



Home Office

BUILDING A SAFE, JUST
AND TOLERANT SOCIETY

Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials

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Home Office Online Report 20/06

The views expressed in this report are those of the authors, not necessarily those of the Home Office (nor do they reflect Government policy).

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Summary of the main findings

Background

Rape law has long been criticised for its evidential requirements, one aspect of which has been the use by the defence of previous sexual history evidence to impugn the credibility of the complainant. Attempts to control its use have been made in many common law jurisdictions.

Section 2 of the Sexual Offences (Amendment) Act 1976 was the first concerted attempt to regulate sexual history evidence in England and Wales, but research revealed that the intention of the legislature was rapidly undermined in legal practice.

Few young people or adults in the twenty-first century have had only one sexual partner. The majority of the population, therefore, has a 'sexual history'. Yet these sexual experiences can take on additional and negative meanings when introduced as 'evidence' in sexual offence trials.

The new legal regime

Sections 41-43 of the Youth Justice and Criminal Evidence Act 1999 (for shorthand, section 41) are the most recent attempt to address the failures of section 2 of the Sexual Offences (Amendment) Act 1976.

No sexual history evidence should now be admitted, or questions by the defence allowed, unless a judge has ruled that they lie within one or more of four exceptions. Crown Court Rules outline a new procedure, designed to make the process of applying to have such evidence admitted more transparent and to offer some form of certainty to complainants. Under the Rules, applications are to be made in writing pre-trial, specifying under which of the subsections covering the various exceptions the application is made and the questions the defence wishes to ask. The intention was to provide both judge and prosecution with the opportunity to assess, and where relevant challenge, the application. A fallback provision is made for late applications at trial.

None of the exceptions explicitly permits evidence of past sexual behaviour with the accused to be admitted where this is considered to be relevant to the issue of consent. This issue arose in the *R v A* case which was finally decided by the House of Lords. It considered that this omission was in conflict with Article 6 (the right to a fair trial) of the European Convention on Human Rights, and therefore it interpreted the similarity exception (section 41(3) (c)) as permitting such evidence where it was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial.

The research and its methodology

The Home Office commissioned the present study to assess "the impact of section 41 of the Youth Justice and Criminal Evidence Act on the prosecution of sex offence cases and the handling of such cases by the courts".

A multi-method approach, combining quantitative and qualitative data collection, was devised to address the research questions. Some data were collected nationally, and four areas of the country were studied in more detail.

The research draws on the following data.

- Secondary analysis of Home Office statistical data, 1998-2002.
- Critical analysis of recent reported legal cases.
- Prospective tracking of rape cases coming before Crown Courts in England and Wales during a three-month period in 2003 (n=236).
- Analysis of Crown Prosecution Service case files from four areas (n=170).
- Observation of trials in three areas (n=31).
- Interviews with judges (17), barristers (7) and CPS lawyers (9).

- Interviews with complainants (19), police officers (40) and Sexual Assault Referral Centre (SARC) staff (10).
- Questionnaire returns from Rape Crisis Centres (16), Victim Support (39) and the Witness Service (18).

The case tracking, analysis of CPS files and observation of trials meant that over 400 prosecuted cases were examined for the presence of sexual history evidence and section 41 applications. The cumulative findings from these data, supplemented by the qualitative interviews, inform the conclusions and recommendations of this study.

Major findings

For the critical analysis of recently reported cases, 13 post-*R v A* Court of Appeal decisions were examined. The majority suggested that the Court of Appeal has understood the purpose of section 41 and is doing its best to interpret it as a rule of exclusion. However, some Court of Appeal decisions give cause for concern that the purpose of the legislation may be undermined.

Section 41 applications occurred in just under a third of jury trials in the case-tracking sample and in the sample of observed trials. Applications were successful in two out of three cases in the case-tracking sample.

The proper procedures for applications, as set out in the Crown Court (Amendment) (No.2) Rules 2000, were used in a minority of cases, with most applications being made verbally at trial.

Sexual history evidence was raised in some cases involving minors, raising concerns that irrespective of the exploitative nature of the past events, children were more often represented as sexually active than sexually vulnerable.

In addition to specific references to section 41, references to sexual behaviour/sexual history were found in over a third of CPS files and observed trials. Sexual history material was included in more than three-quarters of trials.

The main contexts in which sexual history was introduced were: previous allegations – which were treated as being ‘false’; previous or existing relationship with the accused – a claim that was often contested by the complainant; motive to lie; and relationships with unrelated third parties.

Sexual history was raised in two-thirds of the twenty-three trials observed, however specific questioning on it tended to be brief and to the point.

Judges and barristers were mainly in favour of legislation to control sexual history evidence, but also thought that there were occasions where sexual history evidence was relevant. Some saw section 41 as an improvement on previous regimes, whilst others thought it too restrictive. With one exception, all the judges familiar with the decision interpreted *R v A* to mean that they now had a very broad residual discretion in order to ensure a fair trial under Article 6.

There was considerable criticism by both judges and barristers of the belief in consent exception on the ground that it was too wide and ‘illogical’.

Almost half of the judges interviewed were unaware of the Crown Court Rules; some judges had only a vague knowledge of section 41 and few non-legal practitioners and no complainants understood the new law.

Many non-legal professionals felt it was impossible to give accurate advice to complainants on this issue and some were clearly providing inaccurate information.

Impact of section 41 on attrition

National statistical data suggest section 41 has had no discernible effect on attrition, with the conviction rate for rape continuing to fall after its implementation.

Victims said that they weighed up the issue of whether sexual history evidence would be raised in court in deciding whether to report the matter to the police and subsequently in deciding whether to withdraw the allegation.

Police officers, SARC staff and support agencies all concur that sexual history evidence plays a part in the decision-making of complainants, especially, but not exclusively, in the early stages.

Both complainants and police officers provided evidence of variable and problematic practice in the investigation process, ranging from detailed questioning about sexual behaviour through to warnings about how sexual history evidence might be used in the courtroom.

Whilst the study did not systematically trace the CPS case review process, the existence of previous allegations, where complainants were minors, appeared to be related to CPS decisions to discontinue.

The prospective case-tracking data showed that, for adult complainants, there was a statistically significant association between a section 41 application being made and an acquittal. The CPS case file data further suggests that, in cases involving minors, a guilty plea to a lesser offence was offered and accepted in a greater proportion of cases where sexual history material was present than where it was not (although the difference was not statistically significant).

Complainants regarded the use of sexual history evidence in trials as unjust and an invasion of privacy.

Findings from case files, trial observations and interviews raise the possibility that both prosecution and defence share stereotypical assumptions about 'appropriate' female behaviour and that these continue to play a part when issues of credibility are addressed in rape cases.

Problems with the legislation and procedure

The lack of definition of the terms 'sexual behaviour' and 'sexual experience' caused uncertainty among practitioners as to the scope of section 41.

The Crown Court Rules were frequently ignored or avoided, with the vast majority of applications being made at trial and presented verbally. This meant that some of the requirements of the law – that the subsections under which the application is made are specified, that the questions to be asked are listed, and that reference is made to specific instances of sexual behaviour – could be more easily evaded.

Verbal applications disadvantaged the prosecution, since counsel had minimal opportunity to consider the arguments in detail, nor to consult with either the CPS or the complainant about possible objections.

Some defence counsel appeared to time their applications to come just before or during cross-examination to create the most pressure on the complainant.

Where sexual history material was introduced without reference to the legislation at all, judges either failed to notice or failed to sanction the defence for the breach.

Sexual history matters were often resolved by agreement between prosecution and defence. These agreements did not necessarily follow section 41.

Recommendations

The recommendations outlined here draw on the research findings outlined in the report and address ways in which the intention of the legislation might be fulfilled and monitoring be improved.

Changes to the legislation

- The terms 'sexual behaviour' and 'sexual experience' should be defined. Moreover, it should be made clear that these terms include implied as well as express behaviour.
- The embargo on sexual behaviour evidence should be applied to the prosecution as well, as is the case in some other jurisdictions.
- Consideration should be given to amending section 42(1)(b) which allows the court to give leave for evidence of sexual behaviour to be admitted as evidence that the defendant had a belief in consent. The amendment should reflect section 1 of the Sexual Offences Act 2003, which requires a defendant's belief in consent to be reasonable. It should also reflect the fact that it is not generally reasonable to formulate a belief in consent on the basis of past sexual history.
- A new exception to the rule of exclusion should be inserted into section 41, allowing for evidence of previous or subsequent sexual behaviour with the accused. This exception could have a time limitation.
- There should be a clear statement in the legislation that sexual behaviour evidence is not to be admitted by trial judges other than in the exceptional circumstances set out in the legislation.

Changes to the Explanatory Notes

Where the complainant has made previous allegations of rape this should not be an excuse for questioning her about her previous sexual history simply because these allegations have not been proved in court. This should be made clear in the Explanatory Notes (the official guidance to the Youth Justice and Criminal Evidence Act 1999) by amending the present paragraph 150 so that the words 'unproved allegations' are replaced by the words 'demonstrably false allegations'.

Procedural changes

- Steps should be taken to ensure that the Crown Court Rules are observed. There should be an absolute requirement that all applications be made in writing. Applications should generally have to be made pre-trial. Applications made at trial should be accepted only if the defence can show that they were unaware of the information on which the application is based until trial. Applications made at trial should also have to be made in writing, and the prosecution should be given time to consider the application and an adjournment allowed for this purpose if necessary. Judges should be required to give their decisions and reasons for them in writing to both sides.
- Consideration should be given to permitting complainants to be present at hearings of applications, if they wish. This would ensure that allegations about sexual behaviour with the accused before or after the event in question or with third parties can be tested and that judges can make informed rulings. It would also mean that they would know what was in store in any ensuing trial.
- There should be a prosecution right of appeal against decisions to permit the introduction of sexual behaviour evidence.

Training

- Renewed efforts should be made to ensure that the statute, and especially the Explanatory Notes and Crown Court Rules, are understood by judges and lawyers, in order to prevent circumvention by ignorance.
- The Association of Chief Police Officers (ACPO) should develop training and explicit guidance for police officers on both how to deal with sexual history evidence in investigations and when and how to provide information about it to complainants.

Future research

- The prospective case-tracking mechanisms used in this study should be adapted in order to continue to monitor the implementation and impact of section 41. The data collected should be expanded to include at the minimum: whether the complainant is a minor; the case outcome; and whether previous allegations by the complainant were alleged.

1 Introduction

This report presents findings from the evaluation of legislation intended to limit the admission of previous sexual history evidence in sexual offence cases in England and Wales. The use of such evidence has excited considerable controversy – in the courts, in academia and in the political arena – and has vexed legislators and the legal profession alike for three decades. Repeated attempts have been made abroad to limit its use in rape trials. Discretionary legislation introduced both in England and Wales – section 2 of the Sexual Offences (Amendment) Act 1976 – and elsewhere to control this practice has been widely viewed as a failure (Temkin, 1993; McColgan, 1996; Easteal, 1998).

In the late 1990s the issues were revisited by a Home Office working group on vulnerable and intimidated witnesses (Home Office, 1998). In its final report, *Speaking Up for Justice*, two key areas of concern were noted: that the admissibility of sexual history evidence deters many victims from reporting sexual offences and/or may play a part in withdrawals; and that its use is linked to persisting myths and stereotypes about rape and female sexuality and is not only an invasion of privacy but also prejudicial for the complainant. Summarising the findings of research and the concerns of support agencies and advocacy groups¹ the report concluded that section 2 had failed to limit the use of sexual history evidence and merely seeking to tighten its operation was unlikely to deliver much more than marginal improvements (Home Office, 1998). One of the report's recommendations was for new legislation in this area. This was fulfilled by the enactment of sections 41-43² of the Youth Justice and Criminal Evidence Act 1999 which introduced a new and more exclusionary regime.

Responses to section 41 have been mixed. Many viewed it as a long overdue repeal of an outmoded and biased regime which permitted irrelevant evidence to be introduced. Others, primarily but not exclusively those with a legal background, have raised concerns that it might infringe a defendant's right to a fair trial.

The remaining sections of this introductory chapter briefly explore why sexual history evidence has been a matter of such intense debate. The issue of women's credibility as witnesses and myths and stereotypes about rape are first considered, followed by a brief discussion of contemporary sexual mores and a summary of recent research.

Women as less credible witnesses

Women's credibility has been at the centre of how rape is understood and dealt with by the legal system for centuries. In the seventeenth century Sir Matthew Hale explicitly articulated his distrust of women's testimony where the accusation involved sexual crime³, a sentiment echoed several hundred years later by the leading legal scholar Wigmore (Wigmore, 1940, para.924A). Their attitudes, which greatly influenced the law and practice in this area, continue to resonate today. Concern to protect the accused from false rape allegations led to far-reaching protections for defendants, which included permitting a wide-ranging cross-examination of the complainant.

The prosecution of rape has thus taken place within a 'hermeneutics of suspicion' (Denike, 2000). This has been bolstered by a collection of myths and stereotypes which have pervaded this area of law and which may influence the decisions of criminal justice personnel as well as jurors.

¹ Including Rape Crisis Centres and Victim Support.

² From here on referred to as section 41.

³ 1 P.C. 628-9.

Rape myths

Helena Kennedy (1992) has pointed out:

Myths are powerful tent pegs which secure the status quo. In the law, mythology operates almost as powerfully as legal precedent in inhibiting change, and the law is full of mythology. Women are particularly at its mercy... mythology is a triumph of belief over reality, depending for its survival not on evidence but on constant reiteration (p.32).

Table 1.1⁴ presents some of the most common myths and stereotypes about rape in the first column, and contrasts them to recent research evidence in the second.

Table 1.1: Selected myths and stereotypes

Myth/stereotype	Research evidence
Rape is committed by strangers	It is mainly committed by men known to the victim (Walby and Allen, 2004)
'Real rape' happens at night, outside and involves a weapon	Rape happens at many times, most commonly inside, often involving threats and other forms of coercion (Lovett <i>et al.</i> , 2004; Walby and Allen, 2004)
There are always injuries	A minority of reported rapes involve major external or internal injuries (Lovett <i>et al.</i> , 2004)
Anyone facing the possibility of rape will resist	Many do resist, many freeze through fear or shock, or decide that resistance would be futile and/or dangerous (Kelly, 1987)
Women 'ask for it' by their dress/behaviour/taking risks	Most victims know and trust their attackers. In cases where they do not know them it is the targeting choices of rapists which are the determining feature (Polaschek and Hudson, 2004)
All victims react in the same way after being raped	There are a range of responses, from extremely distressed through to quiet and controlled (Herman, 1988)
A rape victim will report promptly	The majority of rapes and serious sexual offences are not reported at all (Walby and Allen, 2004), and many victims take some time to speak with a close friend before deciding to report (Lovett <i>et al.</i> , 2004)

The Scottish Executive (2000) also explored this issue in its discussion of the law on sexual history evidence. The report's authors noted the following commonplace beliefs that are often deployed in legal reasoning – and indeed were evident in debates on section 41.

- Someone who has had sex with persons A and B is more likely to have sex with person C.
- Someone who is 'sexually promiscuous'⁵ has less right than someone who is not to choose who they have sex with.
- Someone who is 'sexually promiscuous' is generally less trustworthy, and therefore less likely to be telling the truth.
- Women have a tendency to 'lead men on' and are therefore to blame if men fail to resist their physical impulses.

⁴ This is an adaptation of a table that appears in Kelly (2002).

⁵ This term has been placed in quotation marks, since the language reflects the very value inferences the Scottish Executive were keen to question.

- When women say 'no' they do not always mean it.
- False allegations of rape and sexual assault are more common than false allegations of other crimes.

The Scottish Executive report concluded that all these statements not only have no foundation in fact, they are also “both illogical and at odds with any system of morality which places a value on the individual's right to self-determination” (Scottish Executive, 2000, p.6). It considered that the frequency with which these ideas are “constantly reiterated” amounts to a form of prejudice which can result in the complainant being treated with a lack of respect and in the worst cases being publicly humiliated.

Alongside, and reinforcing, myths and stereotypes about women's unreliability as witnesses on sexual matters, are notions of women's culpability when victims of sexual aggression. Depending on their actions at the time or their reputation they are located inside or outside the category of 'victim'. Included here are: implicit presumptions about how a reasonable woman should respond to sexual aggression; persisting stereotypes of good/bad women (the madonna/whore binary); and traditional notions about sexual agency on the part of men which is a sign of health and virility, whereas female sexual agency is a marker of low morals and 'promiscuity' (Jordan, 2004). There is also a longstanding construction of heterosexuality that presumes that men will seek sexual activity, and that it is the responsibility of women not only to set, but also to enforce, limits (Lees, 1993).

Contemporary sexual mores

Sexual crime takes place within social and cultural contexts, including contemporary norms and behaviours with respect to gender and/or sexual relationships. Two large-scale national surveys⁶ of sexual attitudes and behaviour in 1989 and 1999 document the changes that have occurred and are occurring (Johnson *et al.*, 1994a, 1994b; Johnson, 2001). Both men and women are sexually active at earlier ages, increasingly have multiple sexual partners and delay cohabitation/marriage (Johnson, 2001). The most recent study (Johnson, 2001) found that 30 per cent of men and 26 per cent of women had had sexual intercourse before the age of 16. Qualitative studies reveal that a proportion of this activity is not freely chosen, but coercive and exploitative (Wight *et al.*, 2000; Department of Health, 2004; Gillan, 2004). Few young people, and fewer still 20 to 40-year-olds, do not have 'sexual histories'. These changes in social and sexual mores need to be taken into account in assessing the relevance of sexual history evidence to issues of consent or credibility today. But, whilst sexual behaviour has undoubtedly changed, the attitudes and ideas surrounding it remain gendered. Women may still be held responsible in some way for unwanted sexual encounters and those who act naïvely or carelessly may be deemed guilty of failing to protect themselves (Lees, 2002; Regan and Kelly, 2002; Department of Health, 2004). This is the contemporary context in which the issues this study engages with need to be located.

Previous research

There is only one previous systematic study of the use of sexual history evidence in England and Wales: Zusannah Adler (1987) observed almost all (85%) rape trials at the Old Bailey in 1978-79 in order to monitor the impact of section 2 of the Sexual Offences (Amendment) Act 1976. Within her sample were 50 cases involving 80 defendants who entered a 'not guilty' plea. Applications under section 2 were made on behalf of 32 (40%) of the defendants. Over 75 per cent were successful. Sue Lees' (2002) analysis of 31 trials in 1993, whilst not presenting similar calculations, did confirm that sexual history questions continued to be asked, and in contexts that were frequently irrelevant. The most extensive UK research on this issue was undertaken in Scotland (Brown *et al.*, 1992) in a study which examined 305 High Court and 74 Sheriff Court trials. There were 98 High Court trials involving applications to lift the prohibition on sexual history evidence during the monitoring period of January 1987 to May 1990. Applications were made in a lower proportion of cases than the Adler study but more frequently allowed – 85 per cent were successful.⁷ The prosecution opposed the application in only just over a third of cases (37%). In a further 46 High Court trials sexual history evidence was introduced without application. Overall, sexual history was an issue in almost half of all cases (n=144, 47%). The researchers noted that legal practitioners sought to stretch the intent of the law in every direction, undermining its exclusionary intent. Most recently, Neil Kibble interviewed judges in order to examine whether section 41 of the Youth Justice and Criminal Evidence Act

⁶ The earlier study included 19,000 respondents, the most recent just over 11,000.

⁷ A 100 per cent success rate was recorded for applications heard in the last five months of data collection (Brown *et al.*, 1992, p.58).

1999 is “fundamentally flawed” in the sense that it continues to allow judges to permit irrelevant questioning and evidence in relation to the complainant’s sexual behaviour in rape trials (Kibble, 2004, p5). He concluded, *inter alia*, that it was indeed fundamentally flawed (Kibble 2005, p274) but that “although many judges approach the question of relevance and admissibility thoughtfully... the judges don’t always get it right and there is room for improvement” (Kibble 2005, p204).

Sexual history evidence also enters criminal trials through the route of third party disclosure applications,⁸ which in some jurisdictions are increasingly frequent (Busby, 1997; Feldthusen, 1996). Some researchers also suggest that such applications are being used by lawyers as a form of intimidation to encourage withdrawal (Busby, 1997; Feldthusen, 1996).

The report

The enactment of sections 41-43 of the Youth Justice and Criminal Evidence Act 1999 was an attempt to cut through the myths and stereotypes in order to produce fair outcomes in trials for sexual offences. This study is an attempt to gauge to what extent this endeavour has been successful.

The next chapter describes the multi-methodological approach designed to address the research questions set by the Home Office as the basis of the study. Chapter 3 analyses the law on sexual history, describing its evolution to the present day, including 13 Court of Appeal cases on section 41 which had been decided at the time the study was carried out during 2003 and the first half of 2004. Chapter 4 presents findings from a prospective case-tracking exercise carried out in all Crown Courts in England and Wales. The aims were to estimate the extent to which applications for sexual history evidence and/or third party disclosure are made and accepted by the courts and to provide some assessment of the impact, if any, of the use of sexual history evidence on trial outcomes. Chapter 5 sets out the findings from an analysis of CPS files in order to establish more detail as to the contexts in which applications are made and accepted. It also explores the ways in which information about sexual history may affect the attrition process. Chapter 6 describes the results of trial observations which were undertaken to investigate a number of issues, including the background contexts in which section 41 applications were made and allowed, the relationship between the use of section 41 and consent issues, the impact of the case of *R v A* on the granting or refusing of applications, the admission of sexual history to impugn complainants’ credibility and whether there are still ‘back door’ routes which evade legal regulation. Chapter 7 analyses interviews conducted with a sample of judges and barristers in order to ascertain their views on section 41 and the way it is operating in practice. Chapter 8 draws on data from a range of sources to explore the ways in which sexual history evidence affects the early stages of the attrition process, including the decision to report and retractions. It also considers the knowledge and awareness of complainants and professionals about the current legal regime. Chapter 9 sets out conclusions drawn from the study and makes recommendations with respect to the law, procedural rules and implementation of both.

⁸ These are applications to admit material held by a third party, such as social services.

2 Methodology

Introduction

This chapter describes the overall aim of the research and the research questions addressed. It also provides an overview of the research methods, sampling, data collection tools and data analysis used in the study. A short section provides information about notation and the use of language.

The overall aim of the research was:

To examine the impact of section 41 of the Youth Justice and Criminal Evidence Act on the prosecution of sex offence cases and the handling of such cases by the courts.

Ten more specific research questions were outlined, the first two covering attrition, whilst the remainder relate to the handling of previous sexual history evidence by the courts. Data collection was structured to address all ten questions (see Appendix 2).

- The extent to which complainants are aware of, or are made aware of, the provisions of section 41 and/or the special measures available in the Youth Justice And Criminal Evidence Act, and the impact this knowledge had on their decision to continue with the trial process.
- The effect of section 41 on the attrition rate of sex offence cases, improvement being measured by the proportion of reported cases resulting in conviction.
- The context in which the defence apply to use evidence or raise questions about a complainant's sexual behaviour, the use of section 41 subsections, and the relationship between the use of section 41 and consent issues.
- The frequency and context of cases in which section 41 applications are allowed.
- The impact of the House of Lords' judgement in *R v A* on the courts' permission/refusal of evidence on prior sexual relationships between complainants and defendants.
- The substance of defence arguments where leave has been granted to admit evidence of previous sexual relationship(s) when belief in consent is an issue.
- Is previous sexual history evidence admitted in circumstances used by defence primarily to impugn the complainant's credibility?
- The criteria used by judges when leave is given to admit previous sexual history evidence when consent is and is not an issue.
- The success of the legislation in controlling and guiding judicial discretion in the admission of previous sexual history.
- The apparent impact of previous sexual history evidence on jury decision-making.

Limiting the frame of reference

Whilst section 41 applies to all sexual offences, there were a number of reasons for restricting the research to offences involving rape of females. First, the timescale meant it was not feasible to extend the study to sexual offences other than rape⁹, primarily because the knowledge base on other sexual offences is limited and extensive research would have been required to establish baseline data against which the impact of section 41 could be evaluated. Secondly, the most obvious category of offence to study other than rape would be indecent assault. However, the number of such cases each year far exceeds those of rape, and covers a complex range of behaviours (including potentially consensual acts involving those under 16 years of age). Had the sample not been restricted to rape, it would have been virtually impossible to create a sampling frame that did not include cases where section 41 was of limited relevance. Where relevant and supported by data, however, the wider reach of section 41 is noted.

⁹ The sampling for national statistics and case tracking includes all rapes in the time periods; the CPS and court samples are overwhelmingly cases involving females and/or minors as complainants.

Designing and implementing a methodology

The range of research questions necessitated a linked multi-method strategy combining quantitative and qualitative methods and legal interpretation. The principal components of the research were as follows.

- Analysis of Home Office statistics for reported rapes to assess whether any trends that might be attributable to section 41 could be discerned.
- A national prospective case-tracking exercise.
- Detailed examination of CPS files.
- Trial observations.
- Interviews with complainants.
- Interviews with police officers, judges and barristers and other professionals.
- A questionnaire to support services.
- Tracking of relevant legal judgements.

All the above sources of data are drawn on in the chapters which follow. Each element is described in more detail below.¹⁰

The four areas from which CPS and interview data were drawn and where court observations were carried out were Greater Manchester, London, Newcastle and Sussex. These were selected partly because the research team had existing links with these areas¹¹, enabling easier access and combined data collection processes, and partly to reflect diverse locales.

Home Office statistical data

Home Office data on reported rape offences which proceeded to magistrates' courts and Crown Courts for the years 1998 to 2002 were subjected to secondary analysis. These data cover the sex of the offender, sexual offence classification and court disposal. Three separate data sources were available: aggregate magistrates' courts' data; aggregate Crown Court data; and data at police force area level. The data were not directly comparable, and all three were examined in detail. Furthermore, whilst some data were available in quarterly format, other information was only available in annual returns. Conviction rates were calculated and examined prior to and after the implementation of section 41.

The difficulty of detecting effects of legal reform in aggregate data sets was highlighted by the research team at the tender stage. In particular, Home Office data contain minimal detail on the reasons why cases are not prosecuted or fail to reach trial. In addition, the implementation of section 51 of the Crime and Disorder Act 1998 meant that from January 2001 indictable only cases were sent directly to Crown Court. One effect was a sharp reduction in the numbers of cases discontinued at magistrates' courts, and it was not possible to isolate any impact of section 41 within this wider change in procedure. Whilst considerable secondary analysis was undertaken, very little of it is discussed in this report (see Chapter 8) since it gave little purchase on the research questions.

Prospective case tracking

Rather than rely either on retrospective sampling of completed cases or observing large numbers of court cases in selected areas, as in much previous research (see, for example, Chambers and Miller, 1983; Brown *et al.*, 1992; Harris and Grace, 1999; Jamieson *et al.*, 2001), a national prospective case tracking exercise was devised. Here, the intention was to collect basic data on *all* cases coming before the courts during a specified time period, thus avoiding unpredictable sample biases, and enabling a more accurate assessment of the proportion of cases in which section 41 applications are made, how often they are granted or refused and their relationship with case outcomes.

¹⁰ Appendix 2 provides more detail of projected and actual data collection and of the relationship between the methods and the research questions.

¹¹ Through other research projects evaluating sexual assault referral centres (Lovett *et al.*, 2004) and examining attrition in reported rape cases (Kelly *et al.*, 2005).

A senior Court Service official co-ordinated this exercise, contributed to establishing a protocol relating to data collection and distributed the research tools from his office. The same individual later facilitated the provision of trial outcome data for the case-tracking sample.

A short pro forma was designed to document whether section 41 and third party disclosure (TPD) applications were made pre-trial and/or at trial and, with respect to section 41, the precise paragraph(s) referred to, and whether *R v A* was mentioned explicitly. The pro forma was distributed electronically to court managers in the 81 Crown Courts in England and Wales, for completion in all rape cases that came before the court between 1 April and 30 June 2003. The timing of this exercise was determined by how quickly the data collection arrangements could be put into effect and the length of time that it was reasonable to expect busy court staff to collect data. There is no reason to think that choice of this time period may have introduced any seasonal effect: the events to which the cases related occurred over a lengthy time period prior to the data collection exercise. Completed forms were submitted to the research team at the end of each month. All data from the pro formas were entered into a specially designed database in Microsoft Access, and a series of analyses undertaken (see Chapter 4).

Returns were subsequently compared with central records on rape cases heard during that period (see Appendix 3 for a detailed comparison). The research sample covers almost two-thirds (63%) of all cases heard, and, whilst not complete, was considered to be sufficiently large as to be representative.

CPS case files

The requirement that section 41 applications should normally be in writing (see Chapter 3) led to the expectation that such documentation would be part of CPS case files. Copies of applications, combined with the prospective case tracking, would therefore make it possible to explore which elements of the law were most used, and how section 41 articulated with issues of consent and belief in consent.

Preliminary discussions with the Bar suggested that, at least in London, few applications were made pre-trial. However, one application and one reference to an application were found in a small number of files examined initially in order to develop a pro forma. The research plan required examining between 40 and 50 cases completed during 2003 in each of the four study areas: a total of 160-200. Access to CPS case files outside London was arranged expeditiously but delays in negotiating access to London files¹² meant that only 20 of 170 cases surveyed came from this area. Since data were being collected by a team of researchers across four locations, a pro forma was designed to ensure consistency, and to enable comparison with the case-tracking data. Additional fields with respect to the relationship between defendants and complainants, their ages and case outcomes were included. Further qualitative data were also collected, including: reasons for discontinuances; references to sexual history/sexual experiences; and, where available, accounts of the trial process. All numeric and coded data were entered in an Access database. Interviews with nine CPS prosecutors were also conducted to ascertain their perceptions of the legislation in practice.

Trial observations

This element of the study was undertaken *after* completion of the prospective case tracking and CPS file examination to ensure that no case was duplicated across the various data sources.¹³ Trial observations were undertaken to record how section 41 played out in the courtroom, and to compare this to accounts provided by judges and barristers. They also afforded the opportunity to assess concerns raised by service providers (and in the literature) that methods other than section 41 applications are employed by barristers to bring evidence of a complainant's sexual history into the courtroom (Sheehy, 2000; Temkin, 2002b).

Access to courts was greatly facilitated by Lord Justice Judge, the then Senior Presiding Judge for England and Wales, who made direct contact with the senior judges in all selected courts. This facilitated

¹² The agreement reached in other locations – to hold all completed cases for the research team – was not possible to implement in London. An alternative, whereby Project Sapphire in the Metropolitan Police provided the researchers with the names and court dates of recently completed cases was implemented. This list of over 80 cases was submitted to London CPS, but three months later only ten case files had been located. Subsequently a version of the arrangement with other areas was implemented, but this only resulted in a further ten cases after four months.

¹³ In principle, it was possible that a retrial could have been observed that was already in the case tracking or CPS file analysis, but this did not happen in practice.

not only the observation of section 41 applications and the taking of notes throughout, but also the opportunity to talk informally with judges and barristers. Previous contact with the CPS offices proved to be of additional benefit during trial observations and on numerous occasions researchers were allowed to examine the committal papers and other documents in the CPS file.

The original research design specified observing four to six trials in each of the four research areas. However, Sussex was dropped, since a limited number of cases came to trial here each year and only three months were allocated to this part of study. Additional trials were observed in London courts other than the Old Bailey (Wood Green, Snaresbrook and Southwark) to compensate. Identifying and observing trials was very time-consuming. Regular contact with court listing officers was essential, since trials that fitted the research criteria – single complainant and defendant and listed to run for up to five days – could be adjourned at the last minute, ‘dealt with’ (one presumes by a plea being entered), delayed for unspecified reasons or not heard due to the CPS not offering any evidence. In all, members of the research team attended 31 cases, although only 23 resulted in full trials.

The focus of the trial observations was the use of sexual history in general and section 41 in particular. A pro forma¹⁴ was constructed to ensure standardised data collection and a consistent focus on the research issues. Notes were taken throughout, but observers were requested to take down verbatim (as far as possible) discussions of section 41 applications and any other explicit and implicit references to complainants’ sexual history. Observers also produced a memo summarising each trial, informal discussions with lawyers, court staff and judges and any additional observations. This documentation suggests that there may have been a ‘research effect’. On a number of occasions judges, all of whom were aware of the research, would nod in the direction of the researchers when a section 41 issue arose. It is possible, therefore, that the rules were observed more often, and that defence barristers, who were equally aware of the researchers’ presence and role, modified their approach.

In-depth interviews

Several sets of in-depth interviews were undertaken to address specific aspects of the research questions. In all cases interviews took place on the basis of anonymity. Interviews with 17 judges and seven barristers were undertaken in two of the research areas (across five courts) to explore their experiences and perceptions of the legal reform. Full notes were taken of all the interviews and most were tape-recorded and then transcribed. The judges and barristers gave generously of their time, with interviews lasting a minimum of one and a half hours. All judges were ‘rape ticketed’ (i.e. they had received the appropriate authorisation from the senior judiciary to enable them to hear rape cases), but represented a spectrum in terms of their experience of trying cases. All had considerable experience of trying other sexual cases as well and some had also had experience of dealing with these cases as barristers or in one case as a solicitor. The judges also varied in terms of the proportion of their caseload that was currently devoted to trying rape cases, ranging from 80 per cent to only five per cent. The sample, therefore, whilst small, includes many who had had considerable experience presiding over sexual cases, both in the previous regime under section 2, and more recently under section 41.

The barristers were at different points in their careers: two were Queen’s Counsels, and the rest had been practicing for between 10 and 21 years. All were experienced in dealing with sex cases, and six out of seven were highly experienced, having both defended and prosecuted, although most specialised in one or the other. Of the three female barristers interviewed, one noted that female barristers could easily be swamped with such cases, as both defence and prosecution – for different reasons – favour women barristers for sex cases.

Nineteen rape victims¹⁵ were interviewed as part of another study, also being conducted by the research team in the Child and Women Abuse Studies Unit, to explore how far the issue of sexual history influenced their decisions to report and/or continue with a prosecution and, where relevant, to ask about their experience of the trial process. Given the difficulties noted by other studies of finding complainants willing to participate in research on criminal justice responses to rape (see, for example, Gregory and Lees, 1999; Harris and Grace, 1999), inserting a section on sexual evidence into interviews with an

¹⁴ This pro forma included: brief demographic details of defendants and complainants (age, ethnicity, relationship etc); context of the assault; prosecution and defence opening and closing arguments; judges’ summing-up; all references to section 41 (when applications made, grounds used, granted/refused); other routes for bringing sexual history into the trial process, including TPDs; and charges, pleas and trial outcomes.

¹⁵ A subgroup of a larger sample (see Lovett *et al.*, 2004), all of whom were interviewed after the section 41 research began.

existing sample of survivors ensured that this would not become an 'add on', comprising very few participants. Some of the interviewees had experience of going to trial (n=6) but two had withdrawn, one at an early stage and one pre-trial.

All 19 interviewees were female and white; seven were aged between 16 and 25, six between 26 and 35 and six between 36 and 55. The majority (n=17) had been assaulted by single perpetrators, although two cases involved multiple assailants. The largest group of assailants (n=10) were known to the victim (including five current or ex-partners and both sets of multiple perpetrators, who were acquaintances). In the remaining cases, three assailants were recent acquaintances of less than 24 hours and six were total strangers. Fifteen had reported the assault to the police; seven did not proceed beyond the police stage, mainly for evidential reasons. Eight cases were scheduled for trial. In one there was a late victim withdrawal; in one a guilty plea at start of the trial; four resulted in acquittals; and two resulted in convictions for rape or attempted rape.

As part of the aforementioned other study, police officers were also being interviewed and an additional section was added to these interviews to cover issues of sexual history evidence. Thirty-six officers were interviewed across all the research sites (excluding Sussex, but with the addition of Thames Valley). Most of these interviews took place over the telephone and addressed how far, in the officers' experience, the issue of sexual history deterred complainants from reporting or continuing with proceedings, alongside questions about their knowledge of the recent reforms.

All interviews were tape-recorded and transcribed. They have been coded and analysed using content analysis. In the case of the interviews with police officers and victims, these were also 'consolidated', that is to say, all responses to particular questions were collected in one text file and analysed for frequency of responses.

The views of support services

The concurrent evaluation of Sexual Assault Referral Centres (SARCs) which was being conducted by the Child and Women Abuse Studies Unit made adding questions to interviews with SARC staff relatively simple. A range of support staff at SARCs in two of the study areas was included (n=10). The original intention had been to supplement these with interviews with key informants from Victim Support (VS), the Rape Crisis Federation (RCF) and Campaign to End Rape. Following discussions with both VS and RCF at national level, it was decided that the most fruitful approach would be to canvass local groups, since national co-ordinators had only a limited sense of how the issues were playing out in practice. This was an additional element to the original research brief, requiring the design and distribution of a questionnaire. A total of 73 organisations returned the questionnaires comprising: 16 Rape Crisis Centres (RCC); 39 local VS groups; and 18 Witness Support (WS) services. All questionnaires were coded and analysed, and responses to open-ended questions extracted and typed up.

A note on language and notations

A number of complex issues about language, concepts and meaning arose during the study, not all of which it has been possible to resolve to the satisfaction of all concerned. Within legal discourse many words that have 'everyday' meanings have technical definitions, and the question becomes even more complex when: there is also a conceptual meaning in social science; and/or terms are used in legislation but not defined.

Most difficulty was encountered in relation to the terms 'sexual history', 'sexual behaviour' and 'sexual experience' – all of which appear in the legislation and/or the guidance notes on the 1999 Act. As a descriptive concept, 'sexual behaviour' is problematic: within the legislation it is defined as 'any sexual behaviour or other sexual experience' (section 42(1)(c)), but there is no clarification of how the two are to be distinguished. From a social science perspective, both 'sexual behaviour' and 'sexual experience' carry connotations of choice and active participation, whereas sexual history evidence includes references to prior sexual assaults and allegations of assault. After much discussion the terms 'sexual history' and/or 'sexual history evidence' were viewed as the most neutral, and hence are preferred throughout, although some parts of the report also refer to 'sexual behaviour' and 'sexual experience'. It is acknowledged, however, that a potential weakness of the word 'history' is that it may be understood more in relation to the distant rather than immediate past, or indeed events subsequent to a rape.

One short cut has been used: 'section 41' is taken to cover the three sections of the Youth Justice and Criminal Evidence Act 1999 which deal with sexual history evidence. The terms 'complainant' and 'defendant' have also been used to refer to the parties, since this is an evaluation of a legal reform and these terms designate their status with respect to the legal case. At various points, however, other terms such as 'the accused' or 'survivors' 'victims/survivors'¹⁶ are used where relevant.

Where quotes are presented from interviews and questionnaires, or reference is made to specific cases, various notations are used.

- Judges, barristers and SARC staff are simply identified by a letter and number (J1, B1, S1 etc.).
- Quotes from complainants follow this convention (C1) with additional information detailing the relationship to the perpetrator and the status/outcome of the case. The latter includes: unreported; victim withdrawal; no proceedings (where additional information is available on why this is also included); no evidence offered (CPS drop case); guilty plea; acquittal; and conviction at trial.
- Quotes from questionnaires are identified by the organisation and a number (RCC1, VSS1 etc).
- CPS cases and observed trials are coded by location and a numeric reference (e.g. CPSNcle20 refers to CPS case file number 20 from Newcastle, and Lon12 is the London trial number 12).
- Where direct quotes are used from trial observation data, they are coded by location and identifier numbers as, although trials are in the public domain, the comments made by judges and barristers were subject to the usual social science confidentiality protocols.

¹⁶ See Kelly *et al.* (1996) for a discussion of the debate on these terms.

3 Overview: law on sexual history evidence

This chapter considers the background to the introduction of sections 41-43 of the Youth Justice and Criminal Evidence Act 1999, provides a brief analysis of these provisions and considers how they are being interpreted in the case law.

Background

One of the tactics traditionally employed by defence counsel to discredit the complainant (C) in sexual offence trials has been to bring up her past sexual history. In the nineteenth century, certain rules appear to have crystallised in England and Wales so far as such evidence was concerned (Temkin, 1984). Evidence that C had had sexual intercourse with other men in the past was considered to be relevant to her credit: that is, it tended to show that she was not a trustworthy witness. Evidence that she was a prostitute or had a bad sexual reputation in the community¹⁷ or had had previous sexual intercourse with the defendant (D) himself¹⁸ was considered to be relevant both to credit and to the issue of consent. In the twentieth century these rules were still being applied.

Heilbron Report

In 1975, the Heilbron Report expressed concern “about the extent to which, in a rape trial, the personal history and character of a rape victim can be introduced”, and declared that such evidence not only caused distress and humiliation to the victim but was also “inimical to the fair trial of the essential issues” (Heilbron, paras.89, 92). A further possible consequence of its use is that it may deter victims from reporting the offence. It was also suggested in a Home Office report that one possible reason why women who do report rape to the police subsequently withdraw their complaints is because they are “deterred by the prospect of cross-examination in public on their previous sexual history” (Home Office, 1998, para.9.57).

The Heilbron Committee concluded “that the previous sexual history of the alleged victim with third parties is of no significance so far as credibility is concerned and is only rarely likely to be relevant to issues directly before the jury” (Heilbron, 1975, para.131). It accordingly recommended that the use of such evidence should be strictly regulated by statute so that it would rarely be admissible. Its proposals, however, were never implemented and section 2 of the Sexual Offences (Amendment) Act 1976 was passed instead.¹⁹

Section 2 of the Sexual Offences (Amendment) Act 1976

Section 2 forbade any evidence to be adduced and any question to be asked in cross-examination by or on behalf of any defendant about any of C’s sexual experiences other than with D himself, but permitted the defence to apply, in the absence of the jury, for leave to do so. The judge was left to decide whether it would be unfair to D to exclude such evidence or question and, if it was thought to be unfair, the judge had to accede to the defence’s request.²⁰ On the face of it, this solution would appear to have been less than satisfactory. The Heilbron Committee’s proposal would have given the judges far less scope to decide when such

¹⁷ See *Tissington* (1843) 1 Cox C.C. 48; *Greatbanks*, [1959] Crim. L.R. 450; *Barker* (1829) 3 C. & P.589; and *Clarke* (1817) 2 Stark.241.

¹⁸ *Riley* (1887) 18 QBD 481; *Cockcroft* (1870) 11 Cox C.C.410. The complainant is henceforth often referred to as C in this report, and the defendant as D.

¹⁹ Section 2 provided as follows:

- (1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with the person other than that defendant.
- (2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.
- (3) In subsection (1) of this section ‘complainant’ means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.
- (4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

For a detailed analysis of the legislative history of section 2 and its interpretation see Temkin (1984, 1993).

²⁰ *Viola* [1982] 3 All ER 73, 77. See also *Lawrence* (1977) Crim. L.R. 492; *Mills* (1978) Cr. App. R. 327.

evidence should be admitted. In Scotland, a not dissimilar scheme to section 2 was introduced by section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. This legislation, whilst it forbade evidence to be adduced or questions to be asked about sexual behaviour not forming part of the subject matter of the charge, provided certain exceptions, including one which required the judge to admit such evidence or allow such questioning where it would be “contrary to the interests of justice to exclude” it.²¹

Section 2 was soon given a broad interpretation. In the leading case of *Viola*, the Court of Appeal held that “if the questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent as opposed merely to credit, they are likely to be admitted”²² Thus, all was left to depend on what view the trial judge took as to the relevance of the sexual history to an issue in the trial. But in a series of cases, the Court of Appeal also made it clear that it was prepared to oversee such decisions and to impose its own broad view of relevance (Temkin, 1993). Relevance, however, is in the mind of the beholder and, as L'Heureux-Dubé, J. explained in the Supreme Court of Canada's decision in *Seaboyer*, all too often in this area of law it has been swayed by stereotypical assumptions, myth and prejudice.²³

Empirical studies into the operation of section 2 revealed that irrelevant questions about sexual history were continuing to be asked in cross-examination and that for barristers defending in rape cases, questioning about sexual history in order to discredit the complainant was frequently part of the repertoire (Adler, 1985, 1987; Temkin, 2000; Lees, 2002). A similar situation prevailed in Scotland (Brown *et al.*, 1992). In other jurisdictions legislation similar to section 2, in that it gives full scope to the judge to determine when sexual history evidence should be admitted, was also passed without much success (Woods, 1981; Attorney General's Legislation and Policy Branch, 1996). Henning and Bronitt (1998) have pointed out that “the principal structural flaw of these legislative schemes is their failure to define the key concepts for determining admissibility” leaving the judges free rein to apply their “common sense assumptions” (p.85).

Youth Justice and Criminal Evidence Act 1999

Despite growing concerns about the doubtful efficacy of section 2, the Criminal Law Revision Committee in 1984 expressed its satisfaction with the existing law (CLRC, 1984). However, this did not put a stop to the debate or to growing dissatisfaction with the section 2 regime (see, for example, McColgan, 1996). The turning point came in 1998 with the Report of a Working Group set up by the Home Office which, having concluded that there was “overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose”, proposed that the law be changed (Home Office, 1998, para.9.64). By the end of the same year, the Government responded by introducing the Youth Justice and Criminal Evidence Bill which contained a new scheme to control sexual history evidence far more rigorously. The proposed scheme was slightly modified to take into account amendments introduced in the House of Lords.

Sections 41-43 of the Youth Justice and Criminal Evidence Act 1999 (hereafter ‘the 1999 Act’) sought to offer a more structured approach to decision-making. Many American states, most notably Michigan²⁴, together with New South Wales, Australia, have similar structured regimes, as had Canada, although the law there has since been changed (Temkin, 2002). But the new provisions have been the object of criticism. On the one hand, it was considered that the circumstances in which sexual history is permitted have been drawn too widely to make a significant difference (Hall and Longstaff, 1999). On the other hand, there are those who believe that a structured regime of this sort cannot do justice to the many different situations which in practice may arise and that the provisions are so restrictive that they may prevent the court from hearing relevant evidence and hence fall foul of Article 6 of the European Convention on Human Rights (Birch 2000; 2002).

²¹ The Scottish law was regarded as unsatisfactory and has now been repealed: see Scottish Executive (2000). The new law is contained in the Sexual Offences (Procedure and Evidence)(Scotland) Act 2002.

²² [1982] 3 All ER 73 at p.77.

²³ *R v Seaboyer* (1991) 83 D.L.R. (4th) 193 at p.228. For different views about the relevance of sexual history, see Elliott (1994) and Redmayne (2003).

²⁴ The Michigan legislation is far stricter than section 41 in its exclusionary intent. But American legislation needs to be interpreted against the backdrop of the Constitution and, in particular, the Sixth Amendment, which guarantees the right to confront and cross-examine witnesses. It has been interpreted to permit evidence in certain limited situations which are not included in the legislation itself (see, for example, *People v Wilhelm* [1991] 190 Mich.App.574.). However, this is not the same as “restoring judicial discretion” to Michigan, as is claimed by Kibble (Kibble, 2004, pp.8-9, 169).

The Rule of Exclusion

Section 41 of the 1999 Act provides a rule forbidding evidence to be adduced or questions to be asked in cross-examination about any sexual behaviour of the complainant but it allows certain exceptions to this rule. The exclusionary rule expressly applies only to defence evidence. Thus, the prosecution is free to adduce such evidence or ask such questions as it pleases. By contrast, the rule of exclusion in New South Wales applies equally to the prosecution.²⁵ The argument in favour of the rule of exclusion applying to the prosecution is that prosecuting as well as defending counsel may seek to introduce such evidence where it is not strictly necessary and where it might be damaging to the complainant to do so. As will be seen, the present research confirms earlier Scottish research that the prosecution not infrequently adduces sexual history evidence (Chambers and Millar, 1986). The rule of exclusion covers evidence of previous or subsequent sexual relations with the accused as well as with third parties. It was considered, with justification, that there was a need to place some control on the use of both types of evidence.

Evidence of sexual behaviour

Under section 41(1) of the 1999 Act, the rule of exclusion applies only to sexual behaviour. This term is not defined in the 1999 Act although section 42(1)(c) does state that sexual behaviour includes sexual experience. It may be assumed that the term covers sexual reputation since section 41(6) only permits specific instances of alleged sexual behaviour to be admitted under the exceptions to the rule. The Explanatory Notes also assume that sexual behaviour includes what it describes as “secondary evidence of sexual behaviour such as abortions” (Home Office, 1999, para.145). It should in that case also exclude questions which relate, for example, to the ethnicity of C’s baby, whether she has children by different men or is a single parent (see also Lees, 2002). Later chapters will show that the absence of a clear definition has caused some difficulties and has provided an opportunity for evasion of the provisions.

In *R v Mukadi*,²⁶ getting into a car with a stranger and exchanging telephone numbers was treated by the trial judge as sexual behaviour. Evidence of this incident was duly excluded. The Court of Appeal did not find it necessary to decide whether this was sexual behaviour or not. However, it commented in the course of its judgement that “it would have been a possible and a proper inference for the jury to conclude that when C accepted this man’s invitation and got into his car what she had in mind was that there might follow some form of sexual activity”. This raises the question whether C’s purpose should be taken into account as a factor in determining whether ambiguous behaviour is sexual or not. Section 78 of the Sexual Offences Act 2003 provides a way of determining whether conduct is ‘sexual’ which might be of use in this context as well.²⁷

Previous ‘false’ complaints

The Explanatory Notes state, “it is not envisaged that evidence that seeks to do no more than show that the complainant has a history of making unproved complaints of sexual offences would be treated as evidence of sexual behaviour” (Home Office, 1999, para.150). The late Lord Williams of Mostyn, Minister of State at the Home Office, explained: “A history of false complaints or false complaints about sexual behaviour is admissible because it goes to credibility. But it is not evidence about sexual behaviour: it is about untruthful conduct on prior occasions. There is a very clear difference”.²⁸ However, given the wording of the statute, it might have been thought that where evidence of false complaints also provides evidence of previous sexual behaviour, it would still be subject to the rule of exclusion.²⁹

It is very easy to allege that the complainant has made false or unproven complaints of rape in the past. There is some evidence that barristers and police officers are keen to find out whether previous complaints have been made to the police or others (see Chapters 7 and 8) and to raise this matter in court. Those who have been raped or otherwise sexually abused may well have had this experience more than once. But rape is hard

²⁵ Crimes Act 1900, s.409B(3).

²⁶ [2003] EWCA Crim 3765; [2004] Crim. L.R. 373.

²⁷ Section 78 provides: “penetration, touching or any other activity is sexual if a reasonable person would consider that a) whatever its circumstances or any person’s purpose in relation to it, it is because of its nature sexual, or b) because of its nature it may be sexual and because of its circumstances or the purpose of any person in relation to it (or both) it is sexual”. See also *Court* [1989] A.C.28.

²⁸ Hansard, Vol.598, March 8, 1999, col.34.

²⁹ In New South Wales, in a series of cases, it has been held that the rule of exclusion which applies to evidence which implies sexual experience would exclude evidence of previous false complaints: see, for example, *R v M* (1993) 67 A Crim. R 549.

to prove, complaints of rape are frequently withdrawn and rape prosecutions often fail. This does not mean that the allegations were false. In Michigan it has been held that a defendant may cross-examine the complainant regarding prior false accusations of a similar nature.³⁰ However, the Michigan courts have made it clear that they require concrete evidence that any prior accusation was indeed false and the relevance of the evidence will need to be demonstrated.³¹

In *R v B*³² the Court of Appeal decided that the trial judge was wrong to refuse permission to defence counsel to cross-examine C regarding a previous complaint she had made where no charges had been brought in respect of it. It accordingly quashed the conviction. Yet the Court recognised that there was cogent medical evidence to suggest that C's previous allegations were true. However, this approach was not adopted by the Court of Appeal in *R v T*³³, in which it was assumed that only evidence of false complaints or evidence of a failure to complain while complaining of other sexual assaults would be outside the section 41 restriction. It was held that the defence should have a proper evidential basis for asserting that false allegations had been made in the past. But the Court seemed content that the judge should simply seek assurances from the defence that this was the case rather than imposing an obligation on the judge to investigate further. The Court merely commented that it would be professionally improper for those representing the defendant to seek to elicit evidence about C's past sexual behaviour under the guise of previous false complaints. This left open the question of what would suffice to provide a proper evidential basis and how far counsel should go in making enquiries into this matter.

In *R v H*³⁴ the Court of Appeal carefully reviewed the statements of a number of witnesses, as well as a statement by C herself, which were relied upon by defence counsel as evidence of previous false allegations on the basis that these statements were inconsistent. The Court found no evidence of inconsistency and ruled that the trial judge was right to exclude consideration of previous allegations. It might be argued that an approach such as this, involving proper scrutiny of the evidence which is relied upon for the assertion that a previous allegation was false, has much to commend it. In *R v C and B*³⁵ defence counsel sought to admit evidence of previous allegations of sexual abuse without providing any reason for suggesting they were false. It was claimed that such allegations were relevant to the credibility of the complainants and that no leave was necessary under section 41. The trial judge refused to permit this evidence, and this decision was approved by the Court of Appeal which ruled that section 41 was clearly relevant in this situation.

Exceptions to the Rule of Exclusion

There are four express exceptions to the rule of exclusion under the 1999 Act. These are wide enough to encompass a range of behaviour and are broader than the range of exceptions in similar regimes elsewhere.

1. Evidence relating to a relevant issue in the case which is not an issue of consent

The first exception to the rule of exclusion contained in section 41(3)(a) of the 1999 Act will permit evidence of sexual behaviour where it relates to a relevant issue in the case which is not an issue of consent. This will permit sexual history evidence in a number of different situations.

a) Belief in consent

Section 42(1)(b) expressly provides that belief in consent is not 'an issue of consent'. This means that subject to sections 41(4) and (6) and 41(2)(b), the defence is free to adduce any evidence of past sexual behaviour irrespective of the time or circumstances in which it took place if it has a bearing on D's belief in consent. Other jurisdictions do not have an exception of this breadth. Strong objection to it has been taken by women's groups, which have contended that it creates a substantial loophole in the law (Hall and Longstaff, 1999). The rationale for the section 42(1)(b) provision was the highly controversial decision in *DPP v Morgan*³⁶ which made an honest but unreasonable belief in consent a defence to rape. This has now been overruled by section 1(1)(c) of the Sexual Offences Act 2003

³⁰ *People v Mikula* (1978) 84 Mich.App.108.

³¹ *People v Williams* (1991) 191 Mich. App. 269; *People v Garvi* (1986) 148 Mich.App.444; *People v Oswald* (2004) Mich.App.245444 (Westlaw). For a similar approach by the Pennsylvania Superior Court see *Commonwealth v Boyles* 595 A.2d 1180 (1991).

³² [2001] EWCA Crim 3042.

³³ [2001] EWCA Crim 1877; [2002] 1All ER 683. See also *R v E* [2004] EWCA Crim 1313; [2005] Crim.L R. 227.

³⁴ [2003] EWCA Crim 2367.

³⁵ [2003] EWCA Crim 29, 2003 WL 117134.

³⁶ [1976] AC 182, HL.

which provides that where A is charged with rape it will have to be proved that he does not reasonably believe that B consents. Section 1(2) goes on to state: "Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents".

A change in section 42(1)(b) to reflect this change in the substantive law would now seem to be necessary; however, it is not clear how much difference such a change would make. The difficulty with section 1(2) is that it could empty the reasonableness test of most of its content (Temkin and Ashworth, 2004). Much will now depend on how the phrase "all the circumstances" is interpreted. It might be thought to be an invitation to the jury to scrutinise C's behaviour to determine whether there was anything about it which could have induced a reasonable belief in consent. Is C's sexual history to be taken to be a relevant part of the circumstances? In answer to a question raised in Committee, the Minister agreed that the section "should focus the court's attention on what is happening at the time of the offence" and "should make the previous sexual history of the complainant far less relevant".³⁷ But this does not seem to reflect the meaning of the words 'all the circumstances', which contain no limitation to circumstances existing at the time of the event in question. Moreover, in deciding what it is 'relevant' to consider, there seems little to prevent the influence of stereotypical assumptions about the significance of C's previous sexual behaviour.

b) Evidence relating to identity

Where D alleges that he did not have sexual intercourse with C at all, section 41(3)(a) of the 1999 Act will permit him to adduce any evidence to support this contention since this is evidence which does not relate to the issue of consent. Thus, for example, the defence will be able to argue that the semen found on C's body, her pregnancy or the disease she has contracted are attributable to someone else.

c) Motive to lie

Under section 41(3)(a), the court may give leave to admit evidence of sexual behaviour where it "relates to a relevant issue in the case which is not an issue of consent". Under section 42(1)(a), "relevant issue in the case" means any issue *falling to be proved* by the prosecution or defence in the trial of the accused". This phrase is potentially capable of a broad construction. Thus, if C's motivation became an issue in the case, it would, arguably, be possible to question her about previous sexual behaviour if this were relevant to it. It remains to be seen whether the courts will accept such an argument. Lord Hope in *R v A* considered that section 41(3)(a) was a gateway to admitting evidence of motive to lie³⁸ but this was not the view taken in *R v Mokrecovas*.³⁹ In *R v Floyd Charles Darnell*⁴⁰, defence counsel, relying on Lord Hope's remarks, suggested that a very wide interpretation should be given to section 42(1)(a). The Court of Appeal did not consider it necessary to explore the matter in this case but commented that if evidence could be admitted under section 42(1)(a) as indicative of a motive to lie, it was not clear how this could be reconciled with section 41(4), which forbids evidence the purpose or main purpose of which is to impugn C's credibility. In *R v Martin (Durwayne)*⁴¹, the Court of Appeal found a way of circumventing this problem. D, who was charged with indecent assault, denied any contact with C on the occasion in question, claiming he was elsewhere at the time. D sought leave to cross-examine C about an alleged previous sexual encounter between them based on which C had a motive to lie. The Court of Appeal held that the trial judge was wrong to have refused the application on section 41(4) grounds, since this subsection requires that *the purpose or main purpose* of the cross-examination must be to impugn C's credibility. Whilst it was clear that this was one purpose of the intended cross-examination, it was not the only one, since the proposed evidence went to D's credibility as well. Thus, the Court held, the purpose or main purpose test was not fulfilled. It added that, had it not been possible to interpret section 41(4) in this way, it would have been necessary to invoke the Human Rights Act.⁴² But it is hard to imagine that this interpretation reflects what the legislature intended. Where the credibility of C is in issue, it will often be the case that D's credibility is in issue at the same time, in that only one of them can be telling the truth. If the Court of Appeal's approach is followed, this will result in a considerable attenuation of section 41(4).

³⁷ Sexual Offences Bill [Lords], House of Commons Standing Committee B, September 9, 2003, col.21.

³⁸ [2001] UKHL 25, [2001] 3 All ER 1 para.79.

³⁹ [2002] 1 Cr App R 226.

⁴⁰ [2003] EWCA Crim 176.

⁴¹ [2004] EWCA Crim 916. The appeal was dismissed in this case for other reasons. See now *R v F* [2005] EWCA Crim 493; Crim.L.R. 564.

⁴² See below under the heading '*R v A*'.

d) *Sexual offences where consent is not the issue*

Sections 41-43 apply to a range of sexual offences, including those against children below the age of consent. This means that in prosecutions for sexual offences against children where consent is not the issue, previous sexual behaviour evidence is *prima facie* admissible if it relates to a relevant issue in the case. The same would apply to evidence of previous sexual abuse if this is interpreted to come within the meaning of 'sexual experience'. D might argue, for example, that he did not have sexual contact with C and that her evidence and sexual knowledge were based on certain specific experiences she had had with other men. Great care is clearly required before such evidence is admitted. In Michigan, in *People v Morse*,⁴³ D sought to prove that the victims had been sexually abused in the past by their mother's partner, who had pleaded guilty to charges brought against him. The Court of Appeals held that, under the right to confrontation found in the Sixth Amendment to the United States Constitution, such evidence would not be precluded if it were to show that the victims' inappropriate sexual knowledge had not been learnt from D and that they had a motive to lie. But such evidence could be admitted only where an *in camera* hearing determined that there had been a conviction of criminal sexual conduct involving the children and that the facts were sufficiently similar to be relevant.⁴⁴

2. *Evidence of sexual behaviour at or about the same time as the sexual activity in question*

Under section 41(3)(b) of the 1999 Act, where the issue is consent, evidence of C's sexual behaviour may be admitted if it is alleged to have occurred at or about the same time as the event which is the subject matter of the charge. According to the Explanatory Notes, the phrase 'at or about the same time' is not expected to be interpreted to mean more than 24 hours before or after the alleged offence (para.148). There is a clear danger that the phrase could be interpreted more widely than this but in *R v A* the House of Lords declined to do so. Indeed, Lord Steyn stated that it could not be interpreted to extend the temporal restriction to days, weeks or months.⁴⁵

This exception is arguably too broad. Subject to section 41(2)(b) and section 41(4) (see below), it will be possible for evidence of sexual acts which are entirely unconnected to the alleged rape to be admitted in court provided that they occurred within the 24-hour time frame. A similar exception in the New South Wales legislation requires a connection between the alleged sexual assault and the preceding or following sexual behaviour.⁴⁶ The reason for requiring a connection was explained as follows:

The purpose of this formulation is to distinguish between 'smear' evidence about C's sexual behaviour ... quite unconnected with the event in question (either before or after it), and relevant evidence. The former type of evidence is merely offensive and intimidatory; the legislature has judged that to continue to allow its admission would be unacceptable. (Woods, 1981, p.35).

In *R v Mukadi*, the Court of Appeal considered that the fact that C had got into an expensive-looking car with a stranger – a car that the Court observed was dirty inside – several hours before the event in question, was evidence which the trial judge had wrongly excluded. Had the jury heard about this, they might have formed a different view as to whether she consented or not to sexual intercourse with D. Sir Edwin Jowitt emphasised that C was on the occasion in question, "wearing a short, tight skirt, which in parts could be seen through and a black vest top". The reasoning of the Court appears to be this. The car incident would have shed doubt on C's assertion that she had accompanied Mukhadi to his flat simply to see if they could become friends and prepared to do no more than kiss him, if that. Such doubt would then have led the jury to question whether her story as a whole was true. Had she said from the outset that she went to the flat, not averse to sexual activity but unwilling to go further by engaging in sexual intercourse, then the car incident would have been irrelevant to the issue of consent. But the problem with this reasoning is that this was an incident unconnected with the events which followed. Willingness to engage in sexual activity with one man in certain circumstances is not to be interpreted as a general willingness to consent, and *a fortiori* willingness to step inside one man's car does not shed light on C's state of mind in agreeing to accompany a different man to his flat a few hours later. The Court is employing precisely the reasoning which the Act was intended to forbid.

The quashing of Mukadi's conviction in these circumstances led the Crown to seek leave to take the matter to the House of Lords in that the case raised important questions about the relevance of previous sexual

⁴³ (1998) 231 Mich.App.424.

⁴⁴ See also the decision of the Pennsylvania Superior Court in *Commonwealth v Wall* (1992) 606 A.2d 449 in which evidence of previous sexual abuse of the complainant was admitted under the Sixth Amendment despite Pennsylvania's rape shield law, where there was a conviction of a third party for this abuse and the evidence was more probative than prejudicial.

⁴⁵ [2001] 3 All ER para.40.

⁴⁶ Crimes Act 1900, s.409B(3)(a).

behaviour with third parties.⁴⁷ But The Court of Appeal did not consider that there was a point of general public importance worthy of certification.

3. Similar behaviour

The third exception to the rule of exclusion was not part of the original Bill but was added in response to criticism in the House of Lords. Under section 41(3)(c), in order for evidence of or questions about C's previous sexual behaviour to be allowed, it must allegedly have been so similar to her behaviour during, at or about the same time as the event in question "that the similarity cannot reasonably be explained as a coincidence". This wording owes its inspiration to *DPP v Boardman*,⁴⁸ which dealt with the circumstances in which the previous misconduct of *the defendant* could be admitted in a criminal trial under the similar fact doctrine. It was held that the test was whether there was such a striking similarity between the accused's alleged offence and his previous offences that it would be an affront to common sense to assert that the similarity was explicable on the basis of coincidence. Translated into the context of sexual history evidence, this approach appears to require that the evidence of past sexual acts which took place with C's consent are so similar to her behaviour during, at or about the same time as the event in question, that her behaviour cannot reasonably be explained otherwise than that she consented on this occasion as well. This test will be hard to satisfy.⁴⁹ The Government intended that this should be a narrow exception.⁵⁰ Indeed, it is hard to conceive of any cases involving previous sexual activity with third parties that will fall within it. The issue is, after all, one of consent which must be given on each occasion to each man. This formula, which might fit well where previous misconduct of the accused is concerned (four previous brides of the accused found dead in his bath do suggest that the presence of a fifth dead bride in his bath is scarcely likely to be a coincidence) can rarely, if ever, be applicable in the context of consent. Consent is to a person not to a circumstance. Consent to one man can never betoken consent to another. Had the exception simply insisted upon a striking similarity between the complainant's conduct on previous occasions and her conduct on the occasion in question, it would have opened the door more readily to the admission of past sexual history.

4. Evidence to rebut prosecution evidence

Since the 1999 Act does not prevent the prosecution from adducing sexual history evidence, section 41(5) contains an exception to the rule of exclusion which permits the defence to challenge any such prosecution evidence. Whether or not it is fair to permit the defence to counter the assertions of the prosecution about sexual history, there is no justification for permitting this exception to open the floodgates by enabling the defence broadly to cross-examine C about her sexual past. Accordingly, section 41(5)(b) provides that questioning by the defence must "go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained".

In *R v Rooney*⁵¹ it was pointed out that section 41(5) is, unlike the other exceptions to the rule of exclusion, not subject to section 41(4) (see below), so that where the defence seeks to rebut evidence of sexual behaviour adduced by the prosecution simply in order to impugn the complainant's credibility, the court may allow this. In *R v Minhas and Haq*⁵² the defence attempted to use answers given by C in cross-examination as a basis for an application under section 41(5). C, who was 13 years old at the time of the alleged rape, said in answer to questions that she would not have taken drugs voluntarily or had sexual intercourse with D, a man of 36. The defence sought leave to put to her that she had a sexually transmitted disease. The Court of Appeal upheld the judge's decision to reject the application. However, the case illustrates that complainants may be lured by defence counsel into making statements which will then be used to form the basis of an application under section 41(5).

Evidence falling outside the exceptional categories

Under section 41(6), for the purposes of all four exceptions, the evidence must relate to specific instances of sexual behaviour. Moreover, under section 41(4), evidence will not be regarded as relating to a relevant issue in the case and coming within the exceptions contained in section 41(3) if it appears to the court to be reasonable to assume that its purpose or main purpose is to impugn the credibility of the complainant.

⁴⁷ [2003] EWCA Crim 3866.

⁴⁸ [1974] 3 All ER 887.

⁴⁹ The case-tracking exercise found two applications which included reference to section 41(3)(c): see Chapter 4.

⁵⁰ Hansard, Standing Committee E, June 24, 1999, col.224. But see discussion of *R v A* below.

⁵¹ [2001] EWCA Crim 2844.

⁵² [2003] EWCA Crim 135.

In *R v Singh*,⁵³ C had lied at the first trial and said that she was a virgin. D's conviction was quashed on appeal when fresh evidence revealed that this was not the case. At the retrial the prosecution had no intention of repeating this assertion but the defence nevertheless sought leave to adduce evidence of the previous lie and, if necessary, to call the man with whom it was said she first had intercourse. The application did not reach first base as far as section 41(5) was concerned and there was no way of introducing such evidence under any of the exceptions contained in section 41(3). The trial judge therefore refused leave and the Court of Appeal upheld this decision on the ground that the only purpose of such cross-examination would have been to impugn her credibility and that section 41(4) ruled this out.

Excluding evidence falling within the exceptional categories

Admission of evidence falling within one of the four exceptions is by no means automatic. The judge must, under section 41(2)(b), also be satisfied that a "refusal of leave might have the result of rendering unsafe a conclusion of the jury or the court on any relevant issue in the case". There is clearly a danger that insufficient heed will be paid to this provision and that evidence which falls within one of the exceptional categories will be admitted even where it is of minimal relevance to the issues in the case.

In *R v Rooney* the Court of Appeal decided that, even though evidence to rebut prosecution evidence should have been admitted and that a refusal of leave might have had the result of rendering the jury's conclusion unsafe, it did not consider that the conviction was in fact unsafe and refused, therefore, either to allow the appeal or to certify a point of law of general public importance. It pointed out that a decision on section 41 may be made fairly early on in the trial and at that point it might appear to have had the possible result of rendering a decision unsafe. However, the Court of Appeal had the advantage of addressing the question in the light of all the evidence and the case as a whole and was able to conclude that the decision was not unsafe since the evidence which the defence sought to have included turned out to be of peripheral importance.

R v A and the Human Rights Act 1998⁵⁴

It has been noted above that the rule of exclusion covers evidence of previous or subsequent sexual relations with the accused as well as with third parties. Whilst there is considerable scope to have evidence of sexual behaviour with the accused admitted by way of one or other of the four exceptions, there is no exception which specifically permits evidence of sexual behaviour with the accused where this is relevant to the issue of consent. Had a specific exception for such sexual experiences been included in section 41, possibly with some temporal limitation, it would not have undermined the purpose of the legislation and would have prevented the intervention by the House of Lords in *R v A*.

In *R v A* the defence sought to have admitted evidence of a previous sexual relationship which D alleged he had had with C, as evidence bearing on the issue of consent. It was contended that there was no obvious way of bringing such evidence within any of the four exceptions. The question was, therefore, whether the exclusion of such evidence for this purpose would amount to a contravention of D's right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR). The House of Lords considered that if evidence of this kind had necessarily to be excluded, this represented a likely flaw in the provisions but was not prepared to hold that they were, as a whole, incompatible with the ECHR. It decided instead to exercise its interpretative duty under section 3(1) of the Human Rights Act 1998 with a view to achieving compatibility with Article 6. It therefore read into section 41(3)(c) (the similarity exception) an interpretation that evidence should be admitted where it was "so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6".⁵⁵ Lord Steyn, who gave the leading speech, entered the caveat that due regard should always be paid to the importance of seeking to protect the complainant from indignity and humiliating questions,⁵⁶ and made clear that a prior relationship with the accused would not always be relevant.⁵⁷ However, since no firm statement was made as to when it would be irrelevant, it seems likely that such evidence will generally be admitted in the future

⁵³ [2003] EWCA Crim 485, see Archbold (2005, para.8-123p, p.1202).

⁵⁴ See Kibble (2001).

⁵⁵ [2001] 3 All ER 1, para.46. The use of section 41(3)(c) as the vehicle for admission of such evidence is not entirely appropriate: see Birch (2000, p.549).

⁵⁶ At para.46.

⁵⁷ At para.45.

for fear of a successful appeal. In *R v R (2) H (2003)*,⁵⁸ the Court of Appeal quashed a conviction for rape on the ground that the judge had refused to allow C to be cross-examined as to whether she had had sexual intercourse with D and a friend of his on one occasion four months before the alleged rape and on a subsequent occasion almost a year after the alleged rape. C had stated in examination-in-chief that D was her boyfriend and that they had had sexual intercourse on one occasion and other sexual activity on other occasions. The judge had allowed the defence to cross-examine her about their consensual sexual relationship on the ground that this was relevant to his belief in consent. Thus, the jury were fully aware of the previous sexual relationship but the Court of Appeal took the view that the alleged incidents were highly relevant to the issue of consent and that cross-examination on the issue of belief in consent was not sufficient. This decision is likely to encourage judges to permit cross-examination about specific instances of sexual activity between D and C even where there has been a significant lapse of time between the incidents and the rape.

The decision in *R v A* has engendered a degree of uncertainty. Strictly speaking, the rule of precedent should ensure that the new formula the House of Lords has tacked on to section 41(3)(c) applies only in the case of a previous sexual relationship with the accused. However, there is clearly a risk that it will be applied more broadly than this to admit evidence in any case where the judge takes the view that an Article 6 breach could otherwise result. There are dicta in the case which could be used to support such an approach.⁵⁹ Lord Hope did not consider that it was possible to read into section 41 “a new provision which would entitle the court to give leave whenever it was of the opinion that this was required to ensure a fair trial”,⁶⁰ but this may be precisely what has been achieved.

Since *R v A* was decided, defence efforts have mainly focused on attacking section 41(4) in order to have greater scope to undermine C’s credibility. However, in *R v Mokrecovas* the Court of Appeal stood firm on this and held that evidence which the defence sought to have admitted as illustrating a motive to lie would invade her privacy, subject her to humiliating accusations and drive a coach and horses through section 41. In *R v Rooney* a further attempt was made to invoke the Human Rights Act, once again with respect to section 41(4). It was argued that section 41(4) should be interpreted to allow questions to be asked even if they did impugn C’s credibility if this was necessary in order to secure a fair trial under Article 6. The Court of Appeal did not have to consider the argument as the case proceeded on a different basis. However, more recently in *R v Martin (Durwayne)* as discussed above,⁶¹ similar arguments have met with some success.

In the more recent case of *R v Andre Barrington White*,⁶² decided after the conclusion of data collection for this study, the Court of Appeal held that unless evidence that C was a prostitute fell within one of the exceptional categories it could not be admitted. It went on to state that the substantial focus of the decision in *R v A* was the introduction of evidence of a previous sexual relationship with the accused himself. It emphasised Lord Hope’s view quoted above and held that where sexual behaviour with third parties was concerned it would “take a very special case to accommodate evidence of such acts” if they could not be accommodated by an ordinary reading of the section. This decision should inject some certainty into this area.

Procedure

Strong procedural provisions are an important accompaniment to laws which seek to control sexual history evidence. Written notice provisions seek to ensure that only genuine and considered applications are made and also serve to give the prosecution some warning of what is in store.

1. Notice

Under the Crown Court Rules, an application for leave to admit sexual behaviour evidence must be made in writing and received by the appropriate officer of the Crown Court within 28 days of D’s committal or service of notice of transfer or within such period as the court may in any particular case determine⁶³ so that there is considerable flexibility. The application must contain a summary of the evidence it is proposed to adduce and

⁵⁸ [2003] EWCA Crim 2754.

⁵⁹ See, for example, [2001] 3 All ER para.161 and Lord Steyn’s speech.

⁶⁰ See para.109.

⁶¹ See above under the heading ‘Motive to lie’.

⁶² [2004] EWCA Crim 946.

⁶³ See Crown Court Rules 1982, r.23D as inserted by Crown Court (Amendment) (No.2) Rules 2000 (S.I. 2000 No.2987) (L.25).

the questions it is proposed to ask, a full explanation of the reasons why it is considered that the evidence and questions fall under one of the exceptional categories, a summary of documents or evidence to be submitted in support of the application and the name and date of birth of any witnesses whom it is proposed to call at the trial to give evidence of C's sexual behaviour. Where the application is received by the prosecutor more than 14 days before the date set for trial, the prosecutor must, within 14 days of receipt of the application, indicate in writing to all parties whether the application is opposed, and on what grounds, and whether it wishes to be represented at any hearing of the application. Late applications must be accompanied by a full written explanation as to why the application could not have been made within the specified 28 days but there is no suggestion that evidence will be excluded on this ground. The Rules also envisage that applications can be made after the trial has begun, in which case neither the application nor the reason for its lateness need to be provided in writing. There are no sanctions for late applications. To the contrary, by applying at the trial, counsel avoids the bother of a written application.

2. Hearing the application

The Crown Court Rules require a hearing to take place where the prosecutor has notified the appropriate officer that he or she opposes the application, where the application was received by any of the parties to the proceedings less than 14 days before the date set for trial, or where a judge of the Crown Court considers that a hearing is appropriate. Where these conditions do not apply, the judge must decide the matter without a hearing. Under section 43, applications to the court for permission to introduce sexual history evidence must be heard in private. This means in the absence of the public, the press, the jury and all witnesses including C. D, however, may be present.⁶⁴ There is clearly a strong case for excluding the public as well as the jury in order to protect C's privacy. But the exclusion of C herself is harder to justify, as she may be able to shed light on the application and provide assistance in challenging it. Nor is it clear why she should not be forewarned if it is successful.

No precise indication is given as to what form the hearing should take or whether a 'trial within a trial' should take place (see Woods, 1981, p.40). But whether or not a hearing takes place the Court may request information to assist in the determination of the application. Under section 43(2) the court must state in open court, but in the absence of the jury, its reasons for giving or refusing leave and the extent to which evidence may be adduced or questions asked in pursuance of the leave. This requirement is intended to ensure that the judge considers the application with all due deliberation and also that counsel know the limits of the questions which may be asked and the evidence which may be adduced.

Summary and conclusions

Sections 41-43 of the 1999 Act were introduced in response to the perceived failure of section 2 of the Sexual Offences (Amendment) Act 1976 to control the flow of sexual history evidence into the courtroom. Section 41 excludes use by the defence of evidence of the complainant's 'sexual behaviour', a term which is not defined. The rule of exclusion is not considered to apply to evidence of previous false allegations of sexual assault but does apply to sexual behaviour with the accused as well as with third parties. There are four exceptions to it. But evidence will not be admitted where its main purpose is to impugn the credibility of the complainant (section 41(4)) and evidence falling within the exceptions will only be admitted where to exclude it would render the jury's conclusion unsafe. There is no exception which specifically permits evidence of sexual behaviour with the accused where this is relevant to the issue of consent. In *R v A* the House of Lords considered that this omission was in conflict with Article 6 of the ECHR. It therefore read into section 41(3)(c) (the similarity exception) an interpretation that such evidence should be admitted where it was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6. However, the decision left the law on sexual history evidence in a state of some uncertainty.

Of the thirteen post *R v A* decisions of the Court of Appeal discussed in this chapter, exclusion of sexual history evidence led to convictions being quashed in four cases. In one of these, the Crown was refused leave to appeal to the House of Lords. In nine cases the appeal was dismissed. The decision in *White* goes some way towards restricting the interpretation of *R v A* which might otherwise be read as giving the judges a general discretion to include sexual behaviour evidence whenever they consider it just to do so

⁶⁴ YJCEA section 43 and see *Explanatory Notes* para.152.

and *R v H* points the way forward where claims of previous false allegations are concerned.⁶⁵ The cases demonstrate that on the whole the Court of Appeal has understood the purpose of section 41 and the way it differs from section 2 and is doing its best to interpret it to give effect to the intentions of the legislature. However, whilst the Court of Appeal may, to some extent, have moved on in its attitude to sexual history, there is room for concern. The judgement in *R v R* does not bode well for cases where there is an existing or past relationship with the accused. The decision in *Mukadi* illustrates the persistence of old-style attitudes to sexual history whilst the decision in *R v Martin (Durwayne)* has seriously undermined section 41(4). It is clear that sexual history remains on the agenda as part of the strategy for defending in sexual assault cases, and that defence counsel will still have the opportunity of seeking ways to diminish the provisions of the 1999 Act.

⁶⁵ But see now *R v Garaxo* [2005] EWCA Crim 1170.

4 Case tracking

Introduction

This chapter presents the findings of a case-tracking exercise conducted in all Crown Courts in England and Wales over a three-month period (April-June) in 2003. The purpose of the case tracking was to assess:

- the extent of applications for sexual history evidence and/or third party disclosure;
- how often applications are accepted; and
- the relationship between the use of sexual history evidence and trial outcomes.

The case-tracking data was also used to explore how far the Crown Court Rules (see previous chapter) are followed and to examine the question of prior relationship between defendant and complainant (the main issue underpinning the major legal challenge to the original statute in *R v A*).

Response from courts

Table 4.1 summarises returns from courts for the study period (responses for each court are presented in Appendix 3). Over 70 per cent of Crown Courts responded at least once during the three months, with most returning completed pro formas, although a small number reported that no cases had come before their court in the month(s) in question (a 'nil return'). There was no response from 23 courts. Subsequently, auditing against finalised central records held by the Court Service revealed that this sample comprised almost two-thirds of all rape trials heard during the study time frame. Despite failing to capture all cases, this prospective exercise represents the most robust and most representative data currently available on the extent of applications being made under section 41.

Table 4.1: Court responses by month

Month	Courts responding	Rape cases heard	Courts with 'nil returns'	Courts not responding ^a
April 2003	39	89	12	30
May 2003	31	62	5	45
June 2003	32	85	5	44

Notes:

^a As there was no requirement to report 'nil returns' this figure includes failures to respond and courts with nothing to report.

A total of 277 completed pro formas was received, 41 of which had to be excluded for a variety of technical reasons.⁶⁶ The analysis that follows is based on the 236 cases in which the data were complete and which fell within the case-tracking time frame. The majority were contested trials (n=213, 90%), with ten per cent comprising pre-trial hearings only. Whilst the results of statistical significance tests are presented below, it should be borne in mind that Chi square is sensitive to sample size, and in small samples even large differences may not be statistically significant. This caveat applies especially to the subsample of cases in which there was a section 41 application (n=51), and especially when it is further divided into those where the application was and was not accepted.

⁶⁶ These comprise: trials that fell entirely outside the tracking period (in some instances due to adjournments); and where for pre-trial proceedings (PDH or Mention hearings) the information was unclear or failed to specify the type of proceedings involved. Considerable efforts were made to follow up missing data, but these were not always successful.

Making section 41 applications

Chapter 3 outlined the rationale for encouraging pre-trial applications. The data presented below show that the provisions for exceptions have, in fact, become the rule, with the vast majority of section 41 applications taking place on the first day of trial. This finding is echoed by the data from CPS files and the interviews with judges and barristers (see Chapters 5 and 8), which also revealed very few pre-trial section 41 applications.

Table 4.2 shows that pre-trial applications occurred in only 13 cases (5%). Five were allowed (Table 4.3). In five no decision was made, but all five applications were renewed and allowed at trial, increasing the success rate at the pre-trial stage to over 75 per cent. Of the remaining three applications, two were refused and information was missing on the third. In only three cases were the paragraphs under which applications were allowed noted: two under section 41(3)(b); and one under section 41(3)(a). *R v A* was referred to in six of these pre-trial applications.

Table 4.2: Frequency and timing of section 41 applications

Application made	Pre-trial		At trial ^b	
	N	%	N	%
None	212	90	149	70
One application	13	5	46	22
Two applications	-	-	2	1
No information	11	5	16	7
Total	236	100	213 ^a	100

Notes:

^a Number of full trials during the tracking period.

^b Includes the five renewal applications noted previously, and an additional submission of an application refused pre-trial.

Table 4.2 shows that section 41 applications were made in almost a quarter of trials, with two separate applications being made in two trials. Twenty-nine applications were heard at the beginning of the trial and 17 during the trial. (No details are available on the timing of the remaining two.) On these data alone several important conclusions can be drawn. Firstly, section 41 applications are not made in the majority of trials. Secondly, where they are made, the procedure does not follow that recommended in the Crown Court Rules. The latter point is significant for a number of reasons (see later discussion), not least that the intention of the Government that complainants will know before they give evidence whether they will be questioned about their sexual history has not been achieved in practice.

Table 4.3 presents the outcomes of the applications made at trial: two-thirds were allowed and just over a quarter refused. In the two trials with two applications, both were allowed in one and neither in the other. *R v A* was referred to in 16 applications, 11 of which were allowed. In only 12 cases were the paragraphs under which the applications were allowed specified.⁶⁷

⁶⁷ The sections referred to were 41(3)(b), (5), and (3)(a) and (3)(b) in combination, section (3)(a), and combinations of (3)(b) and (3)(c), and (3)(c) and (5). Section 41(3)(a) covers evidence relating to an issue which is not an issue of consent; 41(3)(b) covers evidence which is relevant to consent and relates to sexual behaviour of the complainant at or about the same time as the event in question; 41(3)(c) covers evidence which is relevant to consent and relates to sexual behaviour of the complainant which is similar to that which took place on the event in question; and 41(5) relates to evidence which will rebut or explain evidence of sexual behaviour already adduced by the prosecution.

Table 4.3: Outcome of section 41 applications

Outcome	Pre-trial		At trial	
	N	%	N	%
Allowed	5	38	33	66
Deferred	5	38	-	-
Not allowed	2	15	14	28
No response	1	8	3	6
Total	13	100 ^a	50 ^b	100

Notes:

^a Total does not sum to 100 due to rounding.

^b In 48 cases.

To summarise, section 41 applications were made in just under a quarter of all cases. Nearly two thirds were granted. Since some cases involved multiple applications, the proportion of cases with a successful application was slightly higher (67%). Although some applications were refused, twice as many were allowed. The chances of success were substantially different depending on whether the application was made pre-trial or at trial (38% successful pre-trial compared with 66% at trial). *R v A* was referred to over a third of applications. Whilst some sections of the legislation were referred to more frequently than others, in the majority of cases no specific section was noted.

A further consequence of applications not being made in writing is that the prosecution has limited opportunity to make an informed response. The provisions in the Crown Court Rules for the prosecution to respond in writing will thus very rarely be used (see also Chapter 5). The timing of the application, the fact that it is made verbally, coupled with the requirement that the complainant is to be excluded is likely to limit the extent to which she can be consulted about its content, although the complainant may be consulted outside the courtroom. Current practice therefore appears to operate in favour of the defence and offers limited opportunities for the CPS to robustly counter late and inappropriate applications (see Chapter 5).

Factors associated with section 41 applications

The research explored the impact of alleging a previous relationship⁶⁸ – the grounds on which *R v A* was raised. In addition, whilst not tracked systematically,⁶⁹ section 41 applications were found to be present in a proportion of cases where it was known that the complainant was a minor – a matter explored in more detail in the following two chapters.

Table 4.4 examines cases in which it was known whether a previous relationship was and was not alleged (this was not known in a further 29 cases). Unsurprisingly, section 41 applications were more likely where a previous relationship had been alleged (52% versus 18%) – a clear indicator of the impact of *R v A*. It is also worth noting that, where a relationship was alleged, the majority of applications were made at trial. Presumably this information was available to the defence at an early point in the case, making a pre-trial application possible in principle.

Table 4.4: Frequency and timing of section 41 applications by alleged prior relationship

Application made	Prior relationship alleged (n=56)		No prior relationship (n=151)	
	N	%	N	%
Pre-trial	7	13	4	3
At trial	22	39	23	15
Total applications	29 ^a	52	27 ^b	18

Notes:

^a In 27 cases. Includes two cases where two separate applications made.

^b In 23 cases. Includes three of the renewal applications and one resubmission.

⁶⁸ The word 'alleged' is used here, since in some cases the matter was disputed.

⁶⁹ This was not a category on the pro forma but could be identified in some instances through either the additional charges laid, or by direct comments from the court managers.

Whilst the difference was not statistically significant and may be due to chance, Table 4.5 shows that more applications are made where a prior relationship is alleged and they are more frequently allowed (72% compared to 48%). In one sense this is to be expected, since *R v A* made clear that, in many contexts, a prior relationship would be relevant to the case. However, what this analysis cannot reveal is whether this was an uncontested background matter of fact agreed by both sides, or whether the application was contested. The fact that around one-fifth of applications were refused suggests that judges either did not find the evidence of prior relationship convincing or deemed the substance of the application outside the boundaries of section 41. It is also worth noting that even where there was no suggestion of a previous relationship, nearly half of applications made were successful.

Table 4.5: Outcome of section 41 applications according to alleged prior relationship

Outcome	Prior relationship alleged (n=29)		No prior relationship (n=27)	
	N	%	N	%
Allowed	21	72	13	48
Not allowed	7	24	8	30
Deferred	-	-	3	11
No response	1	4	3	11
Total applications	29	100	27	100

Third party disclosure applications

Recent Canadian research reports that restrictions on the use of sexual history evidence have resulted in a concomitant increase in applications for third party disclosure (TPD) of written records relating to the complainant (Busby, 1997; Kelly, 1997; Denike, 2000). This strategy has also been documented in England and Wales (Temkin, 2003). The case-tracking pro forma also canvassed this area, albeit without a question as to whether the TPD was accepted or not.⁷⁰ The following analysis is therefore confined to whether an application was made or not.

Table 4.6 shows that a total of 71 TPD applications were made, either before or during trial, in 54 separate cases (nearly a quarter of the case-tracking sample). Whilst there were slightly more TPDs than section 41 applications, this was entirely due to the greater likelihood of multiple TPDs in the same case: in nine cases two applications were made, and in four cases three. The *proportions* of cases in which TPD and section 41 applications were made were roughly equal.

Table 4.6: Frequency of TPD applications

Type of application	N	%
Social services records	43	61
Medical records	16	22
Counselling records	3	4
Other records	9	13
Total applications	71	100

Note:

N cases=54 (multiple applications possible).

The most common type of application was for social services records, and the combination of social service and medical records accounted for over 80 per cent of all TPD applications. 'Other records' included six applications for school or college records, one for NSPCC records, one for employer records and one for Probation Service records. Interestingly, whilst there were 17 cases in which a section 41 application and at least one TPD application was made, the majority of applications under section 41 or for TPD occurred in different cases. This means that within the sample of 236 there was at least one application of either type in 92 cases (39%) overall.

⁷⁰ The concerns raised about the feasibility of the prospective tracking of cases noted in Chapter 3 also resulted in the information sought being kept to a minimum. It was therefore decided to omit a question on the outcome of TPDs.

The relationship between applications and case outcomes

The pro forma did not include a field for case outcomes, but the Court Service subsequently provided this data for all but nine cases (see Table 4.7). Within the 100 acquittals, juries reached a finding of not guilty in 80 cases, no evidence was offered in ten, judges ordered an acquittal in four, one case was discontinued and reasons were unclear for the remaining five. Similarly, within the 104 cases where there was a finding of guilt, the jury reached this verdict on some or all counts in 41 cases, the defendant pleaded guilty on some or all counts in a further 24, and in 39 cases it is not known if the outcome was due to a plea or verdict.

Table 4.7: Case outcome for the case tracking sample

Outcome	N	%
PDH ^a only	23	10
Acquittal	100	42
Guilty	104	44
Unknown	9	4
Total	236	100

Note:

^a PDH = Plea and Directions Hearing.

Outcomes were compared in cases in which section 41 applications were and were not made (see Table 4.8). The acquittal rate was higher in cases where applications were made (69% versus 41% where there was no application). This difference was statistically significant ($\chi^2 = 11.414$, $df=1$, $p = .001$). Although the acquittal rate was slightly higher still where the application succeeded compared to where it was refused (70% and 64% respectively), this difference was not statistically significant.

Table 4.8: Section 41 applications and case outcomes (cases going to trial only)

Outcome	No section 41 applications made (n=148)		Section 41 applications made (n=51)		Section 41 applications allowed (n=37)		Section 41 applications refused (n=14)	
	N	%	N	%	N	%	N	%
Acquittal	61	41	35	69	26	70	9	64
Guilty	87	59	16	31	11	30	5	36
Total	148	100	51	100	37	100	14	100

Note:

Thirty-seven cases are excluded from this table: 23 where only a PDH took place; nine where the case outcome was unknown; and five where it is unknown if a section 41 application was made or allowed.

Looking only at those cases in which there are no missing data (n=160), the acquittal rate is higher: 83 per cent in cases where a section 41 application was made and 90 per cent where the application was successful, compared with 52 per cent in cases where no section 41 application was made, and 69 per cent where an application was disallowed (see Table 4.9). Again, the difference in outcomes between cases in which application was and was not made was statistically significant ($\chi^2 = 12.919$, $df=1$, $p = .000$). However, the difference in outcome between cases in which applications were and were not allowed was not statistically significant.

Table 4.9: Section 41 applications and case outcomes (cases with no missing data)

Outcome	No section 41 applications made (n=118)		Section 41 applications made (n=42)		Section 41 applications allowed (n=29)		Section 41 applications refused (n=13)	
	N	%	N	%	N	%	N	%
Acquittal	61	52	35	83	26	90	9	69
Guilty	57	48	7	17	3	10	4	31
Total	118	100	42	100	29	100	13	100

Note:

Seventy-six cases are excluded from this table: 23 where only a PDH took place; 39 where the guilty verdict/outcome is unclear; nine where the case outcome is unknown; and five where it is unknown if a section 41 application was made/allowed.

Similar patterns emerged when only those cases in which a trial was known to have taken place were examined. Table 4.10 shows that trials with a section 41 application resulted in acquittals in eight out of ten cases (85%), compared with 64 per cent where no application was made – a statistically significant difference ($\chi^2 = 6.174, df=1, p = .013$). The acquittal rate was slightly higher for cases where the application was successful, although this was not significant.

Table 4.10: Section 41 and case outcomes (cases involving jury trials only)

Outcome	No Section 41 applications made (n=95)		Section 41 applications made (n=41)		Section 41 applications allowed (n=29)		Section 41 applications refused (n=12)	
	N	%	N	%	N	%	N	%
Acquittal	61	64	35	85	26	90	9	75
Guilty	34	36	6	15	3	10	3	25
Total	95	100	41	100	29	100	12	100

Note:

One hundred cases were excluded: 23 where only a PDH took place; 63 where there was a guilty plea, or the guilty verdict/outcome is unclear; nine where the case outcome is unknown; and five where it is unclear if a section 41 application was made or allowed.

Finally, this chapter examines the relationship between alleged prior relationship, TPD applications and case outcomes. Whilst there was a higher acquittal rate where a previous relationship was alleged, the differences were not as marked as those in Table 4.10 above with respect to section 41 applications. Similar patterns were evident with TPD applications (see Table 4.12). There was no significant relationship between either of these two variables and case outcome.

Table 4.11: Alleged prior relationship and case outcome

Outcome	Prior relationship alleged (n=52)		No prior relationship (n=131)	
	N	%	N	%
Acquittal	30	58	59	45
Guilty	22	42	72	55
Total	52	100	131	100

Notes.

1. N=183: cases where outcome and details of any alleged prior relationship are known.
2. Table excludes 23 PDH only cases, nine where the case outcome was unknown and a further 21 where it was not known if a prior relationship was alleged.

Table 4.12: Third party disclosure applications and case outcomes

Outcome	Third party disclosure (n=49)		No third party disclosure made (n=145)	
	N	%	N	%
Acquittal	27	55	68	47
Guilty	22	45	77	53
Total	49	100	145	100

Note:

N=202 (23 PDH only cases were excluded and 11 where it was unknown if TPD application made).

The data presented above show that there is a statistically significant association between the making of a section 41 application and whether the defendant is acquitted or convicted. The statistical evidence is weaker in relation to other factors, such as alleging a prior relationship or securing third party disclosure. The fact that the mere making of a section 41 application is strongly related to acquittal – regardless of its outcome – clearly deserves further scrutiny. The data are neither extensive nor detailed enough to allow systematic testing of possible hypotheses as to why this might be the case, but at least three possibilities bear consideration. First, the small sample size may mean that the influence of some known key factors on outcome is not apparent and that others – e.g. relating to characteristics of the complainant, defendant and context in which the alleged assault took place cannot be explored. Secondly, cases with disallowed applications may be ones in which sexual history material is introduced outside the framework of the legislation (see chapter 6). If this were to be the case, then the use of the evidence itself is the primary issue. Thirdly, where an application is made, the judge and prosecution may become acquainted with the sexual history material even if it has to be excluded, and this may affect the way the case is run by the prosecution and dealt with by the judge. Thus sexual history material may have an influence even if it is not used to cross-examine the complainant. Establishing whether this may be occurring would require following a large sample of cases through the courtroom process and interviewing key actors.

Summary and conclusions

The results of the prospective case tracking concur with research in other jurisdictions: that there is a strong association between the application to introduce sexual history evidence and the chances of acquittal (Brown *et al.*, 1992; Department of Women, 1996). The tracking exercise also shows that there is a statistically significant relationship between making a section 41 application and outcome. In summary:

- section 41 applications were made in around a quarter of rape cases coming before the courts in the present research;
- applications were allowed in just over two-thirds of cases;
- the proper procedure for applications is only used in a minority of cases, with most applications still being made at trial;
- the limited data on the specific paragraphs of section 41 which are being used in applications suggest that many continue to be phrased in general terms, thus evading the purpose of the legislation, which was only to allow sexual history evidence in the circumstances specified in the Act;
- sexual history evidence is an issue in rape cases involving minors; and
- the attempt to make the process more transparent – through requiring that applications be made in writing and that judges record their reasons for granting or refusing applications – has been unsuccessful.

Section 41 applications are certainly not ubiquitous, and the new regime may have placed some limits on what several judicial interviewees referred to as a previous ‘free for all’ (see Chapter 7). At the same time, the fact that they occur in just under a third of jury trials undoubtedly exceeds the ‘exceptional’ circumstances envisaged by the legislators. This level of applications is not accounted for only by a preponderance of applications where a prior relationship is alleged between the defendant and complainant. Moreover, it is vital to remember that prior relationship may be contested (see Chapter 6), but the prosecution is disadvantaged from strongly refuting such assertions where applications are made at trial (the majority) and the complainant is excluded from the proceedings.

5 CPS case files

Introduction

This chapter presents findings on the extent to which section 41 applications and their outcomes were present in the 170 CPS case files which were examined in the four research areas. The case files were expected to provide data on the contexts in which applications are made and the frequency with which the various paragraphs specifying the exceptions are used. The CPS are required to undertake a review of all cases referred to them by the police. This involves an evidential followed by a public interest test. For the former a CPS lawyer will evaluate the strength and weight of the evidence in order to decide whether to proceed with the prosecution or discontinue the case. Even where evidence is considered strong a decision to discontinue may be taken on public interest grounds: for example, where giving evidence would have serious negative health consequences for the complainant. Most discontinued rape cases fail the evidential test, in that they are not considered to offer a more than 50 per cent chance of conviction. Whilst aware of these processes the research team were not able to observe them directly or assess them systematically. In some case files the reasons for discontinuance were recorded clearly and explicitly in various forms of documentation⁷¹, while in others the reasoning behind CPS decision-making was more opaque.

This chapter also looks at other material in files that referred to previous sexual behaviour, sexual experiences and reputation, both in relation to adults and minors.⁷² The penultimate section examines the relationship between case outcomes and section 41 applications and sexual history material. The contents of case files allow for the quantitative data to be complemented by more descriptive material, since, as this chapter will show, there were too few cases with section 41 applications to analyse as a subsample. In this respect it is important to bear in mind that CPS files include a significant proportion of cases that never reach trial, so the sample comprises a wider range of cases than found in the prospective case tracking or covered by court observations (see next chapter).

Case files contained extensive documentation and correspondence, which fell into the four categories outlined in Table 5.1. Explicit references to section 41 and copies of applications were relatively rare, but references to sexual history could appear in the most routine correspondence, making careful examination of the entire file contents necessary.

The range of documents in which sexual history material could be found was also revealing. These included: forensic examiner notes and reports; witness statements, mainly but not exclusively from complainants and defendants; and historic medical notes. The information on trials was minimal, reflecting the fact that many CPS caseworkers cover several trials simultaneously. Whilst recent CPS policy recommends the use of dedicated caseworkers for all rape cases, and that they observe trials in full, only Newcastle had implemented this.⁷³ Minute sheets often contained little other than logs of hearing dates and requests to CPS for additional materials.

⁷¹ This could include the case worker's notes on case progress, a written record of the review process, correspondence between CPS, the police and/or counsel, and letters sent to complainants informing them of a decision to discontinue.

⁷² Defined as those under the age of 16 when the first alleged abuse took place.

⁷³ This was also the only office to have a formal process for tracking lessons for convictions and acquittals.

Table 5.1: CPS case file contents

Evidence	Procedural	Correspondence	CPS case development
<ul style="list-style-type: none"> Defendant, complainant, witness statements (including video transcripts) Police pocket book entries 999 call log Forensic reports, diagrams, photos etc Crime scene photos Medical records Folders of unused materials Other materials disclosed to defence counsel 	<ul style="list-style-type: none"> Bail & custody hearing logs List of exhibits & witnesses Indictment Special measures applications ^aS41 applications Court attendance diary (including pre-trial decisions) Crown Court minute sheet (notes from court attendances) Third party disclosure applications or references ^bQuestionnaire for completion by judges at PDH 	<ul style="list-style-type: none"> CPS/police notes, memos & letters Letters to/from defendant's solicitor Letters to health, social services & others re third party material 	<ul style="list-style-type: none"> CPS case summary & analysis of likely issues ^aCounsel's opinion ^aDefence counsel's statement (arguments for CPS discontinuing cases, amending charges etc) Trial outcomes

Notes:

^a Rarely found.

^b Found only in Manchester (included sections on special measures, Human Rights Act, medical/mental health, evidential and section 41 issues).

The policy context

This research was undertaken in the aftermath of Her Majesty's Inspectorate of Constabulary (HMIC) and Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI) joint thematic review on the investigation and prosecution of rape cases (HMCPSI, 2002). A plan of action, agreed by the Police and CPS nationally, was developed by the Home Office and has resulted in a number of significant changes to CPS policy and practice. These include:

- a series of good practice guidance notes;
- appointment of 'rape co-ordinators' to oversee policy implementation in all CPS areas;
- the creation of experienced and trained 'specialist prosecutors' to work on rape case files;
- decisions to discontinue or reduce a charge can only be made in consultation with another rape specialist;
- the encouragement of pre-trial case conferences that include CPS, counsel and complainant;
- publication of CPS policy and procedure in booklet form for complainants and their supporters (CPS, 2004);
- establishment of 'charging centres' where CPS lawyers are located in police stations and work alongside officers in deciding the most appropriate charges and advising on evidence gathering.

All the cases in this study were completed in 2003, a period when these changes were being implemented, but had undoubtedly not yet become routine practice. Indeed, a number are still to be embedded or rolled out to all areas. It is an open question as to the extent to which such procedural changes will have an impact on the question of sexual history evidence, and section 41 in particular. Whilst it is undoubtedly hoped that they will have an impact on attrition, this too remains to be seen and documented (Kelly *et al.*, 2005).

What the CPS files showed

Nearly 60 per cent of the charges in the 170 files related to rapes or attempted rapes of adults, 25 per cent related to rape of a child, with 16 per cent involving adults alleging historic abuse as children. Just over 40 per cent of the files involved charges relating to young adult complainants who were minors at the time of the alleged assaults (see Table 5.2), therefore allowing a serious exploration of how the issue of sexual history plays out in these cases. Table 5.2 presents the relationships between C and D separately for those who were minors at the time of the alleged rape and adults. Four categories of relationship are used:

- **'intimate'** – current and ex-partners;
- **'relative'** – family membership by blood, marriage or household (foster carers, mother's boyfriends);
- **'other known'** – unrelated people who have been known for longer than 24 hours;
- **'stranger'** – an unknown defendant or one met within the previous 24 hours ('perfect' and 'relative' strangers).

Just over half of the complainants who were minors at the time of the alleged rape were related to the defendants and a further third knew them prior to the alleged rape. In adult cases defendants were most typically 'other known' (42%) but over a third involved allegations against current or ex-partners. Stranger assaults were recorded for a fifth of the adult cases and in 14 per cent of those involving minors.

Table 5.2: Complainants' ages and relationships to defendants

	Intimate		Relative		Other known		Stranger		Total	
	N	%	N	%	N	%	N	%	N	%
Minors ^a	1	1	37	51	24	33	10	14	72	100
Adults	34	35	2	2	41	42	20	21	97	100
Total	35	21	39	23	65	38	30	18	169 ^b	100

Notes:

^a Includes two cases where the abuse began in childhood and continued into adulthood.

^b Relationship between C and D not recorded in one file.

Use of section 41

The absence of written section 41 applications is one of the most important findings from the CPS file analysis. The issue of section 41 was raised in only 14 per cent of files, and an even lower percentage (6%) held documentation of applications. This contrasts with the data in the previous chapter, which suggests that applications were made in around a quarter of cases. The absence of documentation adds to the finding in Chapter 4 that not only do the defence choose to make most applications at trial, but also very few are written. This situation means that prosecution counsel are not in a strong position to follow guidance, issued in 2000, to scrutinise applications carefully and, where relevant, challenge those that are late and/or inappropriate.

A more detailed examination of the 24 applications found on CPS files is reported below.

Cases involving minors

Nine child cases referred to section 41, but only three included details of applications, all of which were written pre-trial submissions. These cases demonstrate that applications to introduce sexual behaviour evidence are not confined to adult cases and often focus on complainant credibility, their purpose clearly being to undermine the complainants' evidence.

In one case of historical sexual abuse, defence counsel sought to question the credibility of the complainant. Since the prosecution had claimed that she had only one consensual sexual partner at the time she was repeatedly raped by her father, the application was allowed under section 41(5). The application noted:

The witness has deliberately tried to paint a false picture of her teenage life, the restrictions placed on her by her father, and the traumatic and debilitating effect that her father's behaviour had on her. (CPSSx50)

Although questions concerning C's alleged boyfriends were allowed, the jury returned a guilty verdict to some of the charges, including rape.

In the second case (CPSNcle23) the application concerned the defendant's belief in consent. A 15-year-old alleged she had been raped when aged 13 by a caravan park warden. The defendant admitted sexual intercourse and knowing the complainant was underage, but claimed she consented and, further, that she had told him about having already had sex with others. Although the application was allowed under section 41(3)(a), the defendant was found guilty of rape.

The third application involved a case of alleged historic abuse by a stepfather over a period of ten years. The defence sought to have evidence admitted that C had previously denied that her stepfather had abused her during a police investigation of a complaint of sexual abuse brought by her sister. There was police evidence that this denial was due to threats by her stepfather. The application also emphasised the delay in reporting the abuse and a further unsubstantiated allegation against a third party. Plainly, this application influenced the CPS decision to discontinue the case as the letter sent to C explaining the decision to discontinue demonstrates:

Putting it broadly, you have had opportunities in the past to complain of this behaviour by [D] and have not done so for whatever reason. Further, you have made allegations in the past against a man by the name of [XXX] which were found not to be substantiated and finally, during the course of an investigation of indecency by [D] against your sister, you failed, when the opportunity arose, to mention any details of what you allege happened to you. (CPSMcr91)

Cases involving adults

References to section 41 were found in 15 of the adult files; however, only seven contained documentation. In these seven cases, all seven defendants were known to the victim, either intimately or casually, with four current or ex-partners. In three cases domestic violence was evident. The applications were allowed in three of the four cases involving intimates, and there was a strong indication that it would have been allowed in the fourth. *R v A* was referred to in three cases, two where defendants were ex-partners. Section 41 applications were made at four of the trials, and three written applications were made in pre-trial hearings. All but one resulted in acquittals, the CPS discontinued the seventh in which C was described as a 'prostitute'. Consent was an issue in five of the trials while belief in consent was also raised in two. Three defendants initially denied having sexual intercourse before claiming consent.

Findings on section 41

The lack of section 41 applications in the CPS files limits what can be said from this data set about the contexts in which the defence applies to use evidence about a complainant's sexual behaviour, or the frequency with which such applications are allowed. What the data do show is that section 41 applications are made, and allowed, in both child and adult cases. The few applications found confirm that the Crown Court Rules requiring written pre-trial applications are generally not being observed. However, these requirements were met in all three cases involving minors and three of the adult cases, indicating that it is possible to follow the proper procedures. Whilst the numbers are small here, allowing applications did not prevent findings of guilt in two trials involving minors, whereas there was no finding of guilt for a sexual offence in any of the adult cases with successful section 41 applications.

The role of sexual history and sexual behaviour evidence in the attrition process is examined in the next section, drawing on general references made in CPS files to such material, as well as those linked to explicit section 41 applications.

Sexual history/reputation material

Searching for references in the files to sexual behaviour, experience and reputation revealed that sexual history or reputation material could be a consideration in CPS decisions to discontinue cases or accept pleas to lesser charges. There were also some examples where the sexual history issue influenced complainants' decisions to withdraw (see also Chapter 8).

References to complainants' previous sexual history, other than explicit section 41 applications, were found in nearly 40 per cent of the files, just under half of which involved minors. Cases involving adults and minors are examined separately, to show the similarities and differences between them.

Cases involving minors

Two issues related to sexual history matters featured in CPS decisions to discontinue cases involving rape of minors: previous allegations and the 'innocence' or 'reputation' of complainants.

In five cases evidence of previous allegations had a detrimental effect on the perceived credibility of complainants. In two (CPSMcr15; CPSMcr120) the CPS offered no evidence, two (CPSSx58; CPSNcle76) involved acceptance of pleas to lesser charges, and in one (CPSLon74) the complainant withdrew. In the latter case prosecution counsel appeared to hold the complainant responsible for the defendant's sexually abusive behaviour.

She is a young woman who seems to put herself in vulnerable situations and men take advantage of her ... Obviously, this will be a difficult allegation to prove, it falling into the category almost of 'date rape'. (CPSMcr15)

The CPS decision to discontinue stated: "Victim not credible witness in previous trial [of alleged rape]. Agreed between counsel/police/CPS not to proceed."

Where pleas were accepted, in one case (CPSSx58) a CPS note referred explicitly to the defence intention to use previous allegations of rape and abuse, along with C's learning difficulties, to undermine her credibility. In the second (CPSNcle76), prosecuting counsel's advice referred to the 14-year-old complainant's history of "previous false or at least unsubstantiated allegations" as one reason for accepting a guilty plea to unlawful sexual intercourse (USI), despite one such 'unsubstantiated allegation' resulting in a guilty plea to indecent assault and an 18-month prison sentence. In another case, where an adult male was accused of raping a girl who was under 16, the CPS note stated:

It is of course strange that there is no great distress or upset and this is why I have chosen to put an alternate charge of USI ... I do not think we will successfully portray these girls as little innocents. (CPSMcr12)

Here two long-standing rape myths (see Chapter 1) can be seen operating simultaneously: that there is only one authentic response to sexual violation; and that only those with unblemished reputations qualify automatically as victims (Jordan, 2004).

Cases involving adults

References to complainants' previous sexual history, other than section 41 applications, were found in over 20 per cent of the adult files (37 cases), nearly half of which did not go to trial. Two broad themes emerged, both of which influenced complainants' decisions to retract allegations: consent and domestic violence. Interestingly, previous allegations featured in only two adult cases, although both of these were discontinued.

Consent

The issue of consent was raised in nine cases. In three involving current or previous relationships, CPS decisions to discontinue or accept retractions were clearly influenced by this fact. In the first example, where C and D were partners, D asserted that C's sexual behaviour during the alleged incident was no different from her sexual behaviour on previous occasions. The CPS file note stated:

Very weak case at the outset, C was under influence of drink/drugs therefore very hard to prove that D knew she was not consenting ... In view of her past psychiatric problems I agree that it would not be in the best interests of the victim to compel her to give evidence, particularly when a conviction is unlikely. (CPSSx56)

The second example involved a relationship that ended three years previously. D initially denied knowing C but DNA evidence identified him and he then claimed C consented. A witness statement described C as having a 'reputation' and that she had slept with others in D's football team. The CPS letter explaining their reasons for discontinuance stated:

You pretended to be asleep, [D] made clear he knew you were not, therefore unlikely to prove non-consent. (CPSMcr9)

In the final example (CPSSx42) a current partner was charged with three counts of rape, false imprisonment and section 20 wounding. The Crown accepted a plea of guilty to the wounding, but only in a context where the defence had made clear their intention to raise the issue of belief in consent through claims that C was promiscuous and had had a threesome with him and another man.

Domestic violence

In three cases in which domestic violence featured, retractions appeared to be accepted with minimal consideration of the context, especially the susceptibility to pressure to withdraw. Two examples exemplify a lack of co-ordination between recent CPS policy initiatives on domestic violence and sexual offences. In a case involving current partners, D's statement contained explicit references to their sexual relationship and C's sexual behaviour. A CPS note stated that: "This is a very weak case, unless there is evidence to corroborate lack of consent then should discontinue." In the same file the caseworker remarked:

Victim made retraction statement. However we felt that was under duress from D. We then received a letter from defence enclosing a letter D had received from the victim clearly stating that she no longer wanted to carry on with the proceedings and intended to get back with D. (CPSSx54)

In the second example the case file documented multiple abuses of C – current domestic violence, a previous rape (which had resulted in a conviction), sexual abuse by her grandfather – and the case notes included explicit recognition that D exerted a 'controlling influence'. Despite all this evidence, an allegation that C was having an affair appeared to carry most weight, apparently casting doubt on her credibility. Following police questioning about the alleged affair C withdrew her allegation. Rather surprisingly, although the police considered the retraction might have been "made out of fear and confusion", they considered charging C with wasting police time after her withdrawal. Discussions with CPS resulted in the decision that:

Prosecution of [complainant] would be of dubious benefit in that there is a possibility of further offences being committed against her in the future and it is imperative to maintain her trust and faith so that she can speak to police without fear of prejudice. (CPSNcle41)

The irony here is that any future allegations of sexual violence are likely to be discounted since this incident will count as a 'previous allegation'. In contrast, were there to be subsequent reports of physical assaults or threats, these would rightly be understood as part of a 'course of conduct' by the perpetrator with a pattern of coercive control. In such domestic violence contexts the CPS now seek to work with the police and other agencies to ensure enhanced evidence gathering and that victims are protected and supported in continuing with prosecutions. This approach did not appear to have been carried over into the prosecution of rape.

Case outcomes

Cases with section 41 applications or other sexual history references were combined and the outcomes compared to those without these elements. Nearly half of cases involving both adults and minors contained sexual history material or section 41 applications.

Table 5.3 presents this comparison, looking separately at cases involving adults and minors. The shaded rows contain cases where sexual history information existed, the unshaded rows those where no such references were found. At this level of analysis, the presence of sexual history references did not appear to be related to higher prospects of an acquittal when complainants were children. In fact the reverse appears the case, with findings of guilt in 69 per cent of cases where sexual history information was found in files and only 53 per cent where no such information was present. However, the reverse pattern appears for adults, with proportionally more acquittals where sexual history references were present, and fewer findings of guilt. These differences were not statistically significant however.

Table 5.3: Comparison of outcomes by presence/absence of section 41 and/or other sexual history references (SHR)

	Victim withdrawals and discontinuances		Acquittals: Judge directed and verdicts		Guilty: pleas and verdicts		Total	
	N	%	N	%	N	%	N	%
Minors with section 41/SHR	6	19	4	13	22	69	32	100
Minors no section 41/SHR	9	23	10	25	21	53	40	100
Adults with section 41/SHR	14	32	18	41	12	27	44	100
Adults no section 41/SHR	21	40	13	25	19	36	53 ^a	100
Proportion of CPS file sample	50	30	45	27	74	44	169	100

Note:

^a One defendant committed suicide before coming to trial

The acceptance of guilty pleas was more prevalent in cases involving minors: this occurred in 43 per cent of cases involving minors compared with just 12 per cent of cases involving adults. However, as Table 5.4 shows, pleas to lesser offences were more readily accepted where information about a complainant's sexual history existed, with 87 per cent of child cases and both of the adult cases resulting in lesser pleas. However, the relationship between acceptance of lesser pleas and presence of sexual history references (SHR) was not statistically significant.

Table 5.4: Acceptance of lesser pleas by presence/absence of section 41 and/or other sexual history references

	Guilty pleas to lesser offences		Guilty pleas to offences incl. Rape		Total	
	N	%	N	%	N	%
Minors with section 41/SHR	13	87	2	13	15	100
Minors no section 41/SHR	11	69	5	31	16	100
Adults with section 41/SHR	2	100	0	0	2	100
Adults no section 41/SHR	5	50	5	50	10	100
Proportion of CPS file sample where a trial took place	31	72	12	28	43	100

The experiences and opinions of CPS lawyers

The nine CPS lawyers were interviewed to ascertain their views on the working of the new law. Whilst few had experience of courtroom advocacy, of section 41 applications or of the ways in which sexual history evidence was used during trials, all offered relevant material about local practice and the more general issues the legal reform sought to address. Over half commented on the variability of local judicial practice, meaning that it was difficult to predict whether evidence would be used in cases or not. There was also unanimity that they needed very strong grounds to oppose an application.

Few, including some with lead responsibilities on rape, were aware of the Crown Court Rules, although this is partly the outcome of the failure of the defence to follow them. More than half felt that the 1999 Act was too complex, and like judges and barristers (see Chapter 7) found it impossible to remember what the precise exceptions to the rules of exclusion were. There were mixed views about the effectiveness of the provisions, but no one argued strongly that they had made a difference. A number of these lawyers, all of whom worked on rape files currently, were of the opinion that poor investigative practice, deterioration in the quality of police files⁷⁴ and the fact that files would already contain sexual history material were factors linked to attrition.

Summary and conclusions

Five principal findings emerged from the analysis of CPS files.

- Section 41 applications are scarce in CPS files.
- Section 41 applications and more general references to previous sexual history were found in both adult and child cases.
- Guilty pleas to lesser offences were more likely to be offered and accepted in cases involving minors where sexual history material was introduced, although the association was not statistically significant.
- The proportion of defendants acquitted in cases involving adult complainants was greater where sexual history material was introduced, although again the association was not statistically significant.
- Sexual history material was associated with an increased likelihood of acquittal in adult cases.
- The existence of previous allegations where complainants were minors played a part in CPS decisions to discontinue.

The lack of section 41 applications adds weight to the finding in the previous chapter that few are made either pre-trial or in writing. A direct consequence is that some of the requirements of the law – that the paragraphs under which the application is made be specified, that the questions to be asked are listed,

⁷⁴ Whilst not specifying which of the many organisational changes in policing accounted for these deficiencies, several noted a move away from investigation as a specialisation and the accompanying loss of officers experienced in rape investigations.

and that reference be made to specific instances of sexual behaviour – can be more easily evaded. Verbal applications also disadvantage the prosecution, as counsel will have minimal opportunity to consider the arguments in detail, or consult with either the CPS or complainant about possible objections. These may be factors in the observation by commentators that the prosecution often fails to object to applications.

The presence of sexual history material in cases involving minors raises concerns that, irrespective of the potentially exploitative nature of the events, children were more often perceived as sexually active than sexually vulnerable.

Access to CPS files made it possible to reflect on the less transparent arena of CPS decision-making, and suggested that sexual history material, and the potential of a successful section 41 application, can be an important factor in the acceptance of pleas to lower charges or decisions to discontinue the case altogether. Despite CPS guidance encouraging the building of cases, the files contained little that attested to efforts to gather additional evidence or develop an argument that might support a complainant's case where material that might go to her discredit was an issue. Neither CPS lawyers nor prosecution counsel appeared to have developed explicit or consistent strategies on the basis of the evidence that could dispute defence interpretations of sexual behaviour intended to undermine credibility. This not only places them at a disadvantage in arguing against sexual history evidence applications, but also means they are seldom well prepared or able to counter the implications of successful ones.

6 Trial observations

Introduction

Trial observations were undertaken to examine:

- the background contexts in which section 41 applications were made and allowed;
- the subsections used⁷⁵ and the relationship between the use of section 41 and consent issues;
- the impact of *R v A* on the granting or refusing of applications;
- the admission of sexual history to impugn complainants' credibility.

By the time that observational work began it was known that most section 41 applications were made at trial (see Chapters 4 and 5). Trial observations thus provided an in-depth, qualitative insight into the content of applications and how they were dealt with and court procedures, as well as whether there were alternative routes through which sexual history evidence entered the trial process.

An overview of the trials

Thirty-one trials were attended, five of which were stopped on the first day.⁷⁶ Of the remaining 26 trials, 23 were observed in full, and these comprise the trial sample for the purpose of this chapter. All were single defendant cases but four trials involved two complainants, and all involved female victims and male perpetrators. Eight complainants were minors when the incidents occurred. Twelve of the defendants were known – though unrelated⁷⁷ – to the complainants, five were relatives, two current/ex-partners and only four were strangers.

Trials lasted between one⁷⁸ and eight days, the average being five days. There were few examples of complainants being on the witness stand for very long periods of time: for the vast majority the combination of evidence-in-chief and cross-examination was less than four hours. Defendants gave evidence in 20 of the 23 trials.

Trials have been allocated to three categories:

- those where either a section 41 application was made or a discussion about the need for one took place (nine cases);
- trials where a complainant's sexual history was raised in questions or evidence but without any reference to section 41 (nine cases);
- trials where no sexual history issues arose (five cases).

Thus, whilst section 41 arose in nearly two-fifths of cases, sexual history and reputation were issues in more than three-quarters of observed trials. This figure is much higher than that suggested by the case tracking in Chapter 4, which was limited to section 41 applications, and is similar to findings from previous studies about the proportion of trials in which sexual history is an issue (Brown *et al.*, 1992; Department of Women, 1996). Of the eight cases involving minors, section 41 was an issue in three, and in a further three sexual history was raised outside the framework of section 41. Whilst numbers are small, the data do confirm the finding from the CPS files (see Chapter 5) that sexual history issues arise in the majority of child rape cases.

Table 6.1 presents data on whether and how sexual history was raised, according to the relationship between the parties. Whilst the numbers are small, sexual history was always raised in cases involving intimates and relatives, and in three-quarters of cases involving other known assailants. It was also

⁷⁵ See note 65.

⁷⁶ The Crown offered no evidence in two cases, guilty pleas to lesser charges were accepted in a further two, and one defendant absconded abroad and the judge ordered the charges to lie on file.

⁷⁷ This is the 'other known' category used in Chapter 5.

⁷⁸ The judge ordered an acquittal on the first day of one trial (Mcr5) after the prosecution had presented its evidence.

present in two out of the four stranger cases. Although the numbers are small, the data suggest that the closer the relationship between C and D, the more likely sexual history will be an issue at trial.

Table 6.1: Whether sexual history raised in trials by relationship between C and D

Means by which sexual history raised	Intimate	Relative	Other known	Stranger
Section 41	-	2	6	1
Outside of section 41	2	3	3	1
Not raised	-	-	3	2
Total	2	5	12	4

Note:
N=23.

Contexts in which the defence raise section 41

Nine trials involved explicit reference to section 41, although in two no application was made, and in a third the discussion resulted in a verbal application which was refused. In this group of cases the issue was whether, as a matter of law, a section 41 application was necessary. This exploration enabled the defence to rehearse arguments before being committed to a formal application. Taking the Newcastle trials as an example, where three involved applications, the shortest resolution of this issue was ten minutes (Ncle20). It was decided that the questions fell outside the remit of the legislation. The longest application took 55 minutes. There was a preliminary discussion lasting 25 minutes as to the need for an application before the jury was sworn, at which point the medical examiner's notes were requested. During cross-examination of the complainant defence counsel requested a break to raise a 'matter of law' and section 41 was again raised. This time a formal verbal application lasting 25 minutes was made. The judge, having considered the application during the lunch break, spent five minutes delivering his decision to refuse the application (Ncle56).

Discussions of section 41

In two of the three section 41 discussions no applications resulted since the judge ruled the matters outside the remit of the legislation. The first case (Ncle20) concerned a sister who alleged that her brother had raped her four years earlier when they were both adults. She had not reported the rape, although she had told her employer (E) about the incident at the time. Before cross-examining C, defence counsel raised the question of the need for a section 41 application, as he believed C was having a relationship with E at that time. The judge held that the question fell outside section 41 after asking defence counsel and with the consent of the prosecution:

- Judge:** *You don't want to ask about sexual relations, just if they were boyfriend and girlfriend?*
- Defence counsel:** *Yes – just if they went out together and had a relationship.*
- Prosecution counsel:** *Not sure suggestion of relationship implies sexual – defence only asking if girlfriend and boyfriend, not about sexual behaviour.*
- Judge:** *If the question is about the relationship but not sexual, then it is outside section 41. OK, permit question about the relationship subject to no sexual reference. (Ncle20)*

This discussion, which included another matter concerning D's physical inability to give evidence, lasted ten minutes; it took place at the start of the second trial day and before the jurors took their seats. During cross-examination defence counsel asked C twice if she had had a relationship with E, and on both occasions she denied this. However, when defence counsel cross-examined E, the questions referred to an entirely separate issue, and E testified that he was aware that C had had a relationship with a customer a year previously. Neither matter was dwelt on, but both were undoubtedly raised to cast doubt on C's credibility. During his summing-up the judge ordered the jury to return a 'not guilty' verdict on the rape charge, as C's evidence was ambiguous about actual penetration, but he left open the possibility of finding the defendant guilty of attempted rape, which the jury did.

This case is an example of circumvention of the new regime. The defence was allowed both to question C about her relationship with E, the implication apparently being that it was a sexual relationship, as well as to question E about a relationship C had had with a third party. Section 41 was simply bypassed, initially by giving a narrow interpretation to the term 'sexual'.

A second case (Lon11) where an application was ruled unnecessary involved a 12-year-old complainant and a defendant known to her, who was a priest. A discussion at the PDH resulted in a ruling that questions about messages on C's mobile phone and her periods were outside the remit of section 41, and this decision was confirmed at the beginning of the trial. Text messages were read in court as evidence that her family was concerned at the number she was sending to and receiving from boys, to establish that D was concerned for C's welfare. The defence stated explicitly that they were not suggesting C was having a sexual relationship with anyone; rather, that she was participating in 'risqué conversations'. D maintained the conversation about periods had taken place on the night of the alleged rape to demonstrate concern that she could become pregnant by associating with so many boys. This trial resulted in a hung jury and a retrial was ordered.

Yet again the question of what is meant by 'sexual behaviour' arose. Arguably, sexual behaviour should include risqué conversation. Certainly, despite defence counsel's claims, the risqué conversation in this case could well have raised a suspicion in the minds of the jury that C was involved in some type of sexual behaviour with those she was speaking to. It might be argued that the mobile phone records should have been held to come within the parameters of section 41 and been excluded, since it is not apparent that any of the exceptions applied here. D could have explained his reason for asking about her periods without the full texts of messages being revealed – the purpose of which clearly was to undermine her credibility.

A third case (Ncle56) provides an example of one in which an application was refused. Section 41 was discussed before the jury was empanelled and again during the cross-examination of C, followed by a verbal application. The case involved a young woman who, after a night drinking with friends, called a taxi, invited the driver into her flat and was allegedly raped. Defence counsel wanted to question C about her sexual history – specifically her claim that she had not had vaginal intercourse for a year or anal intercourse for 18 months. Traces of forensic evidence indicated that people other than D had been on her bed, and the defence sought to argue that the tears to C's anus could have resulted from sex with another person. The application was unclear and difficult to follow, and did not specify any subsections of the statute. The judge, who in a private conversation commented he had not fully understood defence counsel's argument, refused the application on the grounds of section 41(4), stating that the proposed cross-examination was:

Designed mainly if not entirely to undermine C's credibility, which in so far as asking about sex behaviour is not permitted. (Ncle56)

This judge also noted that if he were seriously to consider granting an application, he would require it in writing for the prosecution to examine, but since he was refusing it, he had not made this request. No evidence was put forward about C's previous relationships, although in his closing speech defence counsel implied she was a 'a loose woman', who had been out drinking, going from party to party and was willing to have sex with an unknown taxi driver without a condom. The failure of the section 41 application ultimately did not prevent the defence from casting aspersions on C's sexual character. The jury returned a verdict of not guilty.

Court observations, illustrated by the case examples above, revealed that discussion of the need for a section 41 application was sometimes used by defence counsel to gauge the likelihood of an application being granted, whilst at the same time casting the complainant in an unfavourable light.

Section 41 applications

Six trials involved successful section 41 applications, although one was a retrial in which the original ruling was carried over. The only available information in this case (Lon10) was that the application related to D's claim that he and C had been having an affair. This defendant was found not guilty. In four of the remaining five cases, applications were made under section 41(3)(a) on the basis of belief in consent. In two cases it was also argued that the sexual behaviour evidence was relevant to C's credibility, as it was evidence of a motive to lie.

Two applications were allowed on grounds other than those put forward in the defence applications. In one trial (Lon1), during cross-examination of C, counsel asked: "It wasn't D that you had your first sexual intercourse with?", at which point the judge halted the trial and sent the jury out. The judge reprimanded counsel who agreed not to pursue this line of questioning. An hour later section 41 was raised and the trial was halted again. A verbal application argued that D wished to give evidence that he had had intercourse with C at the same location earlier that evening, and that it had been consensual. Both paragraphs (3)(a) (belief in consent) and (3)(c) (similar incident) were used. The judge granted the application under section 41(5), in rebuttal of evidence adduced by the prosecution that C had been in a sexual relationship with D when she was 13 years old and that the relationship had ended some years before the alleged rape, but ruled that questions must be limited to this one incident of consensual sex claimed by D. However, in defiance of the judge's ruling, when questioning D, defence counsel asked about the first time he had had intercourse with C and whether there had been any blood on the sheet, which D denied. This was clearly intended to suggest that C was not a virgin when she first had sex with D. The jury returned a verdict of 'not guilty'.

This case illustrates two ways in which defence counsel evade the legislation: first, by starting to cross-examine the complainant without making a section 41 application; and, secondly, by deliberately flouting the judge's ruling on the limits of questions to be asked. The latter was facilitated by the failure of judge and prosecution to hold counsel to the original ruling.

The second example (Lon9) also began with an application which was made on the grounds of belief in consent under 41(3)(a) and also under 41(3) (c) (similar incident). D claimed that an ongoing relationship with C existed, which C contested. She testified that the only act of intercourse was the alleged rape. The defence outlined four specific areas about which they wished to ask questions.

- C telling D that she was pregnant and had to have an abortion.
- C's problems with her former boyfriend.
- C and D's consensual sexual intercourse three days after the alleged rape.
- C having suggested to D that they have sex in parks, pubs and cars.

The prosecution objected to questions about the abortion on several grounds: that it was not mentioned in C's statement; that, as Lord Steyn said in *R v A*, the complainant should be protected from "indignity and humiliation"; and that there was no link between an abortion six months earlier and D, who was not claiming involvement with C at that time. Prosecuting counsel also argued that questions on sexual intercourse three days after the alleged rape should not be allowed under section 41, but took a "pragmatic view" regarding the remaining questions, which, if disallowed, might render a conviction unsafe. He even suggested that section 41(2)(b) might support the application. The judge agreed that it was "best to take the pragmatic view" and allowed all questions, apart from those related to the abortion, on the basis of section 41(3)(c). Thus, as in *R v A*, C was allowed to be cross-examined about a contested sexual relationship using section 41(3)(c). The fact that the application was made at trial made it impractical to investigate whether there was any truth in the claim that a prior relationship existed. During the cross-examination of C, detailed questioning concerning the intercourse that D claimed took place three days after the alleged rape included the following questions:

He went round to your house three days later? ... He came because you invited him; you said that sex had been good ... You told him that your period had ended ... Did you say to him, "Don't be lazy like last time?" ... Did you put on romantic music? ... Did sex take place at 8.30pm that evening? ... Did you tell him you wanted to have a varied sex life; you wanted to have sex outside in the park? (Lon9)

C denied all these assertions, but counsel attempted to imply that, as consensual sex had occurred three days after the alleged rape, the latter had also been consensual. The defendant's testimony in this case was not apparently perceived as credible and the jury found him guilty.

Two further applications were allowed in the context of arguments about the right to a fair trial. A verbal application in one (Ncle57) was made just before cross-examination of C. D, a shopkeeper for whom C worked during her school holidays and at weekends, was charged with four rapes and four indecent assaults when she was between the ages of 13 and 14. In her evidence-in-chief, C claimed her first experience of sexual intercourse was with D. The defence sought to introduce evidence that C had spoken to D's wife about the possibility of being pregnant at a time that pre-dated any of the allegations.

The application was made under section 41(3)(a) on the ground of belief in consent, and section 41(5) to rebut evidence raised by the Crown. Prosecuting counsel objected, arguing that section 41(6) required that questions or evidence under subsections (3) and (5) relate to specific instance(s) of alleged sexual behaviour on the part of the complainant, and that the proposed questions did not specify such incidents.

The judge, however, invoking *R v A*, ruled that subsection (6) had to be compatible with the Human Rights Act, and that the questioning was therefore to be allowed. Cross-examination was to be confined to asking whether or not C had said these words to D's wife; if she denied doing so, then this should be the end of this line of cross-examination. If she admitted them, then the defence could explore the matter further. The D was found not guilty of four rape charges, but convicted of four indecent assaults, although of course it is not possible to say to what extent the reported conversation between C and D's wife had influenced the jury's deliberations.

This case illustrates a broad application of the decision in *R v A*, applying fair trial arguments to section 41(6) (see Chapters 3 and 7). The House of Lords ruling in *R v A* was also cited as partial justification for allowing an application in a further case in the sample (Lon2). In this case, both belief in consent and motive to lie were argued in the defence application to admit sexual behaviour evidence. In this case C was allegedly raped on her fifteenth birthday. D contended that he had been in a sexual relationship with C for at least two months prior to this and that they had had consensual sex before; therefore he believed she was consenting on this occasion. C denied any previous sexual relationship with D, and stated that she had been a virgin until the alleged rape. Counsel also argued that this was a question of the complainant's credibility, but the judge pointed out that the 1999 Act cannot be used to "impugn the credibility" of a witness. The defence, however, referred to several cases in support of his contention that the evidence was admissible if it showed that C had a motive for fabricating an allegation.⁷⁹ The relevance of these cases to the current trial was, the defence argued, that C had lied about having consensual sex with D because she was embarrassed that her friends had seen them having intercourse. Further, it was argued that C was also frightened that her strict parents would be angered if they discovered she was sexually active.

The judge allowed the application, having given careful consideration to *R v A* and, in particular, to Lord Steyn's speech. However, he did restrict defence counsel to questions on C's relationship with D. In allowing the application the judge did not invoke section 41(4), thus introducing the issue of C's credibility into the trial process despite her having denied any previous relationship with D. It seems that one of the myths of rape – that young girls lie about rape in order to escape parental wrath – influenced the judge's decision to permit cross-examination about previous sexual behaviour in order to show a motive to lie. Moreover, Lord Hope's suggestion in *R v A* that section 41(3)(a) could be used to allow in such questioning has been followed here despite the different approach taken in *R v Mokrecovas* (see Chapter 3).

Defence counsel's questioning of C went further than the restrictions imposed, as he challenged C's claim that she was a virgin prior to the alleged rape and claimed that she had had other boyfriends whilst going out with D. Neither the judge nor the prosecution challenged this breach. The jury returned a verdict of 'not guilty'.

In the final trial involving a successful section 41 application (Lon17), the defence argument also focused upon the complainant's credibility. The application was made in writing but without reference to specific subsections. It was based on three grounds, all of which related to the allegation that C was a prostitute.

It is submitted that in order to elicit answers relating to her motivation to fabricate the allegation of rape against this defendant that questions will, strictly speaking, need to be directed to her profession. (Lon17)

Three specific grounds were outlined and some of the proposed questions included:

Is she a prostitute? Has she told any police officer that she is a prostitute? Did she have sex with another man? Were the bruises to her forearms made during that encounter? Did she decide to 'cry rape' because the defendant refused to be her driver as requested? Were phone calls made to her phone from clients? (Lon17)

⁷⁹ Including *R v MH* (2002) Crim.L.R. 73; *R v A* (paragraph 79), where it was suggested by Lord Hope that questions about sexual behaviour could be asked under section 41(3)(a) in order to show that the complainant had a motive to fabricate.

A letter from the judge to the research team not only explained why he allowed the application, but also set out the account offered by the defence.

The defendant said intercourse had taken place with consent. When he was arrested and interviewed the defendant said that the complainant had told him she was a prostitute and asked him to be her driver. He believed she had only complained because he had refused and they had fallen out. In those circumstances the prosecution readily conceded that they could not oppose cross-examination both about whether she claimed she was a prostitute and about whether she was in fact a prostitute. (Lon17)

However, not only did C deny any connection with prostitution throughout the entire investigation and trial, but no evidence, other than the word of D, was presented to support the claim. Throughout the trial D was presented as a 'man of good character', and a number of character witnesses took the stand on his behalf. Conversely, C was portrayed as unreliable and dishonest. Following five days of trial, D was found not guilty after approximately 45 minutes. In this case, both defence counsel and the judge appear to have paid scant attention to the legislation. The application, despite its apparent deficiencies, went through on the briefest of considerations.

Reflections on the use of section 41 in the observed rape trials

These nine trials raise a number of concerns relating to section 41.

- Beginning the process through initial discussion in court served defence barristers well by allowing them the opportunity to rehearse their arguments and assess the likelihood of success before making a formal submission. The defence incurred no penalty or even reprimand for failure to apply pre-trial.
- Applications were not necessarily made and decided with proper reference to the legislation.
- The Crown Court Rules permit verbal applications, if made at trial; however, these can be muddled and unclear, which makes arguing against them difficult. Prosecution objections have to be made without the time for proper consideration of defence arguments.
- Belief in consent (section 41(3)(a)), a ground which is easy to allege, was the most popular ground on which applications were based.
- The absence of a specific prohibition against questioning or evidence which *implies* sexual behaviour was exploited to allow such evidence to be admitted.
- In two cases questioning went beyond the restrictions imposed but this was not challenged.
- Discussions about, and applications under, section 41 took place just before cross-examination of the complainant in two trials, and even during cross-examination in a further two cases. These discussions were sometimes lengthy, although if questioning was allowed, the actual questioning could be very brief. The potential use of section 41 to disrupt the flow of a complainant's evidence as a strategy in legal 'gamesmanship' cannot be ruled out (and indeed was noted by two CPS lawyers), and this could be especially damaging when the complainant was a young girl. It is also at odds with the entire tenor of government initiatives with respect to vulnerable and intimidated witnesses.
- Whilst recognising that there may be instances where the facts of the case justified a successful section 41 application, there can be no doubt that the content and style of questioning was designed to impugn C's credibility, and that it frequently drew explicitly or implicitly on the stereotypes and myths outlined in Chapter 1.
- Even where a complainant categorically denied the sexual behaviour or relationship which the defence alleged, this did not prevent the matter being mentioned in the evidence of other witnesses or in closing arguments, despite there being no evidence to support it other than the word of D.

Introducing sexual history without recourse to section 41

The sexual history of complainants was introduced in nine of the 23 full trials observed without any reference to section 41. This was the case in both trials involving current or ex-partners. In one (Lon19), the rape charges were dropped on the fourth day of trial, but in the other (Lon12) the jury returned a verdict of guilty. In two trials sexual history evidence was introduced by the prosecution through reference to boyfriends other than D without the defence seeking to cross-examine on the matter. Evidence about a complainant's sexual history is not subject to section 41 if introduced by the prosecution. It is only if the defence wishes to explore this evidence, either to rebut or explain it, that an application is necessary.

Implicit references to previous sexual history or knowledge were noted in two further trials. In the first case (Ncle55), the defendant was the father of a 14-year-old boy known by the 16-year-old complainant. The issue was consent. Both defence and prosecution counsel agreed, prior to the trial, that all evidence about C having had sex with the D's son five days before the alleged rape should be omitted. In a private discussion the judge said he believed this evidence would have strengthened the Crown's case, as the jury may have felt it increased the evidence of a father/son conspiracy.

The implicit references to C's sexual history occurred during her evidence-in-chief when she referred to arguing with her mother about going out and leaving her seven-month-old baby at home. There were other references to the baby, which C would have had when she was under 16 years of age, in cross-examination of C, in the evidence of another witness, in defence counsel's closing arguments and in the judge's summing-up. When the judge was asked, in private, if such questions should have been subject to a section 41 application, he replied that the evidence was introduced by the Crown so the defence had a right to refer to the baby. The judge did point out that, had the complainant been questioned about *having* the child, then a section 41 application would have been necessary, but as this would probably have gone to the credibility of the complainant, it would have been refused. The judge also thought that under-age mothers were too common an occurrence nowadays to raise any questions about a complainant's lifestyle and the jury would not have been concerned. The jury returned a 'not guilty' verdict.

In the other trial (Mcr1), a stepfather was charged with rape, two attempted rapes, six indecent assaults and one charge of making an indecent photograph of his stepdaughter when she was 12 years old. When defence counsel cross-examined C, he asked a series of questions concerning: her exposure to pornography; sex toys belonging to her friend's lesbian sister and to her mother; the boyfriend of her mother slapping her buttocks and saying "Goodnight sexy arse"; an allegation that a boy at school threatened to rape her; and being approached by a stranger about indecent modelling. All were denied by C, and no mention had been made by her of any of these matters during her evidence-in-chief. When D was on the stand, defence counsel asked him the same questions he had put to C – all of which he maintained related to incidents that had actually happened. D denied all charges but was found guilty on all counts.

This case again raises the question of what is meant by sexual history. Here, it was considered that section 41 did not apply, but this is to take a very narrow view of what is meant by sexual experience. Whilst it was not claimed that C had previously had sexual intercourse or had been engaged in other such activity, the implication was that she had access to a wealth of sexual material and knowledge of sexual practices that could have informed her allegation against her stepfather. Clearly, the defence's line of questioning was meant to discredit the complainant.

In the remaining five trials no section 41 application was made. In three consent was an issue, and in the remaining two both defendants denied the alleged rapes. In one case (Ncle54), which involved the 11-year-old stepdaughter of the defendant, evidence was to be introduced by the prosecution that C had self-harmed as a possible result of the abuse. The defence requested that the prosecution should not ask about this incident as it could have occurred for a number of reasons, especially since C had a large number of boys' names in her mobile phone which, counsel argued, showed insight "into how her life was being conducted". Defence counsel's point was that he was limited in the questions he could put to C concerning her reasons for self-harming, as he could not suggest a sexual relationship with any of the numerous boys that C knew. The judge felt that defence counsel's exploration of C's reasons did not require him to go into any sexual history questions; as such he would allow the prosecution to present evidence of self-harm as part of the history of the period of abuse, and the defence could then explore alternative reasons for her self-injury. Whilst the sexual aspect of the complainant's relationships with boys was not brought up explicitly in the cross-examination, there was clearly an implication of sexual history.

Questions were asked about the number of boyfriends C had and D's attitude towards them. Further references to C's boyfriends were made in D's evidence and in defence counsel's closing arguments. The initial indictment, which included two attempted rapes, was amended to four counts of indecent assault on day two of the trial as C's evidence had been muddled. The jury returned a verdict of 'not guilty' on all charges.

A complainant's boyfriend featured in a second trial (Mcr3). C had been out drinking alcohol all day when she met D (a stranger) in a pub. He offered C a lift home and on the way stopped at a car park where he allegedly twice raped her. During cross-examination of C, counsel asked her about the length of her relationship with her boyfriend at the time of the alleged offence, and whether they had been having problems, which was confirmed by C. When the boyfriend gave evidence, he too was questioned by defence counsel about his relationship with C. Finally, in his closing arguments, defence counsel again referred to the 'difficulties' C had been having with her boyfriend; he further suggested that she felt guilty about her 'liaison' with D and so made a false allegation of rape. When asked privately whether section 41 was not relevant here, the judge stated that previous sexual history was not a feature of this case, implying that questions about relationships can be separated from sexual history issues. The jury acquitted the defendant on both counts of rape.

Previous relationships with defendants were also used in three cases as justification for bringing in sexual history: in all three trials consent was an issue. In one such case (Lon14) C's relationship both with D and with others was brought into the trial. D claimed that there had been consensual intercourse a few weeks before the alleged rape and that C had made a false allegation as she regretted betraying her boyfriend. During his evidence, D was asked about sexual activity with C prior to the offence and described how C had tried to say 'no' here and there but was also kissing him back. When C's boyfriend gave evidence he stated that he should have listened to his friends when they told him how she behaved with other men; the prosecution did not object to this evidence. The defendant was found not guilty.

In the second trial (Lon19) defence counsel used the whole history of the sexual relationship between the complainant and defendant. C began a sexual relationship with D soon after he moved in as a lodger, but the relationship deteriorated after he began to demand sex and money from C, physically assaulted her and threatened to burn the house down. This abuse continued for two to three years and C grew increasingly frightened of D. She said she did not understand that what had happened to her was rape, as she thought rape could only be committed by a stranger.

On day four of the trial the judge spoke with both counsel about the weakness of C's evidence before directing the jury to return 'not guilty' verdicts on each of the three counts of rape. Although prosecution counsel introduced evidence about the sexual relationship between C and D, defence counsel does not have an automatic right to cross-examine on the issue without a section 41 application. None was made in this case and neither the judge nor the prosecution raised any objection to this omission.

The above trials show that sexual history may be brought into the courtroom without a section 41 application and without any challenge from either the judge or the prosecution. Whether this is in blatant contravention of the 1999 Act or due to lack of awareness of the legislation's requirements is difficult to say. One trial (Lon12), however, clearly demonstrated that defence counsel managed to evade the legislation through his dogged persistence in ignoring section 41. Although he was challenged by the judge, repeated transgressions appear to have eroded the judge's readiness to halt the trial. The case concerned a complainant who was a heroin user and a cocaine-addicted defendant. On the night of the incident D brought some heroin to C then allegedly raped her whilst she was drugged. D's case was that she consented and he mistakenly entered her anus, to which she did not object. C's sexual history came up in a number of different ways.

First, during cross-examination of C, defence counsel asked about her previous sexual relationship with D. The judge immediately stopped the case, sent the jury and C out, and asked counsel what he thought he was doing and where his questioning was going. Defence counsel reassured the judge that he would not be dwelling on this, but when the jury was called back, he continued with these questions. When the judge was asked during a private conversation why defence counsel was not stopped again, he said: "I just let it happen, I couldn't keep asking the jury to go out and stop the case." Other judges, who were present during this conversation, supported this approach. The questioning was not necessarily unfair but, by failing to bring a halt, defence counsel was given carte blanche to continue cross-examining about the complainant's sexual history.

Secondly, in D's statement to the police he said that after he had been having sex with C for about five minutes she suddenly exclaimed, "Who are you?" He then withdrew in disgust, the implication being she had sex with so many men she was not sure who he was. D repeated this account several times in the witness box. Later, the judge informally commented that this was the perfect way to circumvent the sexual history provisions – by the defendant in the witness box repeating his version of events and so discrediting the complainant.

In addition to defence counsel bringing in C's sexual history unchecked, prosecuting counsel also introduced sexual history evidence in the form of D's police interviews. The police believed this was a revenge rape because D thought C was having relationships with other men. When asked about other men in C's life, D said that he had been to her flat on occasions and had found men there, and that he suspected she had had sex with others. The police also asked D how many times he had had sex with C, and he replied "countless times". Copies of D's police interviews were given to the jury.

The prosecution introduced sexual history in this case to support the police theory of 'revenge rape'. The unedited transcript of D's statement, in which he made these accusations, was circulated to the jury. When asked about this in private, the judge said that it was not his role to edit evidence but, had the prosecution approached him, he would have removed references to other men from the statement. Despite the prosecution bringing in evidence of C's sexual past, defence counsel still should have made a section 41 application; further, he should have heeded the judge's challenge to his line of questioning with C. The trial judge commented after the trial had ended that he had given up on section 41, since the case had gone wrong from the start, and that, in effect, section 41 had been "tossed totally out of the window". Revealingly, he also noted that had the researcher not been present he would not have noticed that sexual history came into the trial at all. This comment perhaps sheds some light on the strongly held views of most judges who were formally interviewed (see Chapter 7) that sexual history rarely comes up in rape trials. Despite the frequent references to C's sexual history with both D and other men, the jury found D guilty.

Sexual history material and trial outcomes

Table 6.2 presents an overview of outcomes for the trial observation sample according to whether sexual history was or was not present. There were 'guilty' verdicts on the charge of rape in six of the 23 trial cases; and there was a finding of guilt on at least some charges in a total of nine. Only five trials involved no sexual history reference, and three of these resulted in 'guilty' verdicts: this small group represents half of all 'guilty' verdicts. All cases where there was a judge-directed acquittal, or a plea or a jury finding of guilt to lesser charges involved sexual history material. An acquittal was more likely where sexual history evidence had been allowed or introduced. Eleven of the 15 adult trials resulted in acquittals; nine included sexual history material. Numbers were too small to say whether this finding was due to chance; however, it goes in the same direction as the findings from the larger database of cases used in the case-tracking exercise.

One CPS lawyer voiced considerable frustration with the ways in which defence counsel would use sexual history material, but also with the failure of prosecution and judges to place any brakes on this process.

It seems to me so kind of hypocritical. People often lead messy lives, don't they, and the people who are most vulnerable often have the most messy and problematic situations to deal with. And whilst advocacy is a kind of game or act, to ignore the situations in which people find themselves and the difficulties with which they are wrestling seems to me inhumane on occasion. (CPS1)

Table 6.2: Sexual history and trial outcomes (fully observed trials only)

Means by which sexual history introduced	Judge-directed acquittal	Guilty of lesser charges (pleas & verdicts)	Acquittal	Guilty (verdict)	Other
Section 41	-	2	5	1	1 ^a
Outside of section 41	2	1	4	2	-
Not raised	-	-	2	3	-
Total	2	3	11	6	1

Note:

^a Hung jury.

Summary and conclusions

- Section 41 applications were made in nearly one-third of the 23 trials observed and all but one were allowed.
- Sexual behaviour evidence was frequently introduced without any application under section 41.
- Sexual history was raised in more than three-quarters of trials.
- Whilst sexual history was brought up in the majority of cases, highly specific questioning on it was frequently brief and to the point. More often the sexual history material was made use of subtly to sow the seeds of doubt, sometimes invoking rape stereotypes. However, in at least one case in which an acquittal took place the complainant was relentlessly questioned about her sexual history.
- The absence of a pre-trial application resulted in minimal investigation of claims by D to having had a previous sexual relationship with C. Such claims are easy to make and hard to refute.
- As in the case-tracking exercise, there was a higher proportion of acquittals in cases involving adult complainants where sexual history material was introduced, however the numbers are too small to assess whether this finding is statistically significant.
- Some defence counsel appeared to time their applications to create the most pressure on the complainant.
- Crown Court Rules were frequently either ignored or bypassed.
- Inconsistent understandings and interpretations of the law among the judiciary were evident.

The proportion of cases in which section 41 applications were made and accepted and the proportion of cases in which sexual history material is presented contrast sharply with the perceptions of judges (see Chapter 7). The trial observation data, and informal discussions with the judges concerned, suggests that they were working with an extremely narrow definition of 'sexual behaviour' and 'sexual experience'. Perhaps as a direct consequence, they sometimes did not notice when such evidence was introduced outside the restrictions of section 41.

Whilst sexual history evidence appeared in the majority of trials, there were few examples of the lengthy and humiliating questioning that has been documented in other studies (Adler, 1987; Department of Women, 1996; Lees, 2002). In fact, the three cases closest to this stereotype all resulted in findings of guilt. Defence counsel were more effective when a subtler approach was taken, sowing seeds of doubt in the minds of the jury, and implicitly invoking, rather than explicitly stating, stereotypical notions of acceptable femininity.

Most applications were made verbally at trial, were often muddled in presentation and sometimes contained no reference to specific sections of the legislation. At best, there was considerable confusion over when section 41 should be applied and how it should be interpreted. At worst, there were clear efforts to circumvent the legislation in order to admit sexual history evidence, justified through references to *R v A* and the right to a fair trial. In addition, there were several evident failures to stop, let alone sanction, breaches of limits imposed when applications were allowed.

Whilst the frequency with which sexual history issues are present in trials seems to have changed relatively little (see Chapter 1) and evasions of the rules restricting introduction of sexual history evidence persist despite the most recent legal reform, numbers are never the whole story. What the trial

observations revealed, which neither case tracking nor case file analysis could expose, was a noticeable shift in the way in which counsel deal with this issue in the courtroom. The perception (see next chapter) that an 'all-out' approach was poor advocacy has some support from these data. What the practitioners failed to discuss, however, were the more subtle and devious tactics now in place, whereby they seek to raise doubts, both in the minds of judges to encourage acceptance of section 41 applications, and in the minds of juries. That far fewer women suffer the indignities documented in previous studies is a welcome shift, but it has not heralded a decrease in the use of sexual history material in rape trials.

7 Views from the bar and the bench

This chapter reports on interviews with judges and barristers. Details of this part of the study and the methodology employed are described in Chapter 2.

Legislative intervention to control sexual behaviour evidence

Interviewees were asked for their general opinion of legislative intervention to control the use of sexual behaviour evidence. The overwhelming majority were unopposed in principle or were in favour of it. Most of the judges conceded that insufficient control had been exercised in the past. A female judge said:

Well, I would've said no it's not a good idea, but I think it's necessary, because too many judges have let in sexual history in the past... partly because they're persuaded by the arguments and partly because they're men. There you are, that's not a very PC remark to make, but I think that we all tend to do that, we say, 'There but for the grace of God go I,' in this circumstance or the other. (J1)

J13 commented that before legislation was passed in 1976, sexual history evidence would have been admitted almost automatically without much thought. J12 stated:

I'm not uncomfortable with Parliament trying in this way to protect the complainant, because as we all know, there have in the past been dreadful abuses of complainants in sex trials, and it's right that that approach should be stopped. There's no doubt about that.

Five of the barristers believed that without such legislation it was likely to be a free-for-all for the defence.

I think it had to come in through legislation because it wasn't going to come from the profession, because if you're allowed to lead people up the garden path, you will, I mean that's your duty as a defence advocate. (B5)

B1 considered that it put a useful brake on defence bad habits.

It makes those defending focus on the purpose behind their questions. And I speak as someone who defends ... You can't just do a meander through someone's past. Less focused cross-examination gave you that leeway to have a sort of walk round the houses.

However, four judges considered that legislation was unnecessary and was not a good idea. One thought that it merely served to reassure the public. Another considered that it was "an impertinence" on the part of the legislature to intervene in this way. B7, who mainly defended in sex cases, was entirely opposed to it.

When is sexual history relevant?

In terms of the implementation of section 41, the question of when judges and barristers consider that sexual behaviour evidence is likely to be relevant is critical and this was explored explicitly. Three judges (including both the female judges interviewed) considered that sexual behaviour evidence was very rarely of any relevance but the majority did not share this view. In some cases, their approach and that of the barristers did not accord with section 41. Interviewees focused on four main areas.

Previous sexual relationship

Four judges and four barristers specifically mentioned that a previous sexual relationship with the accused was either always or very often likely to be relevant.

Prostitution and promiscuity

Three judges considered that evidence that C was a prostitute was relevant even if the incident in question did not involve prostitution. A fourth judge thought that such evidence was relevant where she had made false complaints of rape in the past. B4 thought that where the complainant had worked as a prostitute, say five years previously, this evidence should be admissible. As the Court of Appeal has recently confirmed (*R v Andre Barrington White*), section 41 clearly does not permit evidence that C is or was a prostitute unless the evidence specifically falls within one of the assigned categories and the rest of the conditions set out in the Act are fulfilled. The same is true of evidence of promiscuity but J10 commented that where women were “amateur prostitutes” with a “free and easy nature” it was problematic to exclude this evidence.

Similar conduct

Two judges considered that evidence of previous sexual behaviour with third parties, particularly where it was allegedly similar to the conduct involved on the occasion in question, could well be relevant. Similarity was also the ground most favoured by barristers. The examples given were unlikely to have met the criterion set out in section 41(3)(c) which requires past behaviour to be so similar “that the similarity cannot reasonably be explained as a coincidence”.

J13, alluding to a case he had tried before the 1999 Act came into force, considered that evidence that an under-age girl had performed acts of oral sex on individual boys in the past should be admitted where Ds were charged with forcing her to perform such acts on them. He considered that C’s past sexual behaviour with other boys was relevant to the issue of consent and to exclude it would have jeopardised a fair trial.

J16 considered that evidence of previous sexual behaviour was relevant in a significant proportion of cases. He said that it was relevant whether a woman was a virgin or a whore. By way of example, he suggested that, in a ‘date rape’ situation, if a woman accepts a lift home in a car and she and the alleged offender end up in a cul-de-sac where she claims she is raped, then it is relevant whether she comes from a nunnery or whether she has had sex in a cul-de-sac six times before. He could not understand why the legislation generally excluded sexual behaviour evidence where the issue was consent and permitted it in cases where the issue was not consent. In his view it should be the other way round.

The barristers also mentioned a number of situations in which they considered that evidence of similar previous behaviour should be admitted. One example given was where the defence alleged that C offered to perform oral sex on D after she had talked to him for five minutes at a party and that C had in the past made comparable offers to men similarly unknown to her.

Child’s previous sexual experience

Evidence of a child’s previous sexual experience was also mentioned as a means of proving that the child’s knowledge of sexual matters could have been learnt from someone other than the accused.

How do barristers approach sexual behaviour evidence?

The barristers were asked about their approach to sexual behaviour evidence. Their answers provided some insight into the business of prosecuting and defending in rape cases. B1, a QC, said that, whether prosecuting or defending, she would look carefully into C’s previous sexual behaviour in every case and would try to find out as much as she could about it.

If I’m defending I want to know from my client what he knows of the complainant – if there’s a sexual history between them ... [or] what he knows of her. From the police, whether you’re prosecuting or defending, you will need to know whether there’s been any previous rape complaints, whether there has been any previous sexual history which impacts on the surroundings of the case.

But several barristers said that they would not necessarily apply to have sexual behaviour evidence included even where it was available. B6 said that her rule was that, unless C and D were a couple or there was evidence of a previous false allegation, she would not seek to have past sexual behaviour

considered. B3 said that, when defending, he would often decide not to seek leave even though he was confident of having it granted.

There have been occasions whether rightly or wrongly I would have been confident of getting leave, but I haven't applied because I don't want the jury to think I'm just chucking mud around, you know, I'm scraping the barrel.

B4 similarly argued that the introduction of such evidence by the defence could be counter-productive. Rape cases could be defended by adducing evidence from a "rent-a-mob" of friends and acquaintances of the accused who were willing falsely to testify to the complainant's past sexual behaviour, but the jury might well see through this ploy.

Section 2 of the Sexual Offences Act 1976

The operation of the previous regime under section 2 was explored and, not surprisingly, given the discretion it afforded to judges, some were strongly in favour of it.

It depends on the judge being sensible and making good decisions, but I think most judges are sensible and do make good decisions. (J14)

Amongst the barristers there were mixed views. Several provided reasons for preferring the old law, expressing concern that the new law might exclude relevant evidence. It was also contended that the old law worked perfectly well and that, in fact, judges had been reluctant to admit past evidence of sexual behaviour and had had to be persuaded to do so. B4 considered that those appointed as judges should be trusted to use their knowledge and experience to arrive at the right decision. He expressed the view that the change in the law was brought about by those with a political agenda who had ambushed the debate, a view also expressed by J8. Two barristers, however, were less impressed with section 2. B1 considered that it was "too woolly and ethereal" with insufficient guidance laid down in the case law. There was mild criticism from two judges as well on similar grounds.

Section 41

Many judges and some barristers were critical of the general approach taken in the new law. The main objection was that the legislation was too limiting and that the circumstances in which sexual behaviour could be relevant could not be predicted in advance by an Act of Parliament. Four judges regretted the lack of confidence in the judiciary which, in their view, had led to the legislation.

There does seem to be a desire in the government at the moment to do away with judicial discretion. We're not to be trusted, even though politicians are. (J8)

Several judges felt that section 41 was part of a wider government strategy, seen also in legislation on sentencing, to control the judges. But three judges had more positive things to say about the new legislation, welcoming it for providing a structure for decision-making and for demanding a rigorous scrutiny of the relevance of sexual history.

It concentrates everyone's minds on the relevance of this type of questioning. So that's beneficial. And right. (J12)

Those barristers who favoured the new law felt that, whilst it was not perfect, it had considerable advantages over section 2. It ensured that judges and counsel gave greater thought to the relevance of sexual behaviour evidence and strengthened the hand of the prosecution in challenging its admission. It gave more guidance and created greater certainty and was also a clear statement from the legislature that the use of such evidence should be restricted. It assisted defence counsel by enabling them to explain to their clients, who were keen to have sexual behaviour evidence brought into court, that the law did not permit this. It also allowed judges to set parameters to questioning. B1 explained that the new law had brought about an improvement in practice because of its highly specific procedural requirements. Under the old regime defence counsel would too often be allowed to introduce such evidence whilst assuring the judge that its relevance would become clear in the course of cross-examination.

In the old days the judge would say something like, "Well, where are you going with this?" and counsel would say, "Ah, well, if you give me a moment Your Honour you'll see where I'm going with this," or "Bear with me," and if it's an experienced counsel the judge would think, "Oh, they know what they're doing." Whereas this [section 41] actually makes you focus, because it's in statute.

Familiarity with section 41

Most of the judges who were interviewed were requested to take part in the study by the senior presiding judge of the court, who attempted to prepare them for interview by suggesting reading materials. There was also informal lunchtime discussion. Despite this, some judges' knowledge of the section 41 regime was vague. Several gave the lack of section 41 applications as their reason for this. B1, a highly experienced QC, claimed that many defence barristers were also quite unaware of section 41 or else had little understanding of its implications.

I'd say to people at Plea and Directions.. 'Section 41?' And people look completely blankly at me... Or I've had people say "Oh I don't need to make a section 41 application for that." And I say, "Well, we'll have the jury out before you start cross-examining then, and we'll see".

Contested applications

Amongst the barristers, there were radically different views on the attitude of judges towards sexual behaviour evidence and the chances of making a successful section 41 application. B3 considered that the new law had made little difference in this respect and that the judges were highly reluctant to allow in sexual behaviour evidence, as they had also been under section 2. By contrast, B7 said that defence counsel never had any trouble with applications, which were almost invariably successful. However, B6, who practised in the same courts as B7, felt that judges were interpreting the law very strictly. B4 believed that judges were now having routinely to "strain and pervert the use of language" in order to ensure justice for defendants and were in this way arriving at the same decisions as they would have done under section 2. B1, on the other hand, considered that in contested applications the judges were keeping to the letter of section 41. These divergent experiences are not entirely surprising given the differing views of individual judges about the relevance of sexual history, but they could also reflect different approaches to defending in these cases.

Perceived problems with section 41

When asked for their thoughts about where, in principle, sexual history might be relevant, some interviewees had difficulty responding. However, when asked specifically for their opinion of section 41, the attitude of some towards sexual history became more apparent. A number commented that the drafting rendered the legislation hard to understand, with the following specific criticisms and concerns expressed by one or more judges and barristers.

- *Belief in consent*

The permeability of section 42(1)(b), which defines the meaning of an 'issue of consent', was seen as a problem. Evidence could too easily be admitted on this basis and defence counsel were perceived to be manipulating this subsection to their own advantage. Amongst the barristers, most criticism and comment was reserved for this provision. It was considered to be illogical that pleading belief in consent was a gateway into sexual behaviour evidence, whereas pleading consent was not. Confirming judicial perceptions, it was thought that this was beginning to affect the way that the defence case was drawn up. B1 commented that it was now common practice in defence case statements to claim that C consented or else that D believed she was consenting. B1 added that if she were defending, that would be her approach as well.

- *The meaning of 'sexual behaviour'*

The ambit of this term was not clear. For example, it was not evident whether 'sexual behaviour' included participation in an internet chat room in which sexual conversation took place.

- *Credibility*

Some concern was expressed about section 41(4), which disallows evidence if its main purpose is to impugn C's credibility. This reflects the attempts to challenge this provision outlined in Chapter 1.

- *Res gestae*

One judge considered that the exception under section 41(3)(b) had been too narrowly interpreted so as to permit evidence or questions about sexual behaviour only if it had occurred in the 24 hours preceding and following the alleged rape. In his view, sexual behaviour which took place a week before the incident in question could well be relevant.

- *Specific instances of sexual behaviour*

B2 was concerned about section 41(6), which permits only specific instances of sexual behaviour to be referred to in evidence. He wanted to be able to paint the picture as far as a previous sexual relationship was concerned without having to rely on evidence of specific instances, which could be hard to obtain and easy to refute.

Criticism of sections 41(3)(b), (4) and (6) reveals the extent to which some judges and barristers do favour the admission of sexual behaviour evidence and suggests that without the legislation they would have no compunction in admitting it in these circumstances. The findings also suggest that the fears expressed by women's groups that section 42(1)(b) creates a loophole in the law were not without justification.

The difference between section 41 and section 2

That the section 41 regime is totally different from its predecessor is self-evident. The very aim and purpose of the legislature in passing section 41 was to remove discretion from the judges because of their perceived failure to exercise sufficient control under section 2's discretionary regime. However, six out of the 17 judges in this study were plainly undeterred and, regardless of the new legislation, were not prepared to forego their discretion in these matters.

You see, at the end of the day, I just wonder whether in practical terms there's a great deal of difference [between the old and new regimes], and I suspect that there isn't ... I think that judges tend to take a reasonably generous view when the question of past sexual history is considered. Maybe I'm talking personally, I don't know. But I get the impression from talking amongst colleagues, certainly here, and on occasions at sex courses and so on, that that's the general approach. (J12)

I don't think really that very much has changed, as far as the law is concerned. What it probably has done, I think, is that it has put people on the alert that previous sexual history is not automatically fair game, and that you're going to need the judge's leave to ask about it, and you're going to have to have decent reasons before you get leave. (J14)

If section 41 has done no more than alert counsel to the need to justify sexual behaviour evidence, a goal which could equally well have been ascribed to section 2, its enactment would seem to have been of little value.

The impact of *R v A*

Interviewees were asked their opinion of the decision in *R v A*⁸⁰ and what they considered to be its impact on the interpretation of section 41. Two judges had not heard of the case. One judge had but did not know what it decided. Two judges felt that they did not know enough about the case to discuss it. Four out of these five judges were dealing with rape cases on a regular basis. Not all the barristers were familiar with the decision either. One QC had never heard of it and another barrister confessed that she "had only looked at it in the briefest of terms" although she knew the gist of it.

⁸⁰ For detailed discussion of this case see Chapter 3.

The judges who were familiar with the decision were unanimous in their approval of it.⁸¹ J6 described it as a “remarkable feat of mental gymnastics.” Reading aloud from Lord Steyn’s judgement, he commented: “It’s brilliant stuff, that’s a powerful mind finding a pragmatic solution.” More prosaically, J14 described it as “a good decision, and a commonsense decision”. It seems likely that the recent decision in *R v Andre Barrington White*,⁸² decided after the interviews were conducted, would not be so acclaimed.

It was felt by some that the House of Lords had averted a possible crisis in which the judges would have had to stay proceedings on the ground that a fair trial could not be had under existing law. There were no critical voices on any aspect of the judgement from any of the judges interviewed. However, two female barristers who mostly prosecuted were unenthusiastic, considering that it undermined the certainty which section 41 had provided. B1 said: “To some extent it made judges want to ignore the section”. The rest of the barristers were in favour and it was seen by some of them as inevitable. All the barristers who were aware of the decision considered that it gave the judges greater discretion to admit material. None believed that the decision applied only to situations where there had been a previous relationship with the accused.

With one exception, all the judges interpreted *A* to mean that they now had a very broad residual discretion in order to ensure a fair trial under Article 6. For some, it was clear that it had provided them with a lever to do what they would have done anyway. Some considered that the decision had almost brought the law back full circle to section 2, the only difference being that the new law required the judges to focus more on the issues.

It [R v A] is put so broadly that I think that we are back to just general considerations of, well, discretion and relevance. (J15)

Most of the judges considered that, in combination with the decision in *A*, section 41 provided a framework in which they could now comfortably operate.

I’m rather attracted by the combination of the two, the sort of rigid rules that give you a pretty good starting point and will cover the vast majority of cases, with the sort of overriding discretion to ensure that the trial doesn’t become unfair in the exceptional case. (J9)

Although two judges would have liked to see section 41 scrapped altogether, most felt that the law had now settled down and that, as a result of the intervention of the House of Lords, together with a sensible attitude on the part of prosecuting counsel, a *modus vivendi* had been reached.

Bypassing section 41

Trial by agreement

The judges were unanimous in stating that, by contrast with third party disclosure applications which were frequent, they had had few applications under section 41. Some thought that there were probably more under section 2.⁸³ One reason which the judges gave for the paucity of applications was that prosecuting and defence counsel were mostly in agreement about the issues involved, so that the application process was effectively bypassed. Counsel quite often had experience of both prosecuting and defending in sexual cases and a degree of consensus about how they should be conducted had arisen. For example, where there was or had been a sexual relationship between the parties, the prosecution would itself introduce this evidence. Similarly, where *C* was a child, it was standard practice for the prosecution to introduce evidence of previous sexual experience: for example, through the medium of a Memorandum interview played to the jury.⁸⁴

Interviews with barristers strongly confirmed the frequency with which section 41 issues were settled by agreement between counsel, with the result that contested applications were avoided. As B5, who mostly prosecuted, explained:

⁸¹ The interviewer also explained the decision to four out of five of those who were unfamiliar with it. All four evinced their approval.

⁸² See Chapter 3.

⁸³ But see Chapter 4 for a different perspective.

⁸⁴ This may be contrasted with the far stricter approach to such evidence taken in some American cases: see Chapter 3 under the heading ‘Sexual offences where consent is not the issue’.

Well, generally my approach, to cases is to see if you can agree all the legal issues beforehand, and if you can't then to resolve them through argument. Part of the reason the system actually works quite efficiently is because generally counsel, both prosecution and defence, can reach a measure of agreement.

These agreements would extend to defence statements as well as to cross-examination of C. Thus, B5 explained that she would seek agreement with counsel to edit out references to C's sexual behaviour contained in the defendant's statement. Defence counsel would generally agree to this where there was no intention to cross-examine on this issue. By the same token, prosecuting counsel would frequently agree to introduce sexual behaviour evidence or else acquiesce in defence counsel's wish to cross-examine on the matter. Agreements might take the form of the prosecution agreeing to raise the matter so that the defence could then cross-examine under section 41(5).

Agreements did not necessarily follow the letter of section 41 but might go beyond it to reflect what was agreed by both sides to be fair. Only B2 said that, if prosecuting, he would not feel able to come to an agreement outside the 1999 Act. However, since the Act does not place any restrictions on the prosecution so far as sexual behaviour evidence is concerned, this does leave the prosecution in a position to make whatever agreements it likes on the matter.

Where an agreement was concluded, it was likely to be brought before the judge. The general view of both judges and barristers was that judges would almost invariably accept an agreement, whether or not it complied with section 41. J2 stated that it would be very difficult for him to intervene in these circumstances, "unless it's something really, really, really bad. I mean a real breach". B1 commented:

I would be staggered if I was prosecuting and said, "I think this is a perfectly proper question even though it falls outside Section 41", [if] a judge would say, "Oh well it does fall outside Section 41, I disagree with both of you, and you can't ask it."

The advantage for the prosecution of taking the agreement to the judge was that the judge would frequently set out the boundaries for the cross-examination so that the defence could not go beyond what was agreed.

The preference for a consensual approach to sexual history might seem to run counter to the adversarial model. It is in part explained by the fact that prosecutors also have experience of defending in rape cases and were concerned that the accused should have what they perceived to be a fair trial. There was often a core of agreement amongst barristers as to when sexual behaviour evidence should be admitted which was not necessarily confined to the parameters set out in section 41. B7 also explained that prosecutors rarely contested defence applications for fear of successful appeals.

Defence evasion of section 41

The barristers were asked whether defence counsel sometimes evaded the law by asking questions without making an application. B4 commented, "It would be such a sharp trick that it just wouldn't be tolerated." But B1 said: "Questions are asked without section 41 hoops being gone through, definitely. Even now." B2 also thought this happened. However, both mitigated their criticism of colleagues by adding that this might often be due to counsel's ignorance rather than a deliberate ploy to flout the rules. But the judges were unanimously of the view that there was no defence evasion of the rules and that, if defence counsel tried this on, they would be stopped. The data presented in chapter 6, however, shows a rather different picture.

Procedural requirements and the Crown Court Rules

The Crown Court (Amendment) (no.2) Rules 2000 which govern section 41 applications were outlined in Chapter 3. Two barristers were unaware of their existence and the interviewer therefore explained their content. Similarly, half of the judges interviewed were entirely unaware of their existence or had no idea of their content. One judge, when asked whether he knew about the Rules, replied:

I'm ashamed to say not really, because the trouble is, to be quite honest, I mean, we're sitting there and somebody produces the application, and unless we have a particular reason to look up the Rules, very often I don't know what the Rules say. As a matter of interest, what do they say?
(J9)

Amongst the rest, knowledge of the precise content of the Rules was sketchy, with little apparent awareness of the 28-day and 14-day requirements. J9 confessed that he had only just discovered that section 43 of the statute sets out how applications are to be dealt with.

In fact, do you know, to be quite honest it was only last week that I discovered for the first time that it's supposed to be dealt with in chambers, with reasons given in open court. It actually says that in the Act, curiously enough. I don't think it's followed that often. I think it's section 43. But I'm sure in the past I have actually heard section 41 applications in open court, because I'm ashamed to say I simply didn't know about section 43(1).

J8 was similarly unaware and said that he would always deal with such applications in open court. The overall sense was that few, if any, of the judges had ever come across the procedures actually being implemented in precisely the way they are set out in the Crown Court Rules. As J8 put it: "I think they [the Rules] are more honoured in their absence."

Timing of section 41 applications

From the judges' experience, the best that can be hoped for is that defence counsel raise section 41 issues at the PDH. This is more likely to occur where counsel is also seeking third party disclosure. But the defence is unlikely at this stage to do more than signal that an application will be brought. In some cases the application will be dealt with pre-trial, either at a 'mention' or at a special pre-trial hearing, as envisaged under the Rules. However, the judges confirmed (see Chapter 4) that the more common practice is for applications to be made at the trial itself, either at the beginning, before C gives evidence or after C's examination-in-chief.

Quite often it's a last minute, "Oh, we think she's made this sort of allegation before," or "She's been involved in sexual activities before". No one's made any proper investigation. 'Please can you take it out of the list' ... I honestly can't remember one application being made beforehand.
(J8)

None of the judges considered that it would be right to refuse an application simply because it was made at the trial and, indeed, the Crown Court Rules do not envisage this. It was commented that the Court of Appeal would not look kindly upon such a refusal.

All the barristers save one admitted that, when defending, they would leave the application until the trial. After C's examination-in-chief was the preferred time. Indeed, it was felt that many barristers had no idea that such applications were meant to be made pre-trial. B7 said that the Rules were universally ignored in the city where he practised. He explained that, when briefs came in, there was no payment for reading and preparation, and the fees for appearances at a PDH and a pre-trial review were very low. It seems that the incentives for doing very much pre-trial are minimal.

Those favouring pre-trial applications

Only two barristers were in favour of the Rules. B5 considered that it was generally desirable for as many matters as possible to be determined before trial, and that complainants should know beforehand what was likely to happen at trial. She pointed out that it was very hard for complainants who had come to give their evidence to be kept waiting whilst points were resolved. She considered that it was perfectly possible

to judge relevance some time in advance, based on the accounts given by the complainant and the defendant in their statements, although flexibility had to be maintained in case matters changed in the course of the trial. The Rules, of course, are flexible and do allow for this. Other barristers, who both defended and prosecuted, whilst critical of the Rules, nevertheless conceded that the prosecution's interests should be given some attention. B2 stated that since section 41 applications were very important, they should not be "sprung on the prosecution", who needed time to consider them.

Some judges were also clearly in favour of pre-trial applications in the interests of fairness to the prosecution, the efficient conduct of trials and the proper treatment of complainants. The judges were generally highly attuned to the damaging effects for complainants of having to attend court unnecessarily or having to wait for long periods before giving their evidence. Similarly, there appeared to be some acceptance of the need to deal with special measures applications⁸⁵ in advance so that complainants would know what to expect. But the culture relating to section 41 applications was clearly different and judges seemed far less aware of the problems complainants might have in not knowing in advance whether they would have to confront sexual behaviour evidence in court. One judge was not even convinced that complainants should be told of the results of a pre-trial application.

I'd have to think about whether the complainant should immediately be told that an application has succeeded. In one sense she perhaps is entitled to know that such an attack is coming, or such cross-examination is coming; on the other hand the reaction of someone taken by surprise is often a very good one. In that people who are making stories up are often exposed at that point, and people who aren't making stories up often convince those who put such suggestions to them more forcefully than if they know it's coming and they've got a kind of more relaxed and prepared attitude to it. (J14)

The question of whether or not the application should be heard pre-trial is complicated by the pre-trial arrangements in large Crown Court centres where the trial judge is quite unlikely to be the judge who presides at the PDH. A further problem is that the PDH is very often held many months before the trial when the defence team may not be in a position to prepare its case and the barristers appearing at the PDH may not be those who appear at the trial.

Those favouring applications at trial

Two barristers strongly criticised the Rules, which they considered to be unenforceable. B7 considered that the Rules should be ignored on the grounds that they were impractical and did not serve the cause of justice. Some judges were also strongly in favour of section 41 applications being dealt with at trial. J7, for example, was quite emphatic on this point and did not see how the Crown Court Rules could possibly work in practice. He contended, first of all that, before trial, the judge would not have the feel of the case, adding, significantly, that he would not have heard the complainant. Changes might have occurred by the time the trial took place and the trial judge should then be free to make his own decision in the light of the evidence. He should not be bound either by the decision of a different judge pre-trial or by his own decision if he was the nominated judge. He pointed out that counsel were unlikely to have prepared the case before trial and for them to have to do so would be an extra expense for the system. Furthermore, the defence was not generally bound or inclined to reveal its hand pre-trial and was accustomed to submitting defence statements in the barest possible terms. He added, for good measure, that he could see no reason not to deal with applications at trial since "nobody's been prejudiced".

Other judges and several barristers echoed J7's arguments. The barristers highlighted the strategic advantages of making the application at trial since, if it was made beforehand, this would provide the prosecution with too much information – more than the defence is required to provide in other cases. B1 mentioned that it was very rare for the prosecution to be told in advance what the cross-examination was going to be.

If I highlight to the Crown what I've found in the medical records, will an officer go back and see the complainant and say, "Oh in such-and-such a medical statement it said this, what's the truth of that?" In other words you'd have no sort of line of attack that hadn't already been pre-empted by the police going round and giving her due warning that this was coming. (B1)

⁸⁵ The Youth Justice and Criminal Evidence Act 1999 provides for a range of special measures to assist vulnerable or intimidated witnesses give best evidence.

From the point of view of the defence, it was considerably advantageous to apply after C's examination-in-chief.

She may say something in her evidence-in-chief which she hasn't said in her witness statement, which brings me in under subsection 5(b). So if I'd made my application at the beginning, I'm disadvantaged, although you could argue, well I could repeat the application after her evidence-in-chief, but I'm in a weaker position when the application has already been refused ... There's a psychological advantage in the sense that, if having listened to the complainant in chief, the judge as a human being finds him or herself thinking, "Well, I've got a lurking doubt about the truth of this allegation", he or she is more likely to grant my application. (B3)

B3 was clearly astute in his observation that judges might be more inclined to allow section 41 applications after hearing the complainant give evidence. J3 made the following comment in which J8 concurred:

A judge faced with a particular case may very well react differently having it in the flesh from how he would perceive it on paper. Particularly if he's seen the complainant give her evidence. I mean human nature means that one forms a view. And there are cases in which you could say, "That woman's telling the truth. There's no way that woman's making it up." And there are cases in which you think, "Well that's a bit iffy." And, I have to say, rightly or wrongly, I think one's reaction to an application under section 41 might subconsciously at any rate be governed by one's own perception of the strength of the case.

It goes without saying that section 41 applications should be dealt with according to the criteria set out in the legislation. If judges may be swayed into allowing section 41 applications by their own subjective assessments of C's performance in the witness box, this may offer some explanation for poor conviction rates in some cases and argues for ensuring that section 41 applications are generally dealt with before this stage.

There are good reasons for section 41 applications to be made and resolved pre-trial. Complainants are then forewarned and are less likely to be shocked, upset or thrown by such questioning. Moreover, the prosecution has an opportunity to look into the matter, since allegations of previous sexual behaviour are frequently spurious or irrelevant. The difficulties mentioned by the judges for dealing with applications pre-trial were clearly not insuperable. J14 explained how this could be arranged.

Well, at the PDH, bearing in mind there's going to be quite a delay between the PDH and the trial, it would be very easy for the defence to say, "Well, we are going to make a section 41 application, so we'd like a date for that." So what would then happen is, of course, listing would allocate a judge and the judge at PDH would fix a date convenient to that judge to hear the application. And then the judge would say, "Well, 14 days before that [hearing]," or whatever it may be, "the defence must lodge the application."

He recognised that the problem would then be that the defence might well not lodge the application by that date. There was a widespread problem in the CJS of counsel ignoring judges' orders. Rape cases were by no means special in this respect. He thought that sanctions were necessary to stop this happening: perhaps the judge should disallow a proportion of the legal aid fee. Wasted costs orders were regarded as, in practice, too cumbersome: "a convoluted, complex operation – most of us really don't bother with them. They're more trouble than they're worth."

Written applications

The Crown Court Rules provide that applications should be made in writing before the trial but orally once the trial has begun. Barristers were disinclined to put applications in writing since this pinned them down – which is, of course, precisely what was intended. J2 had adopted a more stringent approach than that required by the Rules, which might be thought to represent a model of good practice. He would ask for submissions made during the trial to be in writing as well.

If there's a serious issue arising on section 41, where the Crown can't agree, I do say that I do want a written submission put before the court to consider it. It's not that they can't give it orally,

but it clarifies their minds, what the issue is going to be, because if it's verbal it can be just a lot of waffle, can't it, really, I mean putting it in writing does show how clear it is.

He would also require the written submission to be shown to the Crown with a view to obtaining an agreement upon which questions should be allowed. Having heard from both sides, he would then, in accordance with section 41, formulate the questions which could be asked and set them out in writing.

You see counsel can get carried away easily with one answer, and then you get a breach of section 41, and then you're faced with the problem of starting the trial again, which you don't want to, you know.

Has section 41 been effective?

Several barristers felt that section 41 was proving to be an effective instrument for controlling the flow of sexual behaviour evidence. B1 considered that it needed to be better enforced. She suggested that all PDH forms should include the question, 'Is this a sex case where Section 41 may apply? Yes/No –What is the time sought to serve the notice?' This would focus the mind of defence barristers. At present PDH forms differed from court to court and not all courts included such a question on their forms.

The barristers and some judges were in no doubt that the new provisions were helpful for complainants but were divided on whether section 41 was likely to make any difference to conviction rates. Judges who expressed a view were not optimistic. One barrister thought that the law made no difference and that conviction rates would rise only if police procedures were improved. It was also said that in a rape case "the problem is that it's difficult to know which party is telling the truth" (B2) and no legislation could overcome this. However, two barristers who mainly prosecuted were far more positive. B5 believed that the new law would encourage genuine complainants to come forward and give their evidence in court, that it would and had already brought about a change in judicial attitudes and that this would lead to a change in jury attitudes, all of which would have an eventual bearing on conviction rates. B1 also thought that if victims knew that they would not be subjected to unnecessary and unpleasant cross-examination, then not only would they be more likely to come forward to give evidence, but they would make better witnesses.

Summary and conclusions

Judges and barristers were mainly in favour of legislation to control sexual history evidence as they considered that there had been abuses in the past and, without legislative intervention, such evidence would certainly be widely introduced. Amongst the judges, there were differences of view as to the relevance of sexual history but all interviewees considered that it could be relevant in some situations, not all of which necessarily fitted within the section 41 categories. Those opposed to section 41 considered that it was too restrictive. However, there was considerable criticism of the belief in consent exception on the ground that it was too wide and 'illogical'. There was evidence that it had led to a change in practice amongst defence lawyers in order to benefit from it.

Virtually all the judges considered that they needed a residual discretion to allow in sexual history evidence where they considered it was fair to the defence to do so. Some operated as if section 41 did contain a discretion, some were prepared to ignore the letter of the legislation and many latched on to the decision in *A*, for which there was unanimous approval and which was interpreted as giving them a broad discretion. All the six barristers who were familiar with the decision in *A* construed it widely and none considered that it was limited to situations where there was an alleged relationship between D and C. By contrast with the judges, there were two barristers who were critical of the decision and considered that it had undermined the 1999 Act.

The barristers acted strategically with respect to sexual behaviour evidence, choosing carefully whether or not to seek to deploy it. Their perceptions of judicial reactions to sexual behaviour applications differed markedly. The judges were variously depicted as very strict or very lax in their approach.

Despite the findings in Chapter 4, section 41 applications were not thought to be frequent. Shared attitudes about relevance and 'fairness' to the accused operated to bring about agreements between prosecution and defence which were not necessarily in keeping with, and may circumvent, the legislation. Judges generally ratified such agreements and might enforce them by setting boundaries to the

questioning. Given that the 1999 Act places no restrictions on prosecuting counsel's own use of sexual behaviour evidence, this consensual approach is not always contrary to the law as it stands. Even where there is no specific agreement, prosecuting barristers may decide not to oppose applications on 'fairness' grounds. In the experience of several barristers, section 41 was also bypassed in some cases by defence barristers who introduced evidence of C's sexual behaviour without bothering to make an application at all.

Given that judges with the rape ticket are supposed to attend JSB training sessions, there is a surprising lack of knowledge of both the law and the surrounding procedure in this area. Almost half the judges interviewed were unaware of the Crown Court Rules. Ignorance of the Crown Court Rules was also thought to be widespread amongst barristers.

There was considerable criticism of the Rules from both judges and barristers and no evidence that they were being widely observed. Some of the criticism emanated from defence reluctance to forego the advantage of concealing its hand until the very last moment. It is clear that, when defending, barristers feel free to ignore the Rules and there was no sanction for such failures. Thus, section 41 applications may be 'sprung on the prosecution' which is deprived of the opportunity properly to investigate the matter.

8 Sexual history evidence, reporting and attrition

Reporting rates and the ‘justice gap’ are key public policy concerns with respect to rape, which is still one of the most under-reported crimes (Kelly, 2002; Myhill and Allen, 2002; Walby and Allen, 2004). Victim withdrawal constitutes one of the major sources of attrition in reported rape cases (Kelly *et al.*, 2005). This chapter draws on data from a range of sources – Home Office statistics, interviews with victims, police officers and support staff, and questionnaires completed by support agencies – to explore the influence of sexual history evidence on these issues.

Did the law reform affect the attrition rate?

An explicit intention behind all rape ‘shield’ laws has been to remove impediments to reporting sexual crime, and the 1999 Act was no exception. The then Minister of State, Paul Boateng, made this explicit in the House of Commons.

Women – it normally is women although it might be a man – who are considering making an allegation of rape are all too often deterred from so doing, or from going through with the process of prosecution, because they are terrified of having their sexual history trawled through in a gratuitous way. The intention of the Bill is to keep as much evidence of complainants' sexual behaviour out of trials as possible. That is vital if complainants are to pursue their complaints through to trial and not to feel that their privacy is being invaded to discredit and humiliate them (House of Commons Standing Committee E, 8th Sitting, 24 June 1999).

The Government clearly hoped that a stronger regime might increase the proportion of cases proceeding to trial, and possibly decrease the number of acquittals.⁸⁶ Identifying whether legal reform results in expected and desired outcomes is notoriously problematic, since a range of other factors may influence decision-making at key points. For example, national and local policy in the police and CPS may affect both judicial disposal rates⁸⁷ and cases proceeding to trial and reporting behaviour may be affected by, for example, high profile media cases or themes in soap operas.

With these caveats in mind, Home Office data on all rape offences between 1999 and 2002 were subjected to secondary analysis to see if any patterns emerged following the implementation of the 1999 Act. Data were examined for the period 1999 to 2000 and post-implementation from 2001 to 2002. Table 8.1 shows that the proportion of recorded rape offences proceeded with remained relatively constant at about one-quarter of reported incidents, although there was a small increase in 2001.

Table 8.1: Rape offences proceeded with 1999-2002^a

Year	Notifiable offences	Proceeded with	Percentage of notifiable offences
1999	8,281	2,169	26
2000	8,580	2,046	24
2001	9,449	2,651	28
2002	10,981	2,945	27

Note:

^a Data for 1998 were unavailable from the Home Office.

It was impossible to identify any direct impact on victim withdrawals since Home Office data do not record the reasons why cases are dropped (see Chapter 2). However, the conviction rate as a proportion of reported rapes fell in both 2002 and 2003 to the lowest ever level. It will become even more difficult in the future to relate changes in the statistical data to legislative developments because the Sexual Offences

⁸⁶ Research suggesting that the inclusion of sexual history and reputation evidence increases the chance of acquittal has been noted earlier in this report.

⁸⁷ The ‘judicial disposal rate’ is the number of cases in which police investigation enables both a charge to be laid and a file to be submitted to the CPS. During this study, Project Sapphire in the Metropolitan Police, set a target to increase the judicial disposal rate for rape (a quarter of all reported rapes occur in London).

Act 2004 transforms the definition of rape and introduces a range of specific child offences. As a consequence the base numbers for notifiable offences will be reconfigured.

Considerable additional secondary analysis was undertaken, but it was impossible to isolate the impact of section 41 from wider changes, such as the Narey reforms (see Chapter 2). Since the analysis adds little to understanding of the impact of section 41, it is not reported here.

Perspectives and experiences of complainants

In-depth interviews with 19 victims⁸⁸ were carried out to explore the extent to which concerns and knowledge about sexual history evidence affected their decision-making and their experiences of trials. The sample size, although small, is considerably larger than in some other recent studies (see, for example, Harris and Grace, 1999). All interviewees were female and white, and were contacted through either a SARC or the police. The majority (15) had made an official report, and half were involved in cases that went to trial.

Two of the four women who chose not to report said that sexual history was a major factor in their decision. The same would have been true for a third woman, had the assault taken place in the UK (the assault occurred whilst on holiday in another country).

It did because I had had one-night stands, if I was out and having a good time, I had done that occasionally, and I just thought that would've been used against me. I mean I don't have to justify it, in those situations I was comfortable with it and I was consenting, but I thought it would have been manipulated to make it sound like I had consented to the drug rape. (C10: colleague, unreported)

In addition, a further five who did report said that they thought seriously about the potential of their sexual history and reputation being 'up for grabs', but chose to report despite these concerns. Sexual history was, therefore, a factor for over a third of the sample when considering whether to make an official complaint, and half of the women volunteered comments that the issue of sexual history acted as a deterrent to reporting.

Oh, I think a lot [of victims] wouldn't go [to the police] in the first place ... I was worried about that. (C13: ex-partner, conviction)

For instance it may be inferred that having had a large number of sexual partners, I am in some way immoral and that this has a bearing on whether or not I was a victim of rape... [When I reported to the police] I knew that I might be asked questions about my previous sexual history. I think I had probably picked this up from other cases that have been in the press. Although I went ahead it did make me think twice about it. My biggest fear was not being believed and being made to feel somehow dirty. (C14: acquaintance x 2, did not proceed, reason not known)

Whilst half of the women in the sample were troubled by the issue, few had accurate or clear knowledge about the legal reform, and several noted that their perceptions were primarily drawn from what they had seen on television. Most shared the perceptions of the woman quoted above that having a number of sexual partners not only gave one a 'reputation' but also in some ill-defined way implied one was less worthy of belief.

The ways sexual history plays out in the process of investigation was illustrated by four women who reported having been warned what to expect by police officers if they pursued their complaint, often at a very early point and in extremely explicit terms. Two women were also encouraged by friends to withdraw, to prevent being subjected to intrusive questioning in court.

I was warned by the police that if it made it to court my previous sexual history would be raised. It felt like a threat, although they would claim they were just being realistic. It made me more determined to pursue my case as far as possible. Other people I spoke to echoed the police. (C14: acquaintance x 2, did not proceed, reason not known)

⁸⁸ This term is used rather than complainant, as several chose not to report to the police.

I was told at the [police] station that you go to trial and they're going to basically call me all the names under the sun, and they would sort of go into my sexual history and stuff. (C15: ex-partner, guilty plea)

Of the 15 who reported, ten mentioned being asked about their sexual history. Only two described the police questioning as professional and relevant to the alleged rape. Three recalled detailed questioning about their sexual lives and two added that this was all 'written down'. A further two reported detailed – and in their eyes intrusive – questioning about sexual behaviour by forensic doctors. One was not impressed that the police had asked her friends about the state of her marriage and used their responses to justify dropping the case. The only victim in the sample who withdrew her complaint at the police stage attributed her actions, in part, to the sexual history issue.

Four encountered section 41 and/or sexual history issues during the trial process. One, who was unaware at the time what was happening, only knew that a legal argument was taking place and that she had had to leave the witness box. Her assailant was a very recent acquaintance, who tried to claim prior relationship through having sent her a text message earlier on the day that she claimed she was raped. The application was not allowed. Another interviewee was questioned by a prosecution barrister who, with the first question, compromised the intent of section 41 and the complainant herself, highlighting that the exclusion of the prosecution from the remit of the legislation needs to be revisited.

It was awful, I had no idea what I was going to be asked, and I'd never been asked this, and his first question was: "What was your first sexual experience?". And, funnily enough, it wasn't actually my boyfriend at the time. So the [prosecuting] barrister asked the question, and inevitably the answer came out, "Oh, it was a friend of mine", which obviously starts off the wrong impression in the minds of the jury already, and it sort of went downhill from there ... the defence used it as well, she was a woman, which actually I found quite disturbing! ... I'm not sure they were actually specific questions, it was more inferences that were made ... something along the lines of "So you have slept with other people before?" "Yes." "And you weren't in a relationship with them?" "Yes." And then the next line would follow "So you do have promiscuous relationships with blah-de-blah-de-blah." And that would be sort of the way that it developed ... looking back now, he was obviously trying to paint a picture of somebody who had a sort of impeccable sexual history, had only ever slept with one person and was in a relationship ... The look on the barrister's face when I answered was absolute horror. But they'd never asked the question. Unfortunately for me. (C11: acquaintance, acquittal)

Another young woman was subjected to detailed questions during the trial about previous sexual abuse. Having been entirely unprepared for this, her view about the defence was that: 'In my opinion they've got no morals, no respect'. The experience of being questioned in open court about sexual history was, unsurprisingly, difficult.

It makes it a lot harder. Harder to bear, when you've got family sitting watching, it's not something that you want to broadcast all over. (C9: current partner, acquittal)

Perspectives and experiences of professionals

Whilst the views of complainants were canvassed directly, the sample is not large, and it is difficult to draw out fully the complexity and variety of complainants' decision-making as they negotiate the legal process. However, the experiences of investigative police officers and support agencies are valuable in this respect. Between them they have contact with a large population of complainants, and are therefore able to convey a broader sense of how the legislation, the issue of sexual history evidence and sexual reputation more generally, affect the process of attrition.

There was considerable agreement among all professionals that the issue of sexual history evidence acted as a deterrent to both reporting and remaining within the criminal justice process. This was illustrated very well by one male police officer:

That is probably one of the main reasons why they don't want to go to court in the first place. I mean I bloody wouldn't! I'd be most uncomfortable if people were going to start churning up my sex life, to the point where I'd even consider not going to court. (Area 4, DI, M16)

The views of police officers

Police officers were asked how much of a factor sexual history evidence was in early withdrawals. Of the 24 who expressed a clear opinion, 17 thought it was a factor, three that it was not and four that it could be in specific circumstances.

I think that is one of the things that they are mostly concerned about. Are they going to have to stand up and reel off how many boyfriends they have had and exactly what they've done with each one? I think that does influence them quite a bit. (Area 2, CID/SOLO, F3)

A number noted that a large part of the problem was not what actually happened in court, but media and especially fictional representations of rape trials.

If I've heard that once, I've heard it 20 times. There is still a massive feeling in the woman in the street, that if she is the victim of a sexual attack, she will get slaughtered about her sexual history ... and that she will be made to look as if she was asking for it. I personally believe that the press have got a massive lot to answer for. (Area 6, DS, M3)

Overall, therefore, police officers believed that perceptions about the extent to which sexual history and sexual reputation evidence can be deployed in rape trials affected both the reporting of rape and decisions about withdrawal. Officers took different positions about how they responded to this. Some commented that they were brutally honest from the outset, whereas others argued that such an approach was likely to encourage withdrawal.

I'm quite honest, really, and perhaps I'm too honest when they come in, because I'll tell them exactly what's expected from them, and I would tell them straight that I need them to be honest because I can't operate on the fact of them being dishonest and that if I find something out that isn't true then I will come back and confront them with it. (Area 1, DC, F8)

If you told a rape victim every mortal thing at the beginning, they'd be just – they'd never come back to the police station. They'd be appalled, by everything, if you gave them all that information at the beginning. (Area 2, CID/SOLO, F2)

The range of practice and limited awareness of the statute within this group of officers illustrates the ease with which sexual history can become part of case files, and thus available for disclosure to the defence. It was also of concern that a significant minority of officers apparently introduced warnings about sexual history in trials, even during the statement taking process. Whatever the underlying intention in doing so, this is all too frequently interpreted by those reporting rapes as a message that police officers do not believe them and/or that there is little commitment in the police to investigating their complaint seriously. Equally worrying was the fact that, whilst several officers stressed how critical it was for complainants to provide honest and complete accounts of the event and the circumstances prior to and following it (for example, how much alcohol they had consumed, whether they had had sex with anyone else), such material was often seen to go to her credibility, and lead to the case being viewed in a less positive light. Rape victims are acutely aware of this 'no win' situation, and either choose not to report or withdraw when, in their eyes, the principal focus becomes their behaviour or morality.

The views and experiences of support agencies

Representatives from Victim Support (VS), the Witness Service (WS)⁸⁹ and Rape Crisis Centres (RCC) were asked about the contexts in which the issue of sexual history evidence arise in their support of survivors of sexual violence. The three organisations have a range of contacts with recent rape victims. RCCs are the most likely to have contact with those who choose not to report, although a few also contact VS. The WS, unlike the other two, only has contact with those whose cases go to trial. None operate a 'proactive' contact model (see Lovett *et al.*, 2004), meaning access to support is dependent on victims/survivors either agreeing to be contacted by VS or the WS or seeking contact themselves through RCC or VS. There was also considerable variation in the number of recent rape cases each service had worked with in the previous 12 months.

⁸⁹ Whilst the WS is technically part of VS, responses have been separated because the two services play a different and very specific role in supporting rape complainants.

The questionnaire to support agencies sought to ascertain the contexts within which the issue of sexual history was raised by service users and the frequency. Respondents were also asked to provide specific examples at various points. Table 8.2 presents a summary of the data, combining responses from the categories 'a lot' and 'sometimes' (other possibilities were 'rarely' and 'never') from all three services. The table reflects the various points in the process at which services have most contact with complainants.

Table 8.2: Whether and how the issue of sexual history is raised by service users

Contexts in which sexual history raised	RCC (n=16)		VS (n=39)		WS (n=18)	
	N	%	N	%	N	%
<i>Survivors raise it</i>						
A lot/sometimes	11	69	25	64	8	45
<i>Whether to report to the police</i>						
A lot/sometimes	11	69	5	13	N/a	N/a
<i>Whether to withdraw a complaint</i>						
A lot/sometimes	10	62	21	54	N/a	N/a
<i>Police/CPS decisions to discontinue</i>						
A lot/sometimes	9	56	16	41	N/a	N/a
<i>Prospect of giving evidence</i>						
A lot/sometimes	9	56	24	61	4	22
<i>After having given evidence</i>						
A lot/sometimes	7	44	17	43	6	33

Notes:

1. Percentages based on full sample.
2. 'Rarely/never', responses and 'no' or 'missing data' are not presented.

These data show that sexual history evidence is not an esoteric concern that exercises legal scholars and feminist advocates, but a live issue for victims/witnesses arising at all stages of the legal process. This adds weight to findings in previous sections that, for some, it is an important factor in their decision to report and/or withdraw their complaint. The role of sexual history evidence in the early stages of attrition is illustrated by the short case examples provided by respondents. The first set relate to the decision not to report.

A long telephone discussion and support session with a woman who would not report to the police because her past sexual history [being used] would ruin her present life. (RCC2)

Young woman, abused in childhood, recently raped again by father. Feels sexual history will be examined in detail in court. (RCC6)

A woman who was raped a few years ago, reported, went to court and sexual history evidence was used and reported in the local paper. This woman was raped again several months ago and would not report because of what happened the first time. (RCC11)

A Muslim woman was concerned it would transpire in court that she wasn't a virgin before it happened and the consequences for her family. (VS16)

Client raped by ex-husband after having dinner with him, has three children by different fathers, felt that she would be judged on her acceptance of dinner and by having several past partners. (VS33)

For these women and many others in similar cases, the prospects of either the context of the events being used to deny the legitimacy of the assault or their previous sexual lives being scrutinised acted as powerful deterrents. Few service providers (see later) could provide assurances that their fears would not

be realised. The issues women believed would be held against them or revealed suggest that the construction of the 'good/bad' woman continues to function as a filter, not least for victims/survivors themselves. The questionnaires contained numerous examples of women anticipating that, if they reported, their victimisation would be deemed less serious or less believable, but perhaps most importantly for this study, that their behaviour would be scrutinised in public in ways that would deprive them of dignity and respect. They feared cross-examination in a public courtroom, full not only of strangers but also, most significantly for them, of partners, friends and family members from whom they had chosen to keep intimate knowledge private.

Young woman raped by ex-partner was worried that all the intimate details of their relationship and previous relationships would be brought up in court. She was determined though that she should go through with it. Luckily he pleaded guilty to a lesser charge of sexual assault. (VS8)

Young woman worried about her parents finding out about her sexual history. (RCC2)

A woman who feared her friends/neighbours would find out about her past life as a prostitute. (RCC4)

Several VS respondents also noted a new tendency, which was the threat that defendants who were known to the women concerned (the majority) might bring up those women's sexual history in court to pressurise them into withdrawing. The following example illustrates that such threats can, on occasion, translate into action, beyond the confines of the CJS.

Current case involves victim who was drugged by a man with whom she was having affair. He is her neighbour. After she told the police, he has been telling all the neighbours about what she has told him in confidence regarding the other man she has slept with, trying to portray her as the local slut (her words), whilst denying that he has been involved with her. (VS1)

The highest proportion of victim withdrawals in the early investigative stage are directly attributable either to ill thought out and extensive police questioning on previous sexual behaviour or to anticipation of it being an issue in a future court case (Harris and Grace, 1999; Kelly *et al.*, 2005). These issues continued to be matters of concern for those who remained in the process, and were anticipating giving evidence in court, and in some instances could contribute to late withdrawals. Several WS respondents noted that a question often asked by complainants during court familiarisation visits was whether they could withdraw at this stage, due to fears about sexual history issues. They also pointed out that this was a concern on the day of trial.⁹⁰ As the data in previous chapters have demonstrated, no complainant, other than the few where a section 41 application has been allowed pre-trial, can have any certainty about these matters until after they have completed their testimony. As the example cited here illustrates, some are left feeling sullied by the tone and content of defence cross-examination, with a profound sense that the trial process itself was unjust and that their character, rather than the denial of their sexual autonomy or the behaviour of the accused, had been the focus of inquiry.

Survivor lost case – could not reconcile herself to lack of justice, left with very negative feelings, she had to parade around court in the dress she had been wearing. (RCC13)

Reinforcing findings from other chapters, both RCC and VS respondents noted that cases involving rape by current and ex-partners, and those where an adult complainant had a history of sexual abuse in childhood, could be especially problematic.

The examples from the questionnaires, only a few of which are presented here, show that alongside a sense of unfairness and public embarrassment, what complainants feared and objected to most was the invasion of their privacy and the usurpation of their right to reveal or not reveal life events and actions which they – and most citizens – would deem private. The victims interviewed were unanimous in their belief that revelations – such as that they were not a virgin, had an early pregnancy, worked in the sex industry, had multiple sexual partners – were an invasion of privacy, invariably had nothing to do with the events in question, and were used by the defence to imply something negative about their character and

⁹⁰ A number also suggested that many complainants had been unprepared for being asked about sexual history evidence, and were shocked, distressed and/or angry having completed their testimony. This raises the uncomfortable question of whether some who proceed to trial do so in ignorance of what the trial process might include.

credibility. The fact which was most likely to prompt withdrawal was that such matters would be a matter of public record in a context where those they cared most about would be present.

Knowledge of the law

A key issue with any new legislation is the extent to which practitioners understand it and can advise others in relation to it. Whilst not one of the ten specific questions posed for this evaluation, the tender document did specify an interest in the knowledge of the new law amongst complainants, professionals and the wider public. The knowledge of legal practitioners was dealt with in the previous chapter.

Police knowledge

All the 40 police officers interviewed had some direct involvement in rape cases, either being specialists who undertook statement-taking, victim liaison (SOIT/SOLO) officers, investigative CID officers (CID/DC) or liaison officers with SARCs. Given this, it is noteworthy that knowledge of section 41 was very limited. Only two could provide a clear outline of the provisions, with a further four having some sense of the current situation. More than half noted that they knew very little, and more than a quarter responded in ways that suggested their knowledge, and therefore their practice and any advice they might give, was less than informed.

I'll be totally honest, I haven't got a clue ... that's completely thrown me now – maybe I should know that. (Area 4, DC, F13)

Funny you should say that, because I've been told nothing – a friend of mine has just been on the latest sexual offences course and she came in yesterday and I said "What are the guidelines now?" and she said "I've no idea, they've not told us." We're just not kept up-to-date. (Area 1, DC F7)

My very, very brief understanding is that the victim's previous history won't be divulged. Am I right? (Area 2, CID/SOLO, F3)

There was no consensus amongst police officers about the impact of section 41, with only two arguing that it had had a positive impact.

Yes, I've recently had a case where they couldn't bring in the sexual history which was much better for the victim ... she felt more comfortable when she knew she wasn't going to get a particular line of questioning. (Area 2, CID/SOLO, F4)

Many more believed that there had been little if any impact, and also cited cases where, in their view, evidence had been admitted which was not relevant to the case at hand.

I've just done a big case ... and the defence made applications to get all of their previous history from some psychologist, psychiatrist they'd seen, and the judge said "Yeah". Bear in mind it had nothing to do with the abuse they'd suffered, it was something completely different. (Area 1, DC, F8)

The interviews with police officers also confirmed that the issues of sexual history and sexual reputation affected their own investigative practice. There was a gulf between officers who sought to limit the presence of these issues in evidence and those who sought to obtain extensive information about sexual history. In both cases, however, sexual history material would be included in case files.

I would ask a victim about their previous sexual history, have they made any other allegations, and I would explain to them why, and I would ... tell them that ... I can't guarantee that anything's kept quiet, anything we say in that room I have to put on some form or another, I can't give them 101 per cent guarantee that it won't go any further. (Area 1, DC, F8)

We don't have to put anything in about the person's history, sexual history and unless the person specifically wants something putting in, I tend to put very little in about their past sexual history unless it aids the girl's case. (Area 2, CID/SOLO, F11)

There are many complex questions raised by these statements, echoed by several complainants who were bemused and unimpressed by the extent of police questioning in this area. How the police approach initial interviews and statement taking has immense implications, not just for the level of rapport with the complainant, but also for potential evasions of section 41 through disclosed material from the prosecution. At the same time certain facts do need to be established. There is clearly a need for comprehensive guidance notes and local monitoring, on this topic, since it is not 'common sense' what good practice should be.

Support agencies

Only a small minority of respondents in RCCs, VS and the WS viewed themselves or their colleagues as very knowledgeable about the legislation, with less than a third thinking anyone in their agency could provide an accurate explanation of section 41. Yet over half of VS respondents and almost three-quarters of those from RCCs said they were asked often or sometimes to explain the current law. Ironically, a higher proportion of WS respondents thought they or a colleague could provide an explanation, but this was invariably followed by a disclaimer that their role precluded giving legal advice. It is an open question whether such enquiries should be deemed 'legal advice' and, given the still minimal contact in England and Wales between complainants and prosecution lawyers, it means that there is still no one whose role and responsibility it is to provide this information. The true extent of respondents' knowledge may be even lower, since the answers to a question on the circumstances in which sexual history evidence is currently allowed revealed only four out of 73 replies that accurately reflected the provisions of section 41. About a third responded in more general terms such as 'if deemed relevant' or 'on the discretion of the judge', but the majority left the question blank or stated that they did not know.

Over two-thirds of each of the support agencies thought that it was not possible to advise complainants about whether or not they would be questioned about their sexual history. A reluctance to provide advice was well founded to the extent that the data demonstrate that decisions about admissibility are primarily made at trial, and that judicial interpretations of the reach of section 41 range from narrow to broad. Complainants, however, remain poorly served, with some professionals overemphasising the extent to which questioning will take place, others offering unrealistic assurances that such evidence will not be heard, and most being confused about the statute and current practice.

There was almost unanimous support for a succinct explanation of the legislation in non-legal terms, although as Chapters 3 and 7 make clear, this would be a less than simple task. Others argued for a video drawn from actual cases illustrating what it was and was not permissible to ask, and for the police and prosecutors being completely honest with complainants about the law. The difficulty of this issue is shown by the fact that others noted that realistic representations of what might actually happen could prompt further withdrawals.

General assessments of section 41

Complainants, police officers and the support agencies expressed considerable disquiet about the issue of sexual history evidence in response to an open question that invited comments on and assessment of the current situation.

It makes me very angry that justice for victims of rape and sexual assault is so hard to attain. The threat of having your previous sexual history dragged up in court just makes a horrendous situation a whole lot worse. (C14: acquaintance x 2, did not proceed, reason not known)

What has my past sexual history got to do with the incident that's happened now? You know, whether I'm the sort of person that says never on a first date, or I want to go out and, to put it bluntly, screw every man in sight. What has that got to do with somebody attacking me? It's not relevant ... It's nothing to do with it. I would have seen that actually as a gross intrusion into my privacy. (C4: stranger, undetected)

Women who actually have nothing to fear are still frightened of those questions. Even when a woman is believed and he is convicted she still feels victimised by the court process, questions etc. The woman is 'on trial' and always says she would never go through it again and advises others not to go forward to trial. (RCC15)

It is hard enough for service users to give evidence in a rape trial, let alone have to endure being asked questions about previous sexual history. They have great difficulty in accepting that aspects of their sexual history, maybe going back 20 years, can have any relevance in relation to the current situation. (VS30)

Summary and conclusions

- Section 41 has had no discernible effect on the attrition rate in rape cases.
- Victims did weigh the issue of sexual history evidence in their decisions to report and, later on, whether to withdraw.
- Complainants regarded use of sexual history evidence in trials as unjust and an invasion of privacy.
- Police officers, SARC staff and support agencies agreed that sexual history evidence plays a part in attrition, especially, but not exclusively, in the early stages.
- Complainants and police officers provided evidence of variable and problematic practice in the investigation process, which both played a part in withdrawals and led to sexual history evidence being part of the prosecution case.
- Few practitioners, and no complainants, had a comprehensive command of the legal reform.
- Many professionals felt it was impossible to give accurate advice to complainants on this issue and a minority were providing inaccurate information.

What this chapter establishes is that the hoped for reassurance about limitations on the use of sexual history evidence under a new more restrictive regime is not evident amongst complainants, and still less among the professionals they encounter. If anything, the latter were more cynical, with most arguing that the reform had made little if any difference, and that whatever its intentions, it would be swiftly undermined in legal practice.

9 Conclusions and recommendations

This chapter begins by returning to the ten research questions and presenting findings that address them directly. It then reports on findings which do not directly relate to the original framework, but are nonetheless important outcomes of this research, before examining certain promising practices⁹¹ that were observed or suggested by respondents. The chapter concludes with a series of recommendations designed both to strengthen the statute itself, and to encourage an interpretation more in line with Parliament's intention, which was to limit the use of sexual history evidence.

The original research questions

Attrition

- 1. The extent to which complainants are aware of, or are made aware of, the provisions of section 41 and/or the special measures available in the Youth Justice And Criminal Evidence Act and the impact this knowledge had on their decision to continue with the trial process.**

These issues are dealt with in Chapter 8. Few complainants or those who advised them had an accurate knowledge of section 41. Rather, both worked with a much more popular notion that trials represented an 'open season' on complainants, with relatively little control on the type or extent of questioning. This inaccurate knowledge had an impact on some complainants, playing a part in their decisions either not to report the assault at all, or to withdraw their complaint. The uncertainty evident amongst most professionals, including police officers, coupled with awareness that judicial interpretation was not consistent, militated against any more measured opinions being proffered.

- 2. The effect of section 41 on the attrition rate of sex offence cases; improvement being measured by the proportion of reported cases resulting in conviction.**

Chapters 2 and 8 outlined the difficulties inherent in isolating any clear impact of section 41 on the attrition rate. Since the conviction rate for England and Wales, as a proportion of reported rape cases, has continued to fall since the 1999 Act was implemented and reached an all time low of 5.3 per cent in 2003⁹², there seems to be little evidence of any positive effects according to this measure. Data from the national case tracking and local areas (see below) suggest that sexual history evidence often continues to play a part in acquittals.

The handling of previous sexual history evidence by the courts

- 3. The context in which the defence apply to use evidence or raise questions about a complainant's sexual behaviour, the use of section 41 subsections, and the relationship between the use of section 41 and consent issues.**

The lack of documentation of section 41 applications, attributable to the vast majority of applications being made verbally at trial, has limited findings in this area. However, the examination of the case law (Chapter 3), the trial observations (Chapter 6), the interviews with judges and barristers (Chapter 7) and, to a lesser extent, the case-tracking data (Chapter 4) and CPS case files (Chapter 5) have shed interesting light on these questions.

Attempts to introduce sexual history evidence, both through the formal section 41 process and outside it, were made in a variety of different ways, of which the following seemed to be most common.

- *Previous rape/abuse complaints*

⁹¹ This concept, drawn from the US Department of Justice website documenting the Violence Against Women Act, is preferred to both good and best practice for its recognition that practice is dynamic, and constantly evolving.

⁹² The last year for which complete data are available.

CPS case files and interviews with professionals revealed that those involved in the pre-trial process, including police officers, CPS lawyers and barristers, appeared to seek out such evidence. Defence barristers sought to introduce it to undermine C's credibility. Insufficient attention appeared to be paid to whether previous allegations were demonstrably false.

- *Previous or existing relationship with the accused*
Both CPS files and trial observations demonstrated that defendants frequently alleged a prior relationship, despite firm denials by the complainant. Where C admitted such a relationship, and especially where D was a current or ex-partner, attempts were made to explore the sexual content of it, as well as specific occasions when sexual intercourse took place, in order to argue that consent was present on the occasion in question. Where a previous relationship was alleged, questioning sometimes took place without a section 41 application being made.
- *Motive to lie*
Both CPS case files and trial observations showed that attempts were made to introduce sexual history in order to challenge C's credibility by suggesting she had a motive to lie. Such claims are easy to concoct on the basis of the tired stereotypes and myths of rape. Thus, for example, attempts were made to introduce evidence of relationships with other boys or men, the intention being to suggest that fears that such relationships might be revealed gave rise to the rape allegation. In *R v Mokrecovas* the Court of Appeal saw through these ploys, but the decision in *R v Martin (Durwayne)* is bound to encourage such claims.
- *Complainants aged under 16*
Contrary to what might have been expected, the data show that sexual history evidence was commonplace in cases involving young complainants. It was standard practice for the prosecution to agree to the admission of evidence of previous sexual abuse or sexual relationships and this might be admitted, for example, through a Memorandum interview, medical or social service records. Where there was no documentation, defence attempts were likely to be made to introduce, in one way or another, evidence to suggest that the girl was promiscuous or at least was not a virgin and had had sexual relationships with others.
- *Relationships with unrelated third parties*
Trial observations showed, again contrary to what might have been expected, that C's sexual history with third parties might be introduced in order to discredit her even where there was no connection to the alleged events. Thus, for example, in one trial (Ncle20) where D was alleged to have raped his sister, defence counsel, without seeking the judge's permission, asked a witness if C had been having an affair with a customer. This was entirely irrelevant. The attitude of some judges to relationships with third parties following *R v Mukadi* may serve as an encouragement in this respect.

Thus, sexual history is used both to undermine credibility and to raise a doubt in the jury's mind on the issue of consent. As has frequently been pointed out, credibility and consent are interwoven in rape cases.

Another important finding is that section 41 applications do not necessarily refer to the legislation at all, let alone to the specific subsections of the statute. Using data from the case tracking (Chapter 4), CPS case file analysis (Chapter 5) and trial observations (Chapter 5), the following conclusions can be drawn.

- Belief in consent under section 41(3)(a) in combination with section 42(1)(b) is regarded by the defence as a useful method for introducing sexual history evidence.
- Section 41(3)(c) was specifically referred to in seven cases across the samples, and is being interpreted as a similarity provision without account being taken of its strict requirements.
- There was some use of section 41(5). This was either as part of a deal with the prosecution, whereby the prosecution adduced evidence which the defence could then take up in cross-examination, or alternatively by the defence cross-examining C in order to lead her to make claims which could then be challenged.

4. The frequency and context of cases in which section 41 applications are allowed.

In Chapter 4 the prospective case-tracking data showed that section 41 applications were made in just under a quarter of all the cases tracked and almost a third of those reached jury trial. Applications had a two in three chance of being granted. They were more likely to be made, and allowed, in the context of an alleged prior relationship. Rejections fell into several categories: where judges were not convinced that the assertion of previous relationship had any validity; where the application was vague; and where the application clearly fell outside the exceptions laid out in the statute. This rate of application and high success rate contrasts markedly with the perception of some legal practitioners that applications are rare and unlikely to succeed (see Chapter 7). At the same time, it is a lower proportion than that documented under the previous provision (section 2 of the Sexual Offences (Amendment) Act 1976) by Adler (see Chapter 1). The caveat here, though, is that sexual history evidence was also introduced outside section 41.

5. The impact of the House of Lords' judgement in *R v A* on the courts' permission/refusal of evidence on prior sexual relationships between complainants and defendants.

The absence of systematic documentation, and any requirement to create a public record of applications and rulings⁹³, makes assessment of the ways in which decisions are being made difficult. However, the trial observations (Chapter 6) provided some insights.

Where there has been a previous relationship with the defendant, the judicial approach to cross-examination was generous. The defence would usually be permitted to cross-examine about previous incidents where sexual intercourse allegedly took place. The decision in *R v R*, where cross-examination was allowed about alleged incidents taking place four months before and a year afterwards, illustrates that these incidents do not necessarily have to be close in time to the alleged rape. Even where the defence claims that a sexual relationship exists or existed and this is strenuously denied by the complainant, cross-examination may be allowed on a broad basis and the prosecution will not necessarily oppose this. However, the trial observations also show that where there was a relationship, or this was alleged, an application under section 41 was not necessarily made at all. The prosecution introduced the evidence and the defence went on to cross-examine without any reference to the 1999 Act being made. Indeed, in one case (Lon12) the judge confessed subsequently that it would not have occurred to him that section 41 was relevant in these circumstances had the researcher not been there.

6. The substance of defence arguments where leave has been granted to admit evidence of previous sexual relationship(s) when belief in consent is an issue.

Seven of the observed trials involved allegations of a previous sexual relationship with the accused. In three of these section 41 was ignored altogether and no application was made. In the three cases where an application was made, and information was available, it was argued that C's sexual behavior with D in the recent past and in the context of an ongoing relationship was relevant to his belief in consent. In two cases C denied that there had ever been such a relationship, and in one case maintained that it had ended years previously. By arguing that a relationship existed at the time of the events in question, D was then able to put forward belief in consent on the basis of that relationship.

The trial observations suggest that the process by which applications are made and granted where belief in consent is at issue involves working backwards from the questions which counsel seeks to ask. In other words, defence counsel outlines what questions he or she would like to put to C and then looks for subsections into which they can be squeezed. This is often with support from the judge and even, on occasion, the prosecution, especially in the context of oral applications which do not necessarily follow the logic and reasoned justification envisaged by the legislature. Rather, as one judge put it, they tend to be muddled and judge and counsel on both sides can be observed working out a justification in keeping with the statute.

⁹³ This was an issue during the scrutiny of the Bill in Parliament, but the outcome was limited to a requirement to enter ruling into logs in magistrates' courts only.

7. Is previous sexual history evidence admitted in circumstances used by the defence primarily to impugn the complainant's credibility?

This occurred in two different ways in the present study. There was the direct route whereby the defence openly sought to do this through cross-examination. The purpose was either to establish a motive to lie even where this was purely speculative, or to adduce evidence of previous complaints of rape even where there was no evidence that these were false. There was also the indirect route, whereby cross-examination took place about existing or previous boyfriends – particularly where young girls were involved – to suggest promiscuity or to make the statement that this girl, despite her young age, was not an 'innocent' but a sexually active female. With adult women, there was some evidence that relationships with others who had nothing to do with the case in hand were brought in with the same purpose in mind.

8. The criteria used by judges when leave is given to admit previous sexual history evidence when consent is and is not an issue.

Since there are no available written records which set out the judicial reasons for allowing section 41 applications, the information available is necessarily limited. However, the trial observations and interviews with judges provided certain insights.

- Where the prosecution and defence agreed to the inclusion of sexual behaviour evidence, judges almost invariably acquiesced but might set limits to the agreement.
- Judges sometimes admitted evidence without reference to the legislation at all.
- Judges sometimes admitted evidence about alleged prior relationships on the ground that it fell outside the scope of legislation, since the defence insisted they were not asking about 'sexual behaviour'.
- Judges tended to interpret *R v A* broadly and admitted sexual behaviour evidence on the ground that otherwise a fair trial would be jeopardised, irrespective of the provisions of section 41.
- Some judges took a broad view of section 41(5) so as to allow sexual behaviour evidence where the prosecution referred to C's sexual behaviour and might even be willing to ignore the lack of a defence application in these circumstances.
- Where sexual behaviour with the accused on previous occasions was alleged, some judges allowed in-depth questioning. In one case the judge allowed this to happen on the ground that defence counsel was already asking these questions and he could not keep sending out the jury.
- There was a reluctance on the part of some judges to exclude evidence where motive to lie was alleged, even though this related to credibility. Lord Hope's speech in *R v A* provided them with grounds for doing so.

9. The success of the legislation in controlling and guiding judicial discretion in the admission of previous sexual history.

Judges interviewed formally (Chapter 7) and informally (Chapter 6) maintained that the legislation did guide their thinking and decision-making, although some were opposed to it and were prepared to ignore its constraints. The success of the reform, however, has been undermined by *R v A*. Chapter 3 demonstrates that the Court of Appeal has, on the whole, been sympathetic to the legislation but the recent decision in *R v Martin (Durwayne)* represents a further setback. There has been much less success in structuring the practice of counsel, who consistently in different ways sought to evade the legislation and the Crown Court Rules.

10. The apparent impact of previous sexual history evidence on jury decision-making.

The case-tracking exercise has shown that there is a highly significant statistical association between an application for the introduction of sexual history evidence being made and an acquittal in cases where the complainant is an adult. Although the acquittal rate was slightly higher still where applications succeeded this finding was not statistically significant and therefore could be due to chance.

Further findings and discussion

Cases involving minors

This section reviews a number of other important findings which fall outside the original research questions but which are nonetheless highly relevant. The first of these concerns cases involving complainants who are minors. At an early stage an attempt was made to limit the study to adult cases but this turned out not to be possible. A clear finding of this research is that sexual history evidence is used in cases involving minors with or without section 41. In many instances illegal sex is not seen as evidence of abuse and subsequent vulnerability; rather, it is used by the defence to imply the sexual maturity and agency of the child or young woman. CPS files showed the extent to which the prosecution may either concur with this view or have no strategy for presenting an alternative account, with the result that cases are discontinued.

Previous allegations

The issue of previous allegations recurred throughout the data collection process, and the extent to which these were imputed as 'false' – even where, in some instances, there had been a prior conviction or admission of guilt – raises issues that need to be addressed as a matter of urgency. A recent case, cited by a CPS lawyer, demonstrated the potential ramifications for young women, many of whom are vulnerable to further sexual exploitation. A 15-year-old girl accused a 40-year-old man of rape and there was corroboration by a friend. The friend withdrew her statement. Social service files revealed three previous allegations, but the young woman had never been believed. The judge allowed the section 41 application at a pre-trial hearing and as a direct consequence the young woman withdrew.

Sadly, if anything happens to that girl in the future, I don't think anybody's going to believe her.
(CPS2)

The approach in the Michigan courts has much to recommend it in that jurisdiction defendants may cross-examine complainants regarding prior false accusations of a similar nature,⁹⁴ but only if concrete evidence exists that any prior accusation was false *and* the relevance of the evidence to the current case can be demonstrated.⁹⁵

Definitional issues

The legislation does not define 'sexual behaviour' or 'sexual experience'. This has led to difficulties and, in particular, to the inclusion of evidence which clearly implies such behaviour or experience.

Impact on attrition

Whilst it was not possible to isolate the impact of section 41 on attrition using national statistical data, much of the rest of the data – and especially that from police officers, support services and complainants themselves (see Chapter 8) – all point in the same direction. Perceptions of the intrusive nature of rape trials are a factor both in discouraging reporting and encouraging victim withdrawals. A widespread view that sexual history evidence would inevitably be introduced, and that complainants would be represented as 'sluts', was fuelled by media representations of rape trials. The wide range of data gathered for this study has shown that the influence of sexual history evidence on attrition extends beyond the decisions of complainants to the entire process of investigation and prosecution. Questions of sexual history and reputation reinforce bias and stereotypes, which in turn not only temper the urgency to investigate thoroughly, but also have a bearing on decisions about whether to proceed with a case (see Chapter 8 and Kelly *et al.*, 2005). Interviews with police officers and CPS staff, as well as CPS files (see Chapter 5), confirmed that what are now commonplace behaviours – being drunk, having sexual experiences before the age of 16 (consensual and non-consensual), and having multiple partners as an adult – were all seen to undermine a complaint of rape. These perceptions are, at worst, a form of prejudice or, at best, legacies of centuries of discriminatory requirements in rape law (Baird, 1998; Eastal, 2001; Temkin, 2002; Jordan, 2004).

⁹⁴ *People v Mikula* (1978) 84 Mich. App. 108.

⁹⁵ *People v Williams* (1991) 191 Mich. App. 269; *People v Garvi* (1986) 148 Mich. App. 565. For a similar approach by the Pennsylvania Superior Court, see *Commonwealth v Boyles* 595 A.2d 1180 (1991).

Evasion of the legislation

The research data relating to the legal process point to the many ways and routes by which both the intent and letter of the legal reform have been evaded and circumvented, and judiciary, defence and prosecution are all implicated in these processes, for example, trial observations (see Chapter 6) illustrated that the introduction of sexual history evidence in ways that by-passed the legislation. Some of these issues have been dealt with in respect of the original research questions but the procedural evasions through non-compliance with the Crown Court Rules was an extremely strong and consistent finding in several chapters. In fact, a number of judges, barristers and CPS lawyers confessed that they were unaware that these Rules existed. This is unfortunate, since the Rules were clearly developed to underpin a new regime that, through tighter requirements for applications, would make the process both more rigorous and transparent. This has not happened to date.

Positive findings and promising practices

In contrast to the broadly negative findings reported in the previous section, the research also documented support for the legislation, references to its positive impact on legal practice and the development of local approaches that have much to recommend them.

Generally speaking, a number of interviewees (see Chapter 7) noted that following the Crown Court Rules, and especially the requirement for written applications, 'focused the mind'. Trial observations confirmed this (see Chapter 6): verbal applications were often rambling and vague, seeking to find some point of sympathy with the judge, which could then be built on as the main argument. With written applications judges are in a much stronger position to assess the application and specify with some exactness what the limitations of any application that is granted are to be.

Judgements by the Court of Appeal have also often been in a positive direction, indicating an understanding of the intentions of Parliament with respect to the legislation.

More specifically, the following promising practices were identified during the course of the research.⁹⁶

- Careful case preparation by the prosecution, where, following pre-trial hearings and rulings and agreements on evidence, transcripts and videos were edited to remove material that would introduce sexual history evidence.
- Strenuous efforts made by police and CPS to find evidence that supports the complainant's account. This was especially noted where a CPS lawyer observed that the Criminal Justice System (CJS) had to recognise the 'changing face of rape' – that most assailants were known to the victim and that most defendants would mount a consent defence – and develop tools and strategies to address this.
- CPS areas requiring a report from counsel on any cases that resulted in acquittals in order to learn lessons.
- CPS efforts to discover why, if prior allegations are an issue, they were not proceeded with at the time.
- A local agreement between CPS and a SARC whereby counselling case notes are read by a CPS lawyer and only taken to a judge if they contain materials which are considered discloseable.
- Full implementation in one area of national policy ensuring that the CPS instructs counsel to be robust and challenging with respect to late and inappropriate section 41 applications.
- CPS case conferences with counsel at an early point, both to explore issues like sexual history evidence and credibility and to involve them more deeply in a case, thereby discouraging returned briefs.
- Including Forensic Medical Examiners in case conferences and providing access to case papers, if the medical evidence is to be contested.
- Where a judge decides to accept a section 41 application at trial, insisting that it be submitted in writing and subject to similar requirements under Rule 23D(2) as currently exist for pre-trial applications.

⁹⁶ A number can be attributed to the joint ACPO and HMCPS Rape Action Plan.

Two CPS offices also referred positively to a new protocol with local authorities, who will now, through their own disclosure officers, proactively seek out background material, and make an initial assessment of relevance. Whilst this may aid the CPS in discharging their legal responsibilities, it cannot be regarded yet as a promising practice. There is the risk that these processes might increase TPDs, which in turn may lead to the introduction of sexual history evidence. The extent to which these new processes and procedures are disproportionately used in relation to sexual crime, and whether they result in increased disclosures, should be monitored.

Judges and lawyers made a number of additional suggestions for introducing new practices or mainstreaming existing ones that are not directly part of the 1999 Act regime. These were as follows.

- Amending the form completed for Plea and Directions Hearings to include section 41 applications more explicitly.
- Developing local practice so that section 41 applications were heard and decided pre-trial, and that the Crown Court Rules were properly observed.
- Encouraging the defence to provide their 'Annex C' – a list of issues to be dealt with at trial and a defence statement. Currently, both are provided extremely rarely, and this puts the prosecution at a disadvantage.
- CPS lawyers, following practice in Australia, undertaking supplemental interviews of complainants for clarification.

Recommendations

Drawing upon the data in this report, the following recommendations are made, both to tighten the statute itself⁹⁷, and to make implementation more consistent.

Changes to the legislation

- Both 'sexual behaviour' and 'sexual experience' should be defined. Moreover, it should be made clear that these terms include implied as well as express behaviour (see, for example, s.409B (3) Crimes Act 1900 New South Wales).
- The embargo on sexual behaviour evidence should be applied to the prosecution as well, as is the case in some other jurisdictions.
- Consideration should be given to amending and substantially curtailing section 42(1)(b) (the belief in consent exception) to reflect both the Sexual Offences Act 2003 and the fact that it is not generally reasonable to formulate a belief in consent on the basis of past history.
- A new exception to the rule of exclusion should be inserted into section 41, allowing for evidence of previous or subsequent sexual behaviour with the accused. This exception could have a time limitation.
- There should be a clear statement in the legislation that sexual behaviour evidence is not to be admitted by trial judges other than in the exceptional circumstances set out in the legislation.

Changes to the Explanatory Notes

- Where the complainant has made previous allegations of rape, this should not be an excuse for questioning her about her previous sexual history simply because these allegations have not been proved in court. This should be made clear in the Explanatory Notes (the official guidance to the Youth Justice and Criminal Evidence Act 1999) by amending the present paragraph 150.

Procedural changes

- Steps should be taken to ensure that the Crown Court Rules are observed. There should be an absolute requirement that all applications be made in writing. Applications should generally have to be made pre-trial. Applications made at trial should only be accepted if the defence can show

⁹⁷ For a contrasting view, see Kibble (2004) who considers that the statute is "fundamentally flawed" in its non-discretionary intent, and suggests it should never have been enacted.

that they were unaware of the information on which the application is based until trial. Applications made at trial should also have to be made in writing, and the prosecution should be given time to consider the application and an adjournment allowed for this purpose if necessary. Judges should be required to give their decision and reasons for it in writing to both sides.

- Consideration should be given to C being permitted to be present at hearings of applications, if she or he wishes. This would ensure that allegations about sexual behaviour with the accused before or after the event in question or with third parties can be tested and that judges can make informed rulings. It would also mean that C would know what was in store in any ensuing trial.
- There should be a prosecution right of appeal against decisions to permit sexual behaviour evidence.

Training

- Renewed efforts should be made to ensure that the statute, and especially the Explanatory Notes and Crown Court Rules, are understood by judges and lawyers, in order to prevent circumvention by ignorance.
- ACPO should develop training and explicit guidance for police officers on how to deal with sexual history evidence both in investigative practice and when providing information and advice on the legal process to complainants.

Future research

- The prospective case-tracking mechanisms used in this study should be adapted in order to continue to monitor the implementation and impact of section 41. This study demonstrated that it is, in principle, possible to track legal practice and outcomes. The data collected should be expanded to include, at a minimum: whether C is a minor; the case outcome; and whether previous allegations by the complainant were alleged.

A modern approach

Few young people or adults in the twenty-first century have had only one sexual partner. The majority of the population, therefore, has a 'sexual history' and many people could be represented as having 'taken risks' in the sexual sphere. Yet these sexual experiences take on additional and negative meanings when introduced as 'evidence' in sexual offence trials. That they can be so used is a reminder that gender still functions as a social division, and women can easily be marked out as having a 'reputation' or being 'unreliable'. Evidential and rhetorical devices used by the defence, and unchallenged by prosecution and judge, impugn a complainant's character, rendering her testimony less credible. The attitudes underpinning these practices amount to discrimination, albeit in a subtle and widely accepted form. As one CPS lawyer put it:

I think there is still a reluctance to accept that women have the same rights to sexual freedom, if you like, that men have. (CPS1)

Section 41 was a sincere attempt to deal, through statute, with taken-for-granted, normalised gender bias. That it has proved necessary to do so despite profound changes in sexual and social mores reveals much about the resistance to change of certain expectations and constructions of femininity and masculinity, that have been termed 'constitutive norms' (Lundgren, 1995). In this sense, it should not be surprising that the legislation has been evaded, circumvented and resisted, and that the prosecution is reluctant to pursue cases which require grappling with these complex and contested areas. There is considerable resonance in Patricia Easteal's reflection that legislative change is never sufficient to "overcome the competing powerful though unwritten social and legal sub-text which continues to be revealed in struggles over rape law reform" (Easteal, 2001, p.238). Continuing to develop the jurisprudence is one requirement of the necessary transformation but it needs to be connected to wider social change so that women can exercise the same rights and freedoms as men, without this rendering them less deserving or credible as witnesses.

Appendix 1

Youth Justice and Criminal Evidence Act 1999, sections 41-43

41 Restriction on evidence or questions about complainant's sexual history

(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court-

- (a) no evidence may be adduced, and
- (b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied-

- (a) that subsection (3) or (5) applies, and
- (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either-

- (a) that issue is not an issue of consent; or
- (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
- (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar-

- (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
- (ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case 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 is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question-

- (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
- (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence-

(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

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

42 Interpretation and application of section 41

(1) In section 41-

(a) "relevant issue in the case" means any issue falling to be proved by the prosecution or defence in the trial of the accused;

(b) "issue of consent" means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented);

(c) "sexual behaviour" means any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused; and

(d) subject to any order made under subsection (2), "sexual offence" shall be construed in accordance with section 62.

(2) The Secretary of State may by order make such provisions as he considers appropriate for adding or removing, for the purposes of section 41, any offence to or from the offences which are sexual offences for the purposes of this Act by virtue of section 62.

(3) Section 41 applies in relation to the following proceedings as it applies to a trial, namely-

(a) proceedings before a magistrates court inquiring into an offence as examining justices,

(b) the hearing of an application under paragraph 5(1) of Schedule 6 to the Criminal Justice Act 1991 (application to dismiss charge following notice of transfer of case to Crown Court),

(c) the hearing of an application under paragraph 2(1) of Schedule 3 to the Crime and Disorder Act 1998 (application to dismiss charge by person sent for trial under section 51 of that Act),

(d) any hearing held, between conviction and sentencing, for the purpose of determining matters relevant to the court's decision as to how the accused is to be dealt with, and

(e) the hearing of an appeal,

and references (in section 41 or this section) to a person charged with an offence accordingly include a person convicted of an offence.

43 Procedure on applications under section 41

(1) An application for leave shall be heard in private and in the absence of the complainant.

In this section 'leave' means leave under section 41.

(2) Where such an application has been determined, the court must state in open court (but in the absence of the jury, if there is one)-

(a) its reasons for giving, or refusing, leave, and

(b) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave,

and, if it is a magistrates' court, must cause those matters to be entered in the register of its proceedings.

(3) Rules of court may make provision-

- (a) requiring applications for leave to specify, in relation to each item of evidence or question to which they relate, particulars of the grounds on which it is asserted that leave should be given by virtue of subsection (3) or (5) of section 41;
- (b) enabling the court to request a party to the proceedings to provide the court with information which it considers would assist it in determining an application for leave;
- (c) for the manner in which confidential or sensitive information is to be treated in connection with such an application, and in particular as to its being disclosed to, or withheld from, parties to the proceedings.

Appendix 2: Projected and actual data collection

Data source	Home Office data	Prospective case tracking	CPS files	Trial observation	Interviews	NGO/agencies	Survivors
Research questions addressed	1, 2	3, 4, 6	5-10	5-10	1, 2, 5-9 Criminal Justice system personnel	1, 2	1
Sampling frame	All reported rapes and outcomes – 1998-2002	All rape cases in court over 3-month period April – June 2003	30-70 files across 4 regions: 120-240	6-10 cases in four regions: 24-40	All CJS (police, judges, barristers and CPS), 5-8 per area: 20-32	Interviews with VSS, RCF and CER: 3 SARC staff: 8	Interviews: 20
Projected							
Actual	All data received	236 cases; 63% of all trials in the period	170 files surveyed	31 trials observed	34 police 17 Judges 7 Barristers 9 CPS lawyers n=69	10 SARC staff + 73 questionnaires 16 RCC 39 VSS 18 WSS	19
Data recording and preparation	Excel files	Pro formas completed by Court Managers, coded and entered on Access database	Pro formas and textual records, coded and entered onto Access database	Pro formas and detailed notes	Interviews Coding and consolidation	Coded	Coded and consolidation
Analysis	Secondary analysis	Frequency counts and cross tabulations	Frequency counts and content analysis	Frequency counts and content analysis	Content analysis	Frequency counts and content analysis	Content analysis
Coverage	National ^a	National	Regional ^b	Regional ^c	Regional ^d	Regional ^e	Regional ^f

^a England and Wales, ^b London, Manchester, Newcastle & Sussex, ^c London, Manchester & Newcastle, ^d London (Brent and Newham), Manchester, Northumbria, Thames Valley, West Yorkshire

Appendix 3

Returns from participating courts, compared to total trials as recorded by the Court Service

Where numbers of pro formas returned to the researchers and trials recorded by the Court Service are equal, the proportion of pro formas in the final column appears as 100 per cent, except when there was a nil return, where a dash appears in the final column. Where the number of cases is less in the research, it has been presumed the cases were missed, and the percentage received has been calculated. There are, however, a few instances where the number of trial pro formas exceeded those recorded centrally. Explanations for the discrepancies are offered in notes at the foot of the table.

	Court	Total pro formas received	Pro formas where PDH, no evidence offered & guilty plea	Pro formas where trials	Total trials in Court Services' records	Proportion of trials recorded by Court Services for which pro formas were returned
1	Aylesbury	2	1	1	2	50%
2	Basildon	3	1	2	3	67%
3	Birmingham	11	2	9	13	69%
4	Blackfriars	3		3	9	33%
5	Bolton	3	2	1	2	50%
6	Bradford	2		2	7	29%
7	Bristol	9	2	7	7	100%
8	Burnley	4		4 ^a	2	
9	Cambridge	0		0	0	-
10	Canterbury	2		2	2	100%
11	Cardiff	3		3	11	27%
12	Carlisle	4	3	1	2	50%
13	Central Criminal	10	3	7	17	41%
14	Chester	7	1	6	6	100%
15	Chichester	6		6	6	100%
16	Derby	7		7	7	100%
17	Doncaster	0		0	0	-
18	Exeter	2		2	2	100%
19	Gloucester	2		2	3	67%
20	Great Grimsby	4	1	3	3	100%
21	Inner London	4	1	3	10	30%
22	Ipswich	10	3	7	8	88%
23	Isleworth	8	5	3	3	100%
24	Kingston-upon-Hull	1		1	3	33%
25	Kingston-upon-Thames	3		3	6	50%
26	Leeds	3		3	5	60%
27	Lewes	2		2	5	40%
28	Lincoln	4	1	3	3	100%
29	Liverpool	1		1	16	6%
30	Luton	3	1	2	5	40%
31	Maidstone	1	1	0	5	-

32	Manchester (Crown Square)	4	2	2	3	67%
33	Newcastle-upon-Tyne	14	5	9	9	100%
34	Northampton	12	8	4	4	100%
35	Norwich	2		2	2	100%
36	Nottingham	4		4	6	67%
37	Oxford	5		5	5	100%
38	Peterborough	1		1	2	50%
39	Portsmouth	2		2 ^b	1	
40	Preston	5	1	4	6	67%
41	Reading	1		1	3	33%
42	Sheffield	4	2	2	3	67%
43	Shrewsbury	0		0	1	0%
44	Southampton	4		4	4	100%
45	Southwark	0		0	0	-
46	Stafford	1		1	5	20%
47	Stoke-on-Trent	0		0	1	0%
48	Swansea	10	3	7 ^c	4	
49	Swindon	1	1	0	1	0%
50	Taunton	6	3	3 ^d	1	
51	Teesside	8	1	7	8	88%
52	Warwick	1		1	3	33%
53	Winchester	3	1	2	2	100%
54	Wolverhampton	8		8	13	62%
55	Wood Green	2		2	8	25%
56	Woolwich	3		3	4	75%
57	Worcester	3	1	2	3	67%
58	York	6	1	5	8	63%
	Unknown court	2		2	N/a	N/a
	Total	236	57	179	283	63%

^a Burnley includes one case that may not have been included by the Court Service (defendant found guilty under disability and order for admission to hospital under Section 5 Criminal Procedure (Insanity) Act). It is unclear why the Court Service did not include the second additional case.

^b Portsmouth includes one case that was not among the cases recorded by the Court Service but it is not clear why.

^c Swansea includes two cases where the outcome was unknown and one judge-ordered acquittal, but four definite jury trials (one of which ended in a retrial).

^d Taunton includes one case that was discontinued by the prosecution and may not have been counted by the Court Service, but two definite jury trials.

Appendix 4

Glossary of references to law reports

AC	Appeal Cases
All ER	All England Law Reports
C & P	Carrington and Payne <i>Nisi Prius Reports</i>
Cox C.C.	Cox's Criminal Cases
Cr. App. R	Criminal Appeal Reports
Crim. L.R.	Criminal Law Review
D.L.R	Dominion Law Reports
EWCA Crim	England and Wales Court of Appeal Criminal Division
Mich.App	Michigan Appeal Court
P.C.	Pleas of the Crown
QBD	Queen's Bench Division
Stark	Starkie's <i>Nisi Prius Reports</i>
UKHL	United Kingdom House of Lords

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