



Ministry
of Justice



Attorney
General's
Office

Limiting the use of complainants' sexual history in sex cases

Section 41 of the Youth Justice and Criminal
Evidence Act 1999: the law on the
admissibility of sexual history evidence in
practice

December 2017

Cm 9547



Ministry
of Justice



Attorney
General's
Office

Limiting the use of complainants' sexual history in sex cases

Section 41 of the Youth Justice and Criminal Evidence Act 1999:
the law on the admissibility of sexual history evidence in practice

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
and the Attorney General
by Command of Her Majesty

December 2017



© Crown copyright 2017

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at <https://www.gov.uk/government/publications>

Any enquiries regarding this publication should be sent to us at Louise Horton, Criminal Courts and Criminal Law Policy, 3.20, 102 Petty France, London, SW1H 9AJ.

ISBN 978-1-5286-0132-0

CCS1117478336 12/17

Printed on paper containing 75% recycled fibre content minimum

Printed in the UK by the APS Group on behalf of the Controller of Her Majesty's Stationery Office

Contents

Introduction	3
Background to the law restricting questions on previous sexual history	4
The impact of section 41	5
Section 41 in practice	7
Findings of the review of section 41 applications	8
The effective operation of section 41	11
Ensuring complainants are treated with dignity in court	12
CPS Section 41 Audit – Data Tables	14

Introduction

We want to ensure that victims of sexual offences are treated with dignity and respect in court. Sexual violence is a traumatic crime, and it is crucial that victims have confidence in the criminal justice system to report abuse. Sections 41-43 of the Youth Justice and Criminal Evidence Act 1999¹ ("section 41") provide critical protection for complainants in sex offence cases by restricting the ability of the defence to introduce evidence or questions relating to the complainant's sexual history. This prevents the use of sexual history by the defence to draw on rape myths and stereotypes to discredit the complainant in sex offence cases².

We recognise the importance of these provisions for the protection of complainants and for victims of sexual violence to be confident they will receive such protection in court. We want a criminal justice system where perpetrators are brought to justice, but also one that treats complainants with dignity and enables them to provide their best evidence. That is why we undertook a study to ensure that the law in this area is working in practice and to consider what more could be done to make sure complainants are appropriately protected by the provisions of section 41.

The Lord Chancellor and the Attorney General asked the CPS to undertake an analysis of 309 rape cases finalised in 2016 to determine the frequency and outcome of applications under section 41 to introduce evidence or questions about the complainant's sexual history. In the overwhelming majority of cases (92%) no evidence of the complainant's sexual history was permitted to be introduced by the defence, and section 41 applications seeking to do so were made in only 13% of cases. The bar for the disclosure under section 41 is rightly high, and these findings provide a compelling basis to indicate that section 41 is working as intended.

Whilst the findings of the CPS analysis provide reassurance that the introduction of sexual history evidence by the defence is exceptional, we want to ensure that victims have the confidence to report sexual abuse. That is why we are taking a number of steps to make sure that the protections of section 41 continue to be provided to complainants. The CPS will shortly launch a new training course on section 41 that will be mandatory for all CPS prosecutors dealing with rape and serious sexual offences (RASSO), as well as updated online legal guidance to provide comprehensive guidance for prosecutors on the subject. We have asked the Criminal Procedure Rule Committee to look again at the rules for section 41 applications to ensure that they are up to date and robust, and are working to collect data on the frequency of section 41 applications in sex offence cases in the Crown Court.

¹ Section 41 applies in England & Wales only.

² See report published by the Home Office in 2006: '*Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials*' by Liz Kelly, Jennifer Temkin and Sue Griffiths

Background to the law restricting questions on previous sexual history

The use of evidence of a complainant's previous sexual history in sex offence trials has long been scrutinised. Much like other common law jurisdictions, legislation in England and Wales has sought to control the use of sexual history evidence: we do not want victims of sexual offences being deterred from reporting by the idea of irrelevant or intrusive questioning on their sexual history in court.

In 1975, the government set up an Advisory Group on the Law of Rape, which reviewed a number of aspects of the crime of rape and the conduct of rape trials. At this time, the admission of sexual history was only restricted by the common law to where relevant to a fact in issue. The report recommended partial restrictions on the admission of a complainant's sexual history, which were subsequently enshrined in Section 2 of the Sexual Offences (Amendment) Act 1976 ("section 2").

In June 1998, the Home Office published the report of the working group: '*Speaking up for Justice*'. It found that the practice of regulating the use of sexual history evidence in the courts was unsatisfactory: interpretation of the provisions varied widely and was at odds with the intention of section 2. The report recommended a structured approach to the admission of sexual history evidence that applied to sexual offences more widely. Section 2 was overhauled and replaced with sections 41-43 of the Youth Justice and Criminal Evidence Act 1999 ("section 41"), implementing the report's recommendations³. In general, under section 41 the defence is prohibited from introducing evidence or questions about a complainant's sexual history, save for specified exceptions where a strict set of criteria are met. The prosecution does not require prior permission to introduce such evidence.

³ For a detailed background to the passage of this legislation, see House of Commons Library Research Paper 99/40 on the Youth Justice and Criminal Evidence Bill (HL) (Bill 74 1998/99) dated 14 April 1999. Available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/RP99-40>

The impact of section 41

Under section 41, there is a general prohibition on the admission of evidence or questions in cross-examination relating to sexual history of a complainant by the defence. The legislation sets out four narrowly drawn exceptions for where sexual history may be adduced when a strict set of criteria are met. Section 41 applies to all proceedings for sexual offences – no distinction is made between rape cases and other sexual offence cases.

The legislation specifies the four exceptions where sexual history evidence may be admitted, as follows:

- Section 41(5): where evidence or questions in cross-examination are necessary to rebut prosecution evidence;
- Section 41(3) is divided into three parts, where the evidence or questions in cross-examination relate to an issue set out in the subsection, as follows:
 - S41(3)(a): where the issue is not consent (e.g. for a young complainant, where the detail of their account of the alleged activity must have come from some other sexual activity, which provides an explanation for their knowledge of that activity);
 - S41(3)(b): where the issue is consent and the complainant's sexual behaviour is alleged to have happened about or at the same time as the sexual activity in question at trial (interpreted restrictively to mean no further than 24 hours from the alleged offence);
 - S41(3)(c): where the issue is consent, and the evidence relating to the complainant's sexual behaviour is so similar to that alleged to be part of the event which is the subject of the proceedings, or to any other sexual behaviour which took place at or about the same time as the event, and which cannot reasonably be explained as a coincidence (i.e. the evidence is about similarity of circumstances).

The admission of evidence falling within one of the exceptions is not automatic. The judge must be satisfied that three further criteria are met, as follows:

- That the purpose (or main purpose) of the evidence is not to impugn the credibility of the complainant;
- That the evidence relates to specific instances of sexual behaviour; and
- Refusal of leave might render the conclusion of a jury or the court unsafe (i.e. it would prevent jurors/the court from taking into account material which might reasonably cause them to come to a different conclusion on a relevant issue).

Following a decision by House of Lords in the case of R v A (No 2)⁴, section 41 must also be read subject to an implied provision that evidence or questions relating to a complainant's sexual history that is required to ensure a fair trial (under Article 6 of the

⁴ R v A (No. 2) [2001] 3 All ER 1

European Convention on Human Rights⁵) should not be excluded. In order to maximise the protection afforded to complainants, the admission of sexual history evidence is tightly circumscribed, however, this decision made clear that there is a balance to be struck with the defendant's right to a fair trial.

Obtaining the court's permission to introduce sexual history evidence

To obtain the court's permission to introduce evidence or questions about a complainant's sexual history, the defence must submit an application to the court according to the requirements set out in section 43 of the 1999 Act and Part 22 of the Criminal Procedure Rules⁶. These specify a time frame within which an application must be made, although there are provisions to consider late applications. They also specify that an application must be made in writing, identify the issues to which the defendant says the complainant's sexual behaviour is relevant and must give details of the evidence or questions the defendant wants to ask. The application must be served on the court parties and decided in private (i.e. not in open court) and in the complainant's absence. Any party to the proceedings, i.e. the prosecution and other co-defendants, can make representations about a section 41 application, though they are not obliged to. The prosecution may choose to agree or challenge an application, as appropriate, although the final decision on an application lies with the judge. Having decided on an application, the court must give its reasons for either granting or refusing the application in open court (but in the absence of the jury if there is one), and if granted state the extent to which evidence or questions can be admitted.

In 2016, the Crown Prosecution Service ("CPS") published 'Speaking to Witnesses at Court'⁷ guidance for prosecutors and advocates at court. This guidance requires prosecutors to inform the complainant that a section 41 application has been allowed by the court, and to provide reassurance that objections will be raised to intrusive or irrelevant cross-examination. This communication is designed to improve the experience of the victim in these cases, by ensuring the victim understands the court decision, the limitations of potential questioning on their sexual history and that the court's decision must be followed. Prosecutors are instructed only to inform the complainant of a granted section 41 application, to avoid incurring unnecessary distress where a section 41 application is made but refused.

⁵ http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁶ <http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu-2015>

⁷ http://www.cps.gov.uk/legal/s_to_u/speaking_to_witnesses_at_court/ see 3.4(d)(ii)

Section 41 in practice

We want victims of devastating crime such as sexual violence to have the confidence to report abuse, and continue to encourage victims to report current and historical sex offences. The volumes of rape defendants prosecuted and convicted following an initial allegation of rape has reached the highest level ever, with a steady conviction rate⁸ and police recorded crime figures show an increased willingness of victims to come forward and report these crimes to the police⁹. In 2016/17 there were 5,715 more convictions for sexual offences (including rape and child sexual abuse) than in 2007-8: a 71.5% increase over 10 years¹⁰. Yet, our work here is not done.

While the Government is content with the intention behind the provisions of section 41 as passed by Parliament, we felt it vital to look at how the law works in practice. This provides an opportunity to give victims and the wider public greater confidence about how frequently sexual history evidence is permitted at trial.

To obtain a representative view of how section 41 is operating in practice across England and Wales, we asked the Crown Prosecution Service to undertake an audit of a sample of rape cases finalised in 2016 to assess the frequency and outcome of section 41 applications. As data is not routinely collected or electronically held on section 41 applications, this required the CPS to manually review each case. Section 41 applies more widely to sex offences than rape, but the CPS used a "flag" on their Case Management System to identify rape case files to make this analysis possible. As a result, the sample reviewed was limited to rape cases.

Each CPS area in England and Wales analysed two randomly selected, finalised rape cases for each calendar month in 2016 to ascertain whether an application under section 41 had been made by the defence. If an application was made, CPS areas were asked to detail whether the application was opposed by the prosecution and whether the application was granted by the court. They were also asked to provide the category of the rape case (stranger, acquaintance, domestic, child abuse) and any rationale provided by the court when passing judgment on the issue.

⁸ CPS VAWG Report 2016/17 available <http://www.cps.gov.uk/publications/equality/vaw/index.html#a02>

⁹ According to a recent ONS bulletin, police recorded rape increased by 22% (to 45,100 offences) compared with the previous year, while other sexual offences increased by 17% (to 84,600): <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/crimeinenglandandwales/june2017#rise-in-police-recorded-sexual-offences>

Increases in police recorded crime figures are influenced by a number of factors, including greater victim confidence and better recording by the police rather than more sexual assaults taking place. Police figures do not currently provide a reliable indication of current trends.

¹⁰ <http://www.cps.gov.uk/publications/equality/vaw/index.html#a02>

Findings of the review of section 41 applications

Of 309 rape cases finalised in 2016, the files showed that applications under section 41 were made by the defence in 40 cases (13%). Applications to admit evidence or questions about the complainant's sexual history were granted, either in whole or in part, by the court in a total of 25 cases (8% of the sample). This means that in the overwhelming majority of cases analysed (92%), no evidence of the complainant's sexual history was permitted to be introduced by the defence. In 5 of the cases the application was refused (1.6%), in 5 (1.6%) the proceedings were concluded prior to a determination on the section 41 application and in 5 cases it was not possible to ascertain the outcome (1.6%). Where an application is refused, the complainant may not be aware that the application was made at all, unless they attended proceedings while the judge gave reasons for refusing the application, as they must do so in open court (section 41 applications are heard in private and in the absence of the complainant). Guidance provided to the prosecution states that a complainant should be informed about a section 41 application where it has been granted. This avoids causing the complainant unnecessary distress pending the outcome of a section 41 application.

Where section 41 applications were granted, in the majority of cases the admissible evidence of a complainant's sexual history related to activity with the defendant. In 20% of cases it was not possible to ascertain whether the evidence related to activity with the defendant, and in 24% of cases the evidence related to activity with a person other than the defendant. Section 41 does not distinguish between evidence relating to the defendant and that with persons other than the defendant, and the judge in each case is to determine how differently to approach these two situations. The law makes clear that sexual history evidence cannot be used, drawing on rape myth, to infer that a complainant's sexual experience – with anyone – or sexual reputation made it more likely that they consented or to infer they are a less credible witness.

Applications under section 41 can refer to multiple subsections in the legislation – i.e. the exceptions to the general prohibition on the admission of sexual history evidence – as the basis for their application. This may be to distinguish between different issues that form the substance of the application, or because multiple gateways may be applicable to the same evidence that the defence is seeking to introduce. From the sample analysed, 14 applications (35%) referenced s 41(3)(a); 6 applications (15%) referenced s41(3)(b); 15 applications (38%) referenced s41(3)(c) and 4 applications (10%) referenced s41(5).

Of the 40 applications, 14 files (35%) showed that the application was opposed in its entirety by the prosecution. In 12 cases (30%) the prosecution either agreed or partially agreed the application¹¹. In 11 cases (27.5%) it was not possible to ascertain whether an application was opposed and in 3 cases (7.5%) proceedings concluded before a response to the application was required. The final decision over a section 41 application resides with the judge in that case.

The judge in each case is the final arbiter on what evidence or which questions on sexual history are admissible, but prosecutors also have an important role in protecting complainants from inadmissible questioning at court relating to their previous sexual

¹¹ Where the prosecution agreed to part of a Section 41 application but opposed another element of the application the overall position has been categorised as 'agreed'.

history. Prosecutors will accordingly challenge a section 41 application where they deem it appropriate to do so, as occurred in 35% of the cases reviewed. There are, however, scenarios where the prosecution may choose not to oppose the introduction of evidence or questioning relating to the complainant's sexual behaviour which is the subject of a section 41 application that has been appropriately and properly made and fulfils the criteria set out in the legislation. In 30% of the cases reviewed the prosecution saw fit to agree to the section 41 application, which could have been for a number of reasons, including:

- The effective presentation of the prosecution case relies upon references to previous incidents of sexual activity between the complainant and defendant (this particularly may be the case where the alleged offence has been committed in circumstances of domestic abuse, or where the defendant and the complainant otherwise had a previous relationship¹²). A case could fall apart if this evidence could not be presented at trial¹³;
- Where, as part of its case, the prosecution adduces evidence that is specifically disputed by the defendant;
- Where the evidence of previous sexual history positively advances the prosecution case.

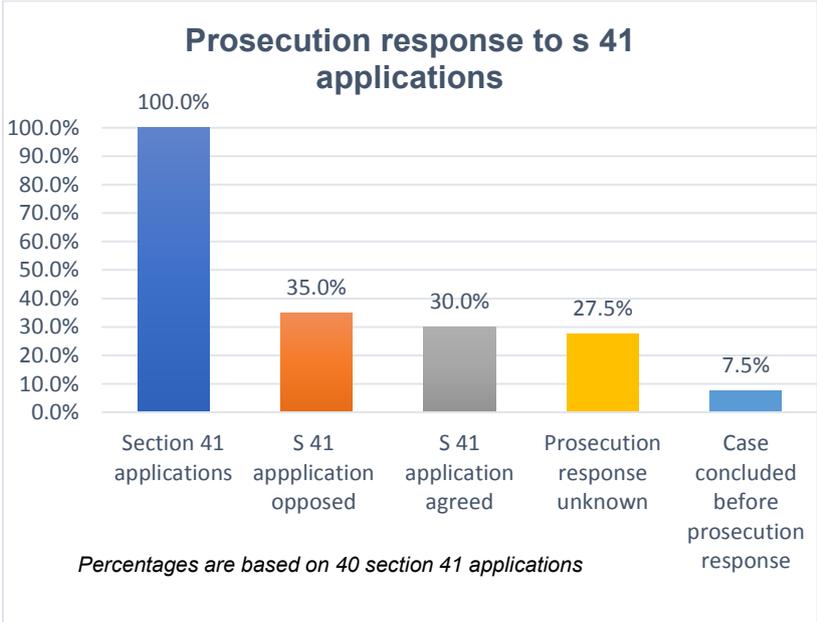
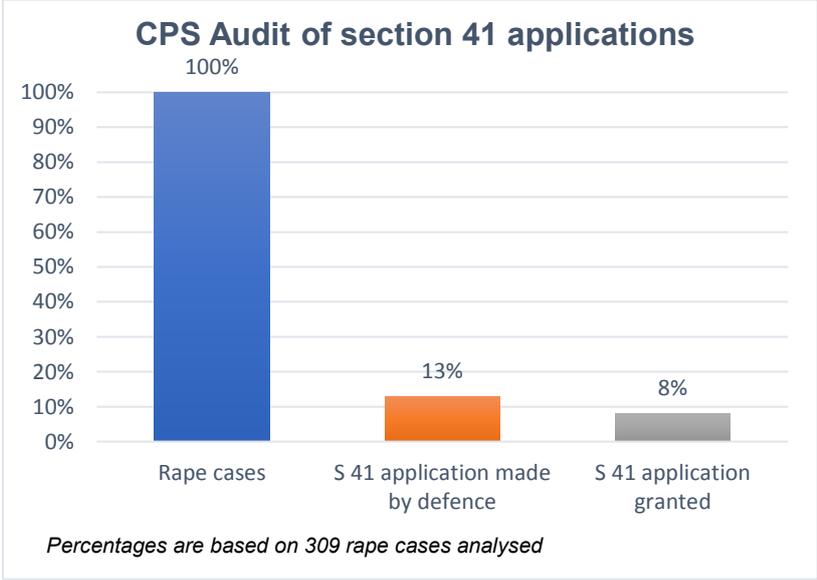
Of the 40 section 41 applications made in the cases reviewed, applications were most commonly made by the defence in acquaintance rape cases (14 cases, 35%) and 'domestic rape' cases (14 cases, 35%). 9 applications (22.5%) were made in 'child abuse' cases, 2 applications (5%) in 'stranger' rape cases and 1 application (2.5%) was made in a case described as both a 'domestic' and a 'child abuse' case. It is a clear minority of cases reviewed in which the defence was permitted to introduce sexual history evidence where the complainant did not know the defendant. In 11 of 12 cases (92%) where the prosecution agreed the section 41 application, the case was marked as 'acquaintance' or 'domestic' (with 1 case categorised as 'child abuse').

¹² A number of myths surround the offence of rape and other sexual assaults, including the myth that sexual assaults are perpetrated by strangers in a random attack. By contrast, the CPS Report on Violence Against Women and Girls for 2016/17 shows that of all the rape flagged defendants for 2016/17, 31% were also flagged as domestic abuse (CPS VAWG Report 2016/17 available <http://www.cps.gov.uk/publications/equality/vaw/index.html#a02>).

Research undertaken by London Metropolitan University that included looking at the relationship of perpetrators to survivors using Rape Crisis centres in England and Wales showed that the majority of experiences of sexual violence by those profiled involved known perpetrators (<http://cwasu.org/resource/hidden-depths/>)

¹³ The prosecution is not subject to restrictions on the introduction of sexual history evidence of the complainant.

Limiting the use of complainants' sexual history in sex cases



The effective operation of section 41

Section 41 rightly places a high bar on the disclosure of a complainant's sexual history by the defence in sex offence cases, going further than previous legislation by providing a structured approach to decision-making in respect of the circumstances when an application for leave to introduce such evidence may be granted. The law makes clear that the admission of a complainant's sexual history should be exceptional. Accordingly, we would not expect section 41 applications to be made routinely by the defence for the law to be operating as Parliament intended. Infrequent use of section 41 would reflect the intention of the legislation to tackle the perpetuation of myths and stereotypes about rape.

We are now confident that the introduction of sexual history evidence by the defence is exceptional. The data provided by the CPS audit of rape case files demonstrates that this is very rarely permitted: in just 8% of cases a section 41 application was granted. Moreover, defence counsel are not routinely making section 41 applications: they were made in only 13% of cases. This is a compelling basis for asserting that the starting point in sex offence trials is that sexual history evidence should not be used by the defence. In showing that the defence is permitted to adduce evidence of a complainant's sexual history only exceptionally, the findings of the CPS audit are persuasive evidence that the law is working as Parliament intended to strike a careful balance between protecting complainants and ensuring the defendant's right to a fair trial.

Ensuring complainants are treated with dignity in court

Whilst the work undertaken in this area provides reassurance that granted section 41 applications are rare, we want to ensure that the public has complete confidence in our criminal justice system. Sexual violence is a devastating crime and we recognise that the process of giving evidence in support of a prosecution case for a sex offence can be traumatic. It is of critical importance that protection for complainants provided for in legislation is available to them and duly communicated at trial. To make sure section 41 continues to operate effectively in practice, and provide the protections of section 41 to complainants, we are taking the following steps:

- The CPS will shortly launch a new training course covering the operation of section 41 provisions which will be mandatory for all CPS prosecutors dealing with rape and serious sexual offences (“RASSO”) and advocates, with the further plan to roll-out this training to members of the external Bar who are instructed to prosecute RASSO cases. They will also launch updated online legal guidance which will provide comprehensive guidance for prosecutors on the subject. The training and guidance has been produced to ensure consistent performance amongst prosecutors in this area and robust opposition to section 41 applications whenever appropriate. This is particularly so given the important role the prosecution plays in communicating with a complainant about a granted section 41 application.
- We have asked the Criminal Procedure Rule Committee to look again at improving the procedural rules for applications to introduce evidence about a complainant's sexual history to ensure that they are up to date and robust¹⁴.
- We will discuss with representatives of the Bar and solicitors the opportunity to improve training for criminal practitioners on section 41.
- We are working to improve the collection of data by Her Majesty's Courts and Tribunals Service on the frequency of section 41 applications in sex offence cases in the Crown Court, to provide an ongoing evidence base for evaluating whether section 41 is working in practice.
- We have listened to the views of victims' groups and stakeholders, and engaged with them on raising awareness of section 41 and ensuring its effective operation. We will continue to engage with them on this issue going forward.

These measures are in addition to our wider work to support victims and witnesses in sexual offences cases. Together they will provide continued support for victims and give them the confidence to come forward and report sexual abuse. Ongoing work to better support victims of sexual violence includes:

¹⁴ The Criminal Procedure Rule Committee is an independent committee established by the Courts Act 2003 to make procedure rules for the criminal courts. The chairman is the Lord Chief Justice and the members include representatives of groups involved in the criminal justice system. The rules that the Committee makes govern the way in which the courts exercise powers created by Acts of Parliament and under the common law. The Courts Act requires the Committee to make rules that are simple and simply expressed, and that help make the criminal justice system accessible, fair and efficient.

- The Home Office has published new guidance for Independent Sexual Violence Advisors (ISVAs) on 28 September. The guidance aims to raise awareness and understanding about the role and support an ISVA can provide before, during and after the court process¹⁵.
- A range of special measures exist to help vulnerable witnesses and complainants give their best evidence and reduce the stress they face during cross-examination, including the use of an intermediary, giving evidence remotely by way of live video link and screens round the witness box. The last of these measures for witnesses, other than the accused, is pre-recorded cross examination of vulnerable and intimidated witnesses (section 28 of the Youth Justice and Criminal Evidence Act 1999).
- We commenced section 28 for vulnerable witnesses, under 16 year olds, and those lacking mental or physical capacity in Leeds, Liverpool and Kingston upon Thames Crown Court Centres in December 2013. This was extended to under 18 year olds in January 2017, and will be rolled out in Crown Courts in England and Wales for all vulnerable witnesses in a phased approach from the Spring of 2018.
- We also plan to test section 28 for intimidated witnesses who are the victims of sexual offences and modern slavery offences in Leeds, Liverpool and Kingston upon Thames Crown Court centres.
- The prohibition on adducing evidence of previous sexual behaviour would also apply to pre-recorded evidence and so the starting point is that the victim should not be asked such questions in the first place.
- As set out in the Queen's Speech, we will introduce a draft Domestic Violence and Abuse Bill, and have pledged an additional £20 million over this Parliament to provide support to victims and to organisations combatting domestic abuse.

¹⁵ <https://www.gov.uk/government/publications/the-role-of-the-independent-sexual-violence-adviser-isva>

CPS Section 41 Audit – Data Tables

Table 1 – Section 41 Applications

Number of section 41 applications made in the sample analysed	Number	% of all case files sampled (309 cases)
Total number of Section 41 applications made by the defence	40	13%
Total number of Section 41 applications granted by the Court	25	8%
Total number of Section 41 applications refused by the Court	5	1.6%
Total number of cases where court determination is unknown	5	1.6%
Total number of cases where outcome of s 41 application is N/A ¹⁶	5	1.6%

Table 2 – Prosecution response to section 41 applications

Prosecution Response to s 41 application	No of s 41 applications	Percentage of applications
Application opposed in its entirety by the prosecution	14	35%
Agreed or partially agreed by the prosecution ¹⁷	12	30%
Not possible to ascertain whether application was opposed	11	27.5%
Proceedings concluded before the prosecution was required to respond to the application	3	7.5%
Total	40	100%

¹⁶ Where proceedings were concluded before a ruling was required

¹⁷ Where the prosecution agreed to part of a Section 41 application but opposed another element of the application the overall position has been categorised as 'agreed'.

Table 3 – Section 41 applications by rape category

Category	No of s 41 applications	Percentage of applications
Acquaintance	14	35%
Domestic	14	35%
Child Abuse	9	22.5%
Stranger	2	5%
Domestic/Child Abuse	1	2.5%
Total	40	100%

CCS1117478336

ISBN 978-1-5286-0132-0