be emphasised that those advocates identified in Figure 3 as "defending only" or "prosecuting only" in the case sample may well perform the opposite role in other cases. That said, that 65.71 per cent 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: unlike most adversarial jurisdictions, most barristers both prosecute and defend, and consequently have a uniquely balanced view of the operation of the criminal justice system and its evidential and procedural rules.

Evaluation of the operation of s.41 (Q3)

Table 1

Roles in case sample	**All (n=140)**	**Defending & prosecuting (n=92)**	**Defending only (n=38)**	**Prosecuting only (n=10)**
Working	59.29%	58.70%	52.63%	90%
	(n=83)	(n=54)	(n=20)	(n=9)
No amendment	47.14%	35.65%	42.11%	80%
	(n=66)	(n=42)	(n=16)	(n=8)
Amend	35.71%	34.78%	44.74%	10%
	(n=50)	(n=32)	(n=17)	(n=1)
Not working	27.14%	23.91%	39.47%	10%
	(n=38)	(n=22)	(n=15)	(n=1)
Requires repeal	1.43%	0%	5.26%	0%
	(n=2)		(n=2)	
Neutral	1.43%	0%	5.26%	0%
	(n=2)		(n=2)	
Unclear	7.14%	8.70%	0%	0%
	(n=10)	(n=8)		

Respondents were asked to give their opinion as to whether s.41 was or was not "working in the interests of justice", and whether it required amendment, eliciting 140 responses.[60]

A margin of 13.16 per cent considered that s.41 was working in the interests of justice over those who believed it did not. A significant number, notably those receiving both prosecution and defence briefs in their most recent instructions, nonetheless considered that amendment would be beneficial.

Respondents considering s.41 was working broadly in the interests of justice frequently invoked the word "robust" in describing its application in the courts.

> "There is nothing wrong with the way s 41 is being currently interpreted and applied. I speak as a full-time CPS prosecutor."
>
> "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 [*sic*]."
>
> "Applications pursuant to s.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."
>
> "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."

Only one respondent considered that s.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."

Representative comments expressing concerns about the operation of s.41 included:

> "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

[60] Because respondents were invited to give discursive comments, many responses fell into several categories, so the numbers total more than 100 per cent.

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 hear of 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."

Three considered that judicial inclusive discretion was necessary to make the provision workable, whilst others raised the need for flexibility in interpretation. These reasons for amendment being desirable were given by the 61 respondents in this group:

- 16.43 per cent (n=23) thought the gateways were too restrictive, excluding evidence which the jury should hear for the defendant to have a fair trial;
- 10 per cent (n=14) thought the wording was unclear and excessively complex, describing it as "tortuous", "obscure", "highly convoluted", "opaque", and "very difficult to read and distil and even more complex to apply";
- 3.28 per cent (n=2) thought the provision should be updated to state the House of Lords' flexible interpretation in *A (No.2)* "so that questioning which is relevant and necessary for a fair trial is permitted", and to enable nonlawyers to understand its interpretation through caselaw;
- 4.92 per cent (n=3) called for a complete or substantial rethink;
- 13.57 per cent (n=19) did not offer a specific reason.

Representative comments from respondents considering s.41 was too restrictive included:

"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."

"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 s.41 applied. This was surely not the intention of Parliament. I feel that s.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 [the] 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."

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

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

Significantly, not a single respondent considered that s.41 was not sufficiently restrictive.

Overview of the sample

A total of 105 Crown Courts across England and Wales featured, with s.41 applications in 45 courts, and no applications in the other 60.[61] This provides a nationwide snapshot of the operation of s.41.

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

In some cases, respondents were imprecise, particularly where there were multiple complainants, so some data regarding the number, ages and gender of the complainants had to be estimated from comments in relation to the case. Numbers were always estimated on the low side.[62] *This means that the ratio of s.41 applications to complainants will probably be significantly overstated.*

Profile of the complainants[63]

A breakdown of the complainants indicates that a significant gender and age mix featured in the sample, a factor ignored in all previous empirical studies.

[61] The full list is provided in the main Report, Annexes C and D.

[62] E.g. "many 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. If the number of complainants 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. "Under age" was treated as being under the age of consent, 16 years. For these reasons, in many instances the figures do not add up to 100 per cent, nor do they tally across tables.

Any approximation of the total number is indicated by a tilde in the data tables in the main Report.

[63] As identified by respondent counsel.

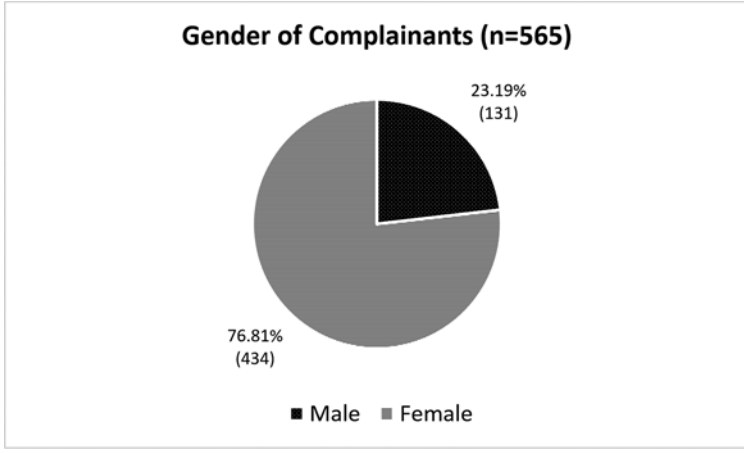

Figure 4

The Sexual Offences Act 2003 created a series of overlapping categories of offences depending upon the age of the complainant. Section 41 is not confined to adult complainants nor 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 experienced by a child as sexual due to naiveté.[64]

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 is likely to be understated. The highest number of complainants in any one case was 17, involving historical allegations of sexual abuse of boys against a schoolteacher. No s.41 application was filed there.

Where the complainant was an adult by the time of trial, these were counted as adult witnesses, yielding this age distribution of adult and child witnesses:

[64] E.g. *Dennis Andrew Etches* [2004] EWCA Crim 1313; [2005] Crim. L.R. 227; *MH; RT* [2001] EWCA Crim 1877; [2002] 1 Cr. App. R. 22; [2002] Crim. L.R. 73; *Alan David C and Julie B* [2003] EWCA Crim 29; [2003] 1 WLUK 620. For the particular relevance of s.41 to child complainants, see Laura Hoyano and Caroline Keenan, *Child Abuse Law and Policy across Boundaries* (Oxford University Press, 2010), pp.760–779.

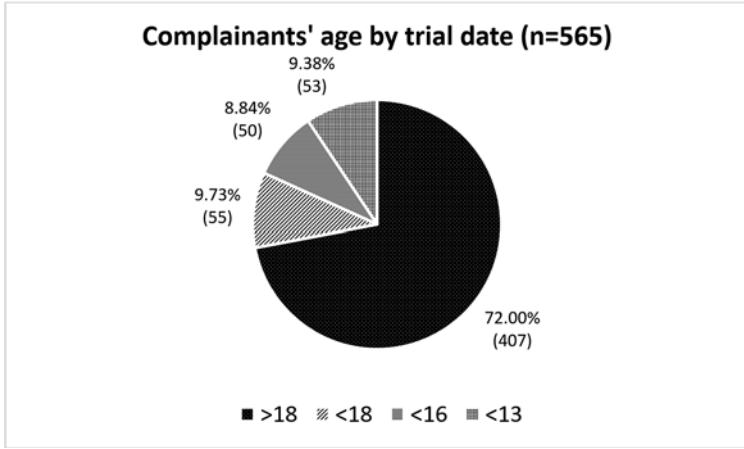

Figure 5

Detailed data was collected on the decisions to make applications under s.41, and their outcome. Not all responses indicated how many complainants in an individual case were involved in an application, so the figures below are indicative only.

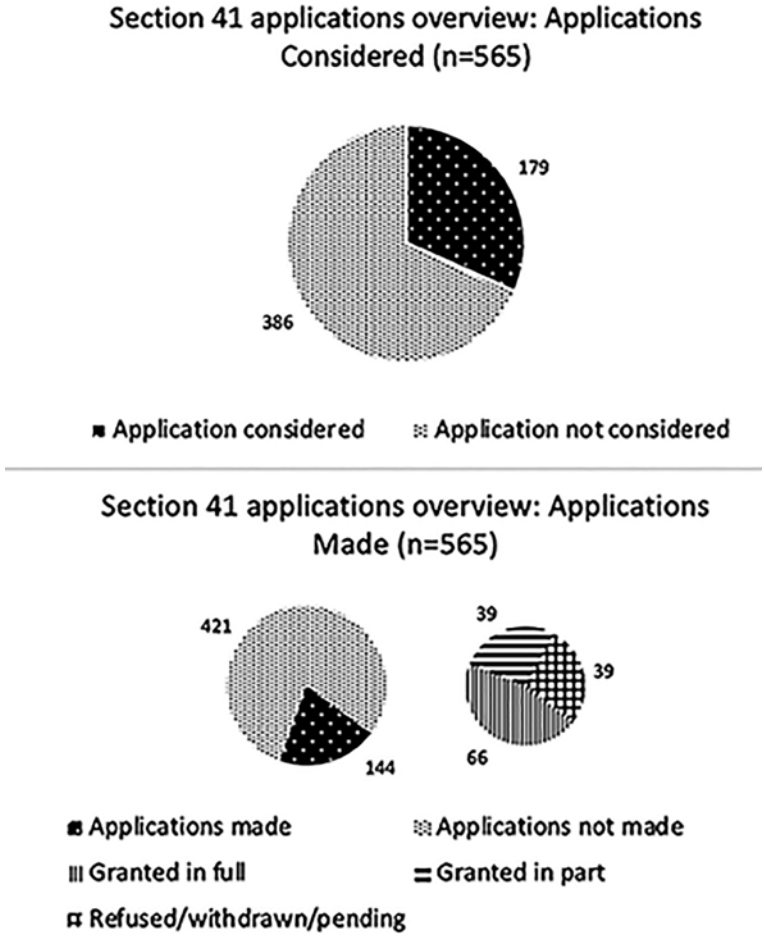

Figure 6

In 179 cases the defence considered making an application under s.41. After this consideration, the defence concluded there was no basis to do so in 35 cases. A total of 144 applications were made, i.e. in respect of 25.49 per cent of the 565 complainants in the sample. Of these 144 applications, 66 (45.83 per cent) were either agreed or granted in full (with one ruling pending at the survey date), and39 (27.08 per cent) granted in part, for a total of 105 (72.91 per cent) applications having at least some success.

Counsel for the defence and prosecution were able to reach agreement in respect of 25 (17.36 per cent) 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 per cent of complainants in the sample were the subject of s.41 orders or

agreements.[65] This falls well short of the persistent claim that sexual history evidence is adduced in "around one third of trials",[66] but exceeds that claimed by the CPS in extrapolating from its dip sample of rape cases of 8 per cent.

There was a marked differential between the number of applications made respecting male and female complainants. This may be partially explicable by the number of historical abuse complaints in the sample involving many male child complainants, for whom previous sexual behaviour was less likely to arise as an issue. That aside, this sharp disproportion should be explored in further research, for example regarding police investigation practices and disclosure inquiries.

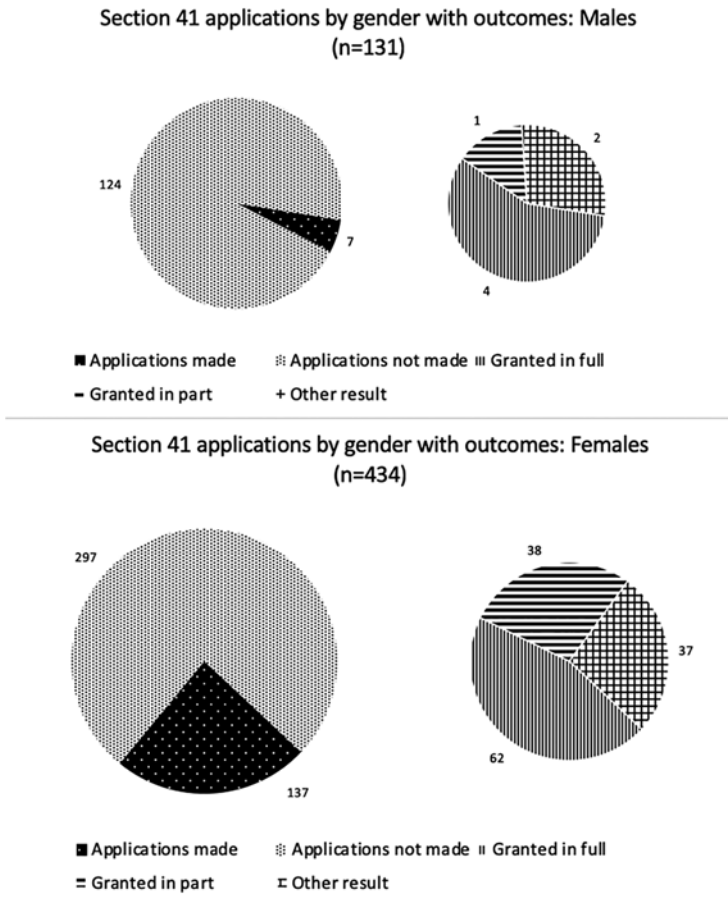

Figure 7

[65] Included as successful applications are two cases where the prosecution agreed to adduce the evidence as part of its case, such was its materiality to the facts in issue; technically s.41 was not invoked. In three other cases the applications remained incomplete and have been excluded from the calculation of the success rate. In one case the filing of the application (within the prescribed time) had prompted further disclosure enquiries from social services files, which caused the CPS to revisit its decision to prosecute, which was still pending; this is why there is one more application than there is outcome indicated.

[66] C. McGlynn, "Challenging the Law on Sexual History Evidence: a Response to Dent and Paul" [2018] Crim. L.R. 216, 220–221.

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.

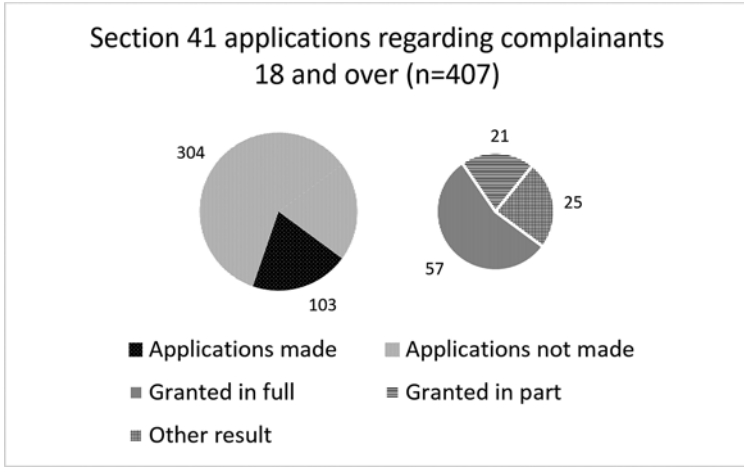

Figure 8

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

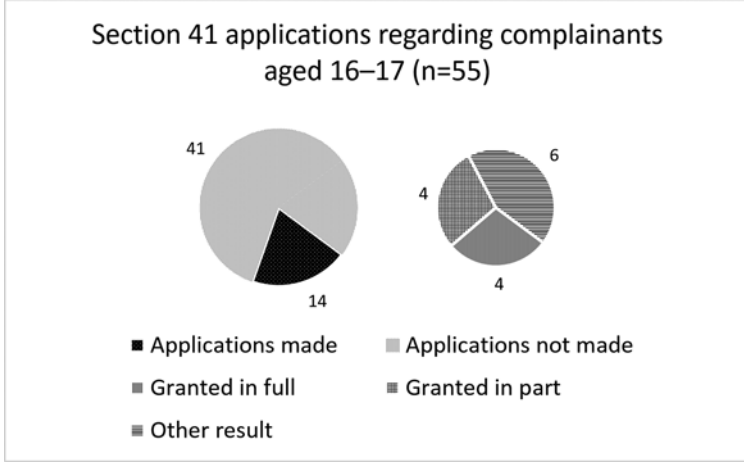

Figure 9

For adolescents aged 13–15 years, hence below the legal age of consent, the application data was as follows.

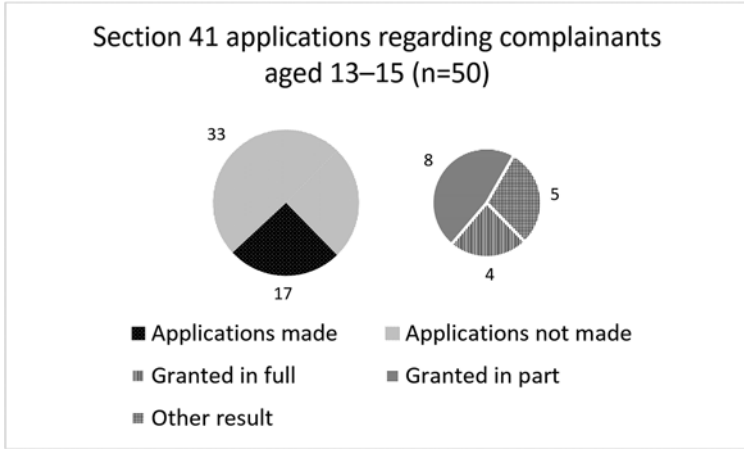

Figure 10

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.

There were also 10 applications respecting young children under 13, regarding whom there is strict liability for sexual activity under the Sexual Offences Act 2003. Only one application was granted in full, and three were granted in part.

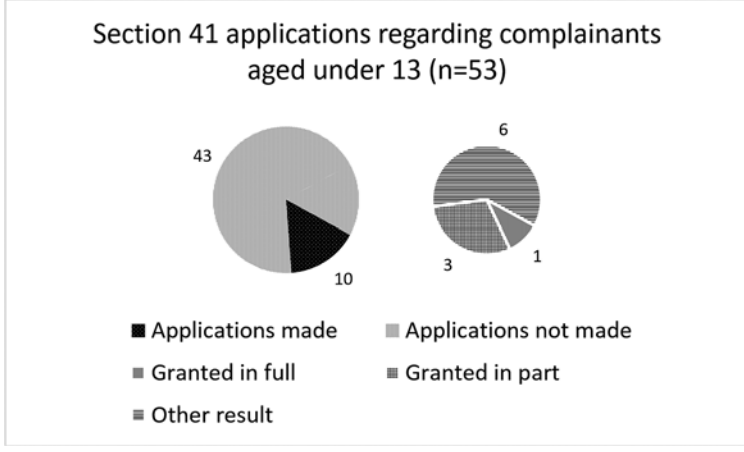

Figure 11

Gateway(s) involved in s.41 applications

Due to the complexity of the drafting of s.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.

Table 2

Single or multiple Gateways invoked in applications	s.41(3)(a)	s.41(3)(b)	s.41(3)(c)	s.41(5)
Total invoked	71	39	34	36
Allowed in full	30	9	8	14
Allowed in part	20	12	9	12

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")

Respondents provided the following examples of applications pertaining to this gateway (outcome in parentheses):

> "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.*)
>
> "… [T]he 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*).
>
> "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 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 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.*)[67]

"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 stated that the behaviour alleged was not captured by s.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")

Respondents provided some examples of use of this gateway:

"Concerned text traffic in which AP [Aggrieved Person] expressed enthusiasm for activities which later founded the basis of her allegations."[68] (*Application allowed in full.*)

"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."[69] (*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."

[67] Application also invoked s.41(5).
[68] Application also invoked s.41(3)(c).
[69] Application also invoked s.41(3)(c).

"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 (i) as part of the event charged or (ii) at or about the same time as that event, that the similarity cannot reasonably be explained as coincidence (hereafter "Consent and Similarity Gateway")

Respondents provided the following examples:

"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.*)

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

Generally this particular gateway should not be problematic, as it is a fundamental precept of a fair trial that the defence be allowed to rebut prosecution evidence, although again it is likely to be misunderstood by observers who do not see the entire trial. Examples where this occurred provided from the sample included:

"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*] 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

In 50 cases (34.72 per cent of total applications), the application was not made in accordance with the time limit of 28 days after prosecution disclosure which applied at the time of the survey.[70]

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

- late prosecution disclosure (n=5), which as noted earlier is a notoriously endemic problem in the criminal justice system, particularly afflicting the trial of sexual offences[71];
- 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 s.41 applied when the matter was first considered (n=3). In one, new counsel realised an application was required;
- counsel had agreed the questions before a retrial (n=1);
- reason unknown (n=2).

Significantly, six respondents 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, but the respondent stated that no prejudice or delay to the trial was caused by the late application.

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".

Consequently, non-compliance seems to have related to the time limit of 28 days. Two respondents commented that the time limits were almost always impossible to meet, especially when the defendant is in custody, making it difficult to obtain instructions.

It may be anticipated that there will be greater non-compliance now that the time limit has been abbreviated to 14 days, because progress in rectifying procedural obstacles to compliance, especially late and piecemeal disclosure by the police and CPS, is slow.[72]

[70] 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).

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

[72] 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).

Non-compliance with the substance of the Criminal Practice Direction

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 prosecution disclosure, a practice has grown up whereby the defence files written applications to adhere to the time limit, and then the substance of the application to be argued is filled in later to reflect progressive disclosure and, if necessary, developments in the evidence at trial.

Approval of the form of questions in advance

It is clear that there is a robust practice of discussion as to the appropriate form of the questions under s.41.

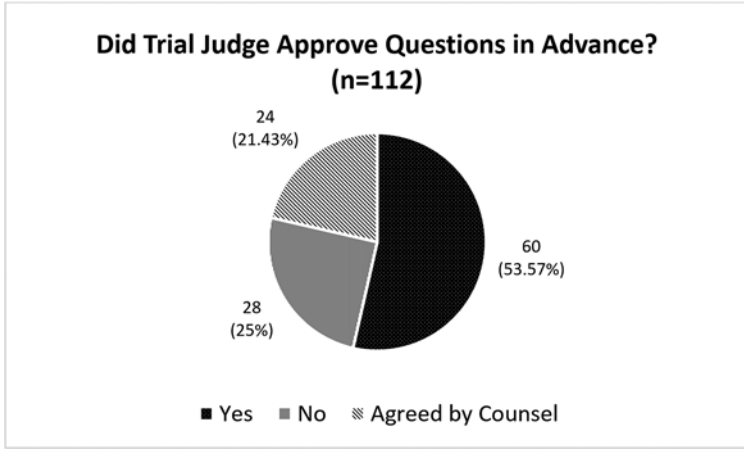

Figure 12

Often these discussions between counsel take place in the robing room, away from observers in the courtroom. Frequently trial judges will accept whatever experienced counsel agree, but it is also common (but not invariable) practice for the court to be asked to approve them.

Of the 144 applications in the sample, 17 (11.8 per cent) were resolved in this manner. In such cases the court will be likely to be presented with that agreement of counsel, and the trial judge will probably conclude that it is unnecessary to impose upon the court's already strained resources and timetable to require a formal application. Criminal Procedure Rule r.3.3(2)(c)(ii) encourages counsel to reach agreement wherever possible to maximise the court's time.[73] 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.

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

- 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 s.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 complainant's situation which had led to police involvement, without questioning about an underage sexual relationship, thereby averting a s.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 be not be aware of what has occurred, and might erroneously conclude that the evidence has been adduced improperly.

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, for example that the parties had previously been in a relationship. The information was thus placed before the jury without involving the complainant at all, 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."

In one case relating 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 ABE interview, so the evidence was adduced by the prosecution in that form, meaning that no questions were put to the complainant about it in court.

Again, this practice of adducing evidence by agreement might mislead observers in the courtroom into believing that previous sexual behaviour was being tendered contrary to s.41. However it is clear from 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 handled in such a way as to spare the complainant from having to deal directly with it.

If no s.41 application was made or was successful, 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?

There were 223 cases in this part of the sample; in 200 (89.68 per cent) no additional questions were attempted or permitted by the court, in 13 (5.82 per cent) a line of questioning was permitted, and in 10 (4.48 per cent) cases, some questions were permitted. In 16 (7.17 per cent) cases the prosecution objected, and in one the court raised the objection first. In nine (4.03 per cent) cases the questions were not permitted (of which nine, in one some questions were permitted of those requested by the defence) and in three (1.34 per cent) some or all questions were permitted. In five (2.24 per cent) cases the prosecution had agreed to those questions being asked without a s.41 application.[74]

Several respondents explained, or it was clear, that the evidence did not fall under s.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."

In several instances it was doubtful whether the evidence fell within s.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."

In eight (3.58 per cent) cases it appears that the evidence should have been the subject of a s.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:

> "Because the Crown's case was that the Complainant [aged 16 or 17] was a virgin." (*In this case there was no s.41 application; there should have been but the question clearly went through gateway (d) as of right to rebut*

[74] 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. The data presented can only be indicative of the situation prevailing in court.

prosecution evidence; no answer to question about any objection from prosecution.)

"Some Qs allowed concerning sexual experience with another and re online messaging/texts." (*Section 41 application had been made and denied in full; it is not clear if these questions had been the subject of the application; no prosecution objection, which suggests they were not.*)

Prosecuting counsel reported: "A formal application was not made but the limits of [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 [sexual] 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."[75]

"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." (*Prosecuting counsel reported that no objection was made as the question had been asked and answered; no s.41 application had been made 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 s.41 application; 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 s.41 application.*)

One defence advocate 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.*)

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, and the prosecution could not object in the circumstances. The evidence would have been admissible through the Rebuttal Gateway.*]

[75] *A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45; [2001] Crim. L.R. 908 at [78]–[79] (Lord Hope).

"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."

Importantly, the data disclosed that judges were not lenient in respect of questions where s.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 s.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 s.41 and CJA 2003 s.100

A complication not addressed by Parliament in 1999 was the intersection between previous sexual history and evidence of the complainant's bad character. The Criminal Justice Act 2003 s.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 s.41, to which CJA 2003 s.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 lies about sex, or 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.*)

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

"The answer is 'no', but … 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 another case in the sample the following questions were permitted by the court at trial without a s.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 s.41 was being breached, when in fact counsel was adhering to the separate procedures under the CJA 2003 s.100.

Limitations of this study

All empirical research studies have their limitations. In the CBA Study, the limitations identified are:

- whilst the survey link was not restricted to CBA members, they were 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 from each Crown Court, especially from Wales;
- it is likely that the ratio of s.41 applications to complainants is *overstated*, because:
  - — the counting conventions adopted where the respondent did not specify the number of complainants in a case were conservative; and
  - — a significant number of barristers who indicated they had done at least five to ten sex offence cases within 24 months provided fewer samples, and it is possible there was an unconscious bias toward recalling and reporting those in which s.41 applications had featured.

Furthermore, a question asking whether the respondent barrister knew whether the complainant had been informed of a section 41 order did not produce reliable data.[76]

Conclusions

Is s.41 working in the interests of justice?

The overarching conclusion emerging from this study is that there is a broad consensus at the Criminal Bar that it is appropriate to have limitations on cross-examination on previous sexual behaviour. Only 1.43 per cent of respondents

[76] This was due to an unfortunate framing of the question which did not emerge when the survey questions were tested. The data results are recorded in the full Report.

thought that s.41 should be repealed, without replacement. This is a balanced and measured view, given that a substantial majority of respondents (65.71 per cent) both prosecuted and defended cases within the sample of 10 cases they were asked to supply. This gave them an informed perspective on the issues and interests in play between complainant and defendant which is unique amongst participants in the adversarial criminal justice system.

The general view was that s.41 worked in the interests of justice, particularly since *A (No.2)* now provides a form of safety valve to ensure that the defendant is not deprived of a fair trial by withholding from the jury relevant information concerning the real situation in which the parties were placed.

However, the complexity and opacity of s.41 leaves a great deal to be desired. It is at the same time the most contentious legal issue in sexual assault trials so far as the media and complainant and survivor advocacy groups are concerned, and the most inaccessible to the public. So labyrinthine is the legislation that even counsel who prosecute and defend sex cases day in and day out admit to having to go back constantly to decipher it yet again. This complexity makes the law exceptionally difficult to explain to lay participants in the trial, much less to lay observers and to those who work with complainants, such as the police and ISVAs.

Thus there was a strong sense amongst the responses that a good case could be made for redrafting the legislation within its current scope, as elaborated in case law, and for delineating judicial power to go beyond those constraints where the interests of justice demand, to ensure a fair trial for all participants, in effect codifying the breadth of the so-called "ECHR gloss" in *A (No.2)*. Although the ECHR gloss has been applied only infrequently and, it has been claimed, inappropriately,[77] in appellate case law interpreting the s.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 s.41 applications. Appellate case law is not a good guide to what happens at trial in this like many other areas of evidence, not least because the prosecution has no right of appeal from a s.41 ruling.[78] Given the fluidity, range and variety of evidence potentially under discussion, the findings of the CBA Study indicate that it would be unwise to try to prescribe what a fair trial would require by way of relevance in particular contexts.[79]

Significantly, not a single respondent thought that s.41 should be made *more* restrictive. Thus the positions of Vera Baird, Harriet Harman and other campaigners for a complete or more stringent ban on the admissibility of sexual history evidence are not consonant with the experiences of prosecuting and defending barristers steeped in sexual offence cases. It is important therefore for the Bar, the Ministry of Justice, the Crown Prosecution Service, politicians and campaigners to engage in an informed dialogue as to actual practice and what could be improved.

[77] Thomason, "Previous Sexual History Evidence: a Gloss on Relevance and Relationship Evidence" (2018) 22 E. & P. 343, 358–359.

[78] Unless the prosecution chooses to treat the order as a terminating ruling under the Criminal Justice Act 2003 s.58 and does not proceed with the trial.

[79] Thomason, "Previous Sexual History Evidence: a Gloss on Relevance and Relationship Evidence" (2018) 22 E. & P. 343, 358–359; Stark, "Bringing the Background to the Fore in Sexual History Evidence" [2017] Arch. Rev. 4.

How is sexual behaviour evidence handled in practice?

The barristers' discursive comments illustrated the vast variety of circumstances and types of evidence which must be funnelled through the s.41 gateways. Fully arguing every application, as academic and lay commentators have urged, would unnecessarily consume scarce court time where the prosecution accepts that the evidence should be admitted in the interests of justice. Counsel have co-operated, 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 s.41 seriously, but are essential given the congestion in court listing, and are accepted—indeed, welcomed—by trial judges.

Defence counsel did not make s.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 barrister who both prosecuted and defended noted:

> "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 s.41, 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, s.41 received careful and anxious scrutiny from the Court."

Where the evidence was seen as providing important information to the jury, every effort was made by counsel and the court to avoid distressing the complainant. The prosecution might introduce the evidence through its opening speech, or the police interview, or an agreed statement of facts, thereby eliminating any questioning of the complainant on that topic. If some questions did have to be asked, then the data shows that they were typically carefully framed, and succinctly put.

There appeared to be a high level of compliance by the Bar with the substantive constraints of s.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 narrowness of the Gateways. In only a handful of the 223 cases was questioning permitted outside a s.41 application or order.

The relatively high success (46 per cent) or partial success (31.9 per cent) rates for applications appears on the evidence of this study not to be attributable to lax approaches to s.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 to this effect in 1998 regarding the 1976 Act.[80] As several barristers noted, s.41 does serve to focus minds on the objectives of this line of cross-examination. The CBA Study shows that many counsel considered but then decided not to bring s.41 applications, as part of their case preparation.

[80] Lord Bingham, *Hansard*, HL Vol.595, col.272 (15 December 1998).

This study provides no evidence to support the contention that late applications were 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 the testimony of the complainant or other prosecution witnesses. Because of the high number of respondents who prosecuted, it could be reasonably expected that they would note any significant and habitual level of wilful 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.

Previous surveys relying upon in-court observations by academics or laypersons could not provide reliable assessments as to defence compliance with s.41, for several reasons. The observers:

- probably would not have seen the indictment and so would be unlikely to know the evidential targets for which the evidence was relevant;
- judging from their reports, would be unlikely to have attended the pre-trial hearing where s.41 applications are supposed to be made;
- might well have not understood that the evidence was adduced by agreement with the prosecution, and possibly also approved by the trial judge, without a formal s.41 application having been filed or argued;
- might well have misunderstood that the evidence was admissible through a different route than s.41, such as CJA 2003 s.100, notwithstanding that sexual experience was somehow involved. From the comments in the *Seeing Is Believing* report, it appears that the observers viewed anything relating to sex as necessarily falling within s.41.

How should the prosecution respond to s.41 applications by the defence?

It is concerning that the recommendations in *Seeing Is Believing* seriously misstate the obligations of 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.[81] The Northumberland Report recommends that

> "[the] CPS ensure that prosecuting counsel *robustly oppose all applications* for the admission of s.41 material and if an application succeeds, further seek to limit the ambit and quantity of such material to the minimum."[82] (emphasis added)

[81] *Lyons* [2002] UKHL 44; [2003] 1 A.C. 978; [2003] Crim. L.R. 623 at [19] (Lord Bingham); *Farquharson Guidelines: Role of Prosecuting Advocates* (Updated 2011, *https://www.cps.gov.uk/legal-guidance/farquharson-guidelines-role-prosecuting-advocates* [Accessed 20 November 2018]; L. Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] Crim. L.R. 4, 24–25.

[82] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017), pp.11, 34.

This is contrary to the ethical and constitutional obligations of prosecuting counsel. Parliament in enacting s.41 contemplated that sexual behaviour 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 s.41, then it would be ethically wholly improper for prosecuting counsel to oppose the application.

Seeing Is Believing also states:

> "[The CPS] should remind barristers that they are *required* to challenge all late S.41 applications and *to challenge any 'bad character' applications* which seek to include previous sexual conduct by the complainant."[83] (emphasis added)

But if there is good reason for the late application, such as late prosecution disclosure, then the Crown ethically should not object. Moreover, there is a clear and judicially recognised overlap between CJA 2003 s.100 and YJCEA 1999 s.41, and the mere fact that the bad character evidence pertains to sexual behaviour (such as previous false allegations of sexual assault) does not bar its admission.[84]

The application of s.41 to children under the legal age of consent

The number of applications brought in respect of children under the legal age of consent (Figures 10 and 11) is striking, and the subject matter of such applications warrants further empirical research.

The non-consent and rebuttal gateways as the most travelled

Perhaps one of the most important findings of the CBA Study is that evidence touching on previous sexual behaviour is most frequently *not* being tendered in an attempt to substantiate the first of the "twin myths" described in *Seaboyer*,[85] that an unchaste woman would be more likely to consent to sexual intercourse with the defendant. Table 2 shows that by far the greatest number of applications (71) were made through gateway 41(3)(a), the Non-Consent Gateway. The discursive comments by counsel are revealing as to how these gateways work in practice.

They also substantiate how critics overlook the 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.

Rebuttal of prosecution evidence under s.41(5) was also frequently invoked (36 applications). This gateway should be uncontroversial to any fair-minded observer. If the complainant testifies that she would never consent to sex with someone on

[83] Durham et al, *Seeing is Believing: the Northumbria Court Observers Panel Report on 30 Rape Trials 2015-16* (2017).

[84] *Mokrecovas* [2001] EWCA Crim 1644; [2002] 1 Cr. App. R. 20; [2001] Crim. L.R. 911; *RMH and RT* [2001] EWCA Crim 1877; [2002] 1 Cr. App. R. 22; [2002] Crim. L.R. 73; *V* [2006] EWCA Crim 1901; [2006] 7 WLUK 739; *BD* [2007] EWCA Crim 4.

[85] *Seaboyer* [1991] 2 SCR 577 (SCC).

their first meeting, then fairness to her and to the jury[86] demands that she be challenged regarding any contradictory evidence.

Presenting reality whilst stripping out bias: the difficult balance

Critics of the Gateways contend that they undercut the right of a person to consent to each and every sexual encounter. 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 and hold no probative value. Whilst there is 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 artificially constructed scenario. This was the issue addressed in *A (No.2)*: since, on its face, s.41 forbids any evidence that the parties had been in a previous consensual sexual relationship, in the absence of qualifying evidence of sexual intercourse "at or about the same time as the event charged",[87] the jury might well infer that it was a case of, or akin to, "stranger rape". This inference could work to the detriment of both parties: for example, the jury might consider that this was a one-night stand if sexual activity followed meeting at a nightclub, when they had had a long-standing physical relationship. At the least, the previous consensual sexual contacts demonstrate a physical attraction, and possibly affection, towards the defendant.[88]

This exposes the inescapable tension in statutory provisions attempting to control the admissibility of previous sexual behaviour. Should the focus be on avoiding prejudiced reasoning along the lines of the twin myths, as in the Canadian model,[89] but otherwise trying to present the realistic situation to the jury? Or should it expurgate from the evidence any information about the complainant's sexual history, on the rationale that it would undermine his/her liberty to consent or to withhold consent on the specific occasion charged?

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 distress to the complainant.

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

This study did not attempt to identify any causal connection between conviction rates and permission to cross-examine on previous sexual behaviour. Indeed, in a jury system with deliberations in secret, it probably would be impossible to design such methodology. The Home Office 2006 study notwithstanding, there is no credible evidence to date that cross-examination on previous sexual behaviour which is authorised under s.41 has a deleterious (or any) effect on conviction rates. The most recent Criminal Justice Statistics for the year ending December 2017

[86] L. Hoyano, "Putting the Case in Every Case" *Counsel* (November 2018), pp.18–19.

[87] *A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45; [2001] Crim. L.R. 908 (Lord Slynn).

[88] HH Judge P. Rook QC and R. Ward QC, *Rook & Ward on Sexual Offences: Law & Practice* 5th edn (Sweet & Maxwell, 2016), para.26.108, citing Lord Hutton in *A (No.2)* [2001] UKHL 25; [2002] 1 A.C. 45; [2001] Crim. L.R. 908 at [151].

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

show that the conviction rate for sexual offence cases has continued to climb, from 59.7 per cent in 2016 to 61.5 per cent in 2017, the highest in the last decade.[90] 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

The greatest damage which can be done regarding s.41 is the misinformation which is disseminated by the media and by non-professional participants in the criminal justice system, repeating myths about ferocious cross-examinations raking-over complainants' sex lives. Many respondents expressed strong concern that this persistent misreporting deters sexual assault victims from reporting. The solution is to disseminate accurate information about the circumstances in which previous sexual behaviour may be relevant, to explain routine court practice, and possibly to redraft s.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.[91]

What the CBA Study establishes is that counsel and trial judges strive on a daily basis to ensure that the underlying intent of s.41 is fulfilled, in the infinite variety of narratives of sexual relations recounted on a daily basis in English and Welsh courtrooms. That reality needs to be conveyed urgently to the police, to the public and to sexual assault advocacy groups to encourage complainants to engage with the criminal justice system.

[90] Ministry of Justice and Office of National Statistics, *Criminal Justice Statistics Quarterly, England and Wales, 2017* (18 May 2018), p.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.

[91] Hoyano, "What is Balanced on the Scales of Justice? In Search of the Essence of the Right to a Fair Trial" [2014] Crim. L.R. 24–25.