Key Findings of the Report

- Almost 60% of respondents considered that section 41 was working in the interests of justice.

- No respondent (0%) considered that section 41 should be reformed to make it more restrictive.

- One respondent (0.5%) thought that trial judges were not being sufficiently rigorous in their application of section 41.

- A number of respondents expressed concern that section 41 was too restrictive, and that exclusion of relevant evidence, which could not fit through one of the four statutory gateways could result in serious unfairness to the defendant. They contended that trial judges should have inclusionary discretion in such cases, as a safety valve.

- 27% considered that section 41 was not working, chiefly due to the complexity of the existing provisions.

- 36% of respondents, bridging the groups who thought that section 41 was and was not working, considered that amendment would be beneficial to clarify overly complex provisions, and to incorporate existing case law to include an explicit guarantee of a fair trial. Even counsel handling sex cases very frequently admitted to struggling with the intricacy and opacity of the wording of the section.

- The data showed that there continues to be a troublesome overlap between previous sexual behaviour evidence under YJCEA 1999 section 41 and bad character evidence under CJA 2003 section 100, which creates difficulties for trial judges and counsel as to which to apply. This should be resolved through judgments or statutory amendment.

- Observers in the courtroom may well believe that section 41 has been flouted when it has not, because the evidence has been admitted for a different legal purpose [See below "Admission of previous sexual experience outside s41"]

- Many respondents expressed concern that a widespread lack of understanding of section 41 and how it is applied in trial courts, exacerbated by misreporting in the media of cases such as R v Chedwyn Evans, could deter complainants from coming forward to report sexual assaults to the police.

- There was a wide and thoughtful consensus amongst barristers that restrictions on previous sexual behaviour evidence was warranted, to eliminate questioning based on stereotypes and myths in sexual assault trials.

Further Details

- Of the 565 complainants, 144, 25%, involved applications being filed under section 41.

- Of the 144 section 41 applications 105, 73%, resulted in questions by the defence being allowed, either by being agreed between counsel, or being granted by the court in full or in part.

- Thus of 565 complainants in the sample, 144, 18.6% of complainants in the sample were the subject of section 41 agreements or orders.

- Note The 18.6% ratio of complainants to applications is very likely to be significantly overstated due to the cautious methodology adopted in quantifying the data. Nevertheless even 18.6% falls well short of the persistent claim that sexual history evidence is adduced in around one third of trials

Observations

- The data disclosed that defence counsel did not make applications lightly; in 35 cases counsel considered an application but decided against it. They saw section 41 as useful in focusing minds on the relevant evidential targets of such cross-examination.

- In accordance with the obligations of all advocates under the Criminal Practice Directions to agree any matter possible for efficient trial management, counsel sought together to devise ways of providing the jury with evidence, which was properly admissible, without the defence having to confront the complainant with it in cross-examination. This was done in 25 (17%) of applications, achieved either by the prosecution leading the evidence, or referring to it in opening the case, or through the police interview, or an agreed statement of facts.

- In other cases prosecutors did not oppose the section 41 application because the evidence clearly was admissible. This fulfilled Crown advocates' constitutional obligations as ministers of justice to protect the defendant's right to a fair trial.

- Prosecuting counsel and trial judges scrutinised applications very carefully, as evidenced by the number of applications in which only some questions were permitted.

- No previous study has looked at the grounds for applications. Significantly, section 41 was most frequently invoked in applications to admit previous sexual behaviour evidence on grounds which did not pertain to consent, which 'rape shield' laws are designed to intercept on the ground of impermissible stereotypes.

Admission of previous sexual experience outside s41

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

There were 223 cases in this part of the sample in which:

- 200, 89.68%, 90% no additional questions were permitted by the court.

- 13, 5.82%, 6% a line of questioning was permitted.

- 10, 4.48%, 4% cases some questions were permitted.