Executive Summary

This is the largest and most detailed empirical study ever conducted of the operation of section 41 of the Youth Justice and Criminal Evidence Act 1999, governing cross-examination of sexual assault complainants on their previous sexual behaviour, in trials across England and Wales. The rich data was collected from the professionals uniquely placed to know exactly what happened before and at trial: the barristers who prosecuted and defended in the cases in the sample. The research enabled insights into daily practice, including legal arguments made in closed courts in section 41 applications, and discussions and agreements between counsel outside the courtroom.

Data[1]

- An online survey of CBA members yielded 179 responses, and provided a sample of:
  - 377 sexual assault cases,
  - involving 565 complainants,
  - which proceeded to trial in 105 Crown Court centres across England and Wales,
  - conducted by 166 barristers, both prosecuting and defending,
  - in the 24 months immediately prior to November 2017.

- The case sample, unlike previous studies of the operation of YJCEA 1999 section 41, encompassed:
  - all sexual offences,
  - all genders, and
  - all age groups of complainants, from adults to children under 13.

  The nature of the cases, and the subject matter and handling of section 41 applications, were explored in depth by the questions.

[1] Numbers are rounded up or down for the purposes of this summary only; the data in the full Report is presented to the second decimal point.

- 140 barristers contributed a maximum of ten of their most recent cases to the sample. 66% had both prosecuted and defended in those cases. It is very likely that many respondents who only prosecuted or defended in the cases they contributed performed the opposite role in other cases they had conducted.

- That a substantial majority of criminal barristers both prosecute and defend marks one of the distinctive strengths of the English and Welsh bar: they have a uniquely balanced view of the operation of the criminal justice system and its evidential and procedural rules, from both sides of the court room. This breadth of experience is reflected in the data collected in this study.

Key findings

Is section 41 operating in the interests of justice?

- Almost 60% of respondents considered that section 41 was working in the interests of justice, including the majority of those barristers identified as defending only in the case sample. Only 27% considered that it was not working.

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

- Not a single respondent (0%) considered that section 41 should be reformed to make it *more* restrictive.

- Only 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.

- 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 to the defendant. Even counsel handling sex cases on a daily basis admit to struggling with the intricacy and opacity of the wording.

- 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.

- 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.

Section 41 application data

- Of the 565 complainants in the sample, 144 applications were filed:

    - ❖ of which 105 (73%) resulted in a measure of success for the defence, either by being agreed between counsel, or being granted by the court in full or in part.

- ❖ So 18.6% of complainants in the sample were the subject of section 41 agreements or orders.

- ❖ NB: 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.

- The data disclosed that defence counsel did not make applications lightly, and that 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 often achieved 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.

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

- Throughout the application process a constant consideration for counsel and the court was the right of a defendant to a fair trial, as read into section 41 by the House of Lords in *R v A (No 2)* (2002).

- 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.
- The most frequent gateways[2] invoked in applications were:

    - ❖ that the evidence was relevant to an issue in the trial which was not an issue of consent (71, or 49%) and

    - ❖ that the evidence rebutted evidence already led by the prosecution (36, or 25%).[3]

- In 35% of applications, the defence filed the documents after the prescribed time limit of 28 days. The dominant reasons given for non-compliance were the chronic problem of piecemeal and delayed prosecution disclosure, or the issue arising late in the pre-trial process or in the trial itself.

- There was no evidence of the defence attempting to manipulate the court process or delay applications as a tactical ploy to prejudice the prosecution. Nor was there evidence of the prosecution being unable to respond adequately to late applications; the contrary was volunteered by several respondents including those prosecuting.

- Some also considered that the deadline for applications was usually impossible to meet. That deadline has now been abridged to 14 days so it is likely that non-compliance will become more common.

- Overall, the data confirms:

[2] i.e. grounds on which questioning on previous sexual behaviour is permissible.

[3] The prosecution is not subject to any restrictions in leading evidence of previous sexual behaviour and does not require the court's permission to do so.

- that the admission of previous sexual behaviour evidence under section 41 remains very exceptional, contrary to previous published reports;

- that when it is admitted, it is for a specific evidential target deemed to be relevant by Parliament;

- successful applications were on narrow points which could be covered very briefly, and did not authorise wide-ranging cross-examination on sexual history; and

- that trial judges and prosecuting counsel are vigilant to ensure that every effort is made to avoid causing the complainant unnecessary distress, whether through adducing the evidence through a means other than cross-examination, or through brief questioning confined to the specific point.

The law is clear: if the evidence is relevant to a fact in issue in the trial, and admissible under section 41, then the jury or magistrates must hear it.