

SCHEDULE

Rule 10

“PART 22

EVIDENCE OF A COMPLAINANT’S PREVIOUS SEXUAL BEHAVIOUR

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**When this Part applies**

**22.1.** This Part applies—

- (a) in a magistrates’ court and in the Crown Court;
- (b) where—
  - (i) section 41 of the Youth Justice and Criminal Evidence Act 1999(1) prohibits the introduction of evidence or cross-examination about any sexual behaviour of the complainant of a sexual offence, and
  - (ii) despite that prohibition, a defendant wants to introduce such evidence or to cross-examine a witness about such behaviour.

*[Note. Section 41 of the Youth Justice and Criminal Evidence Act 1999 prohibits evidence or cross-examination about the sexual behaviour of a complainant of a sexual offence, subject to exceptions.*

*See also—*

- (a) *section 42 of the 1999 Act(2), which among other things defines ‘sexual behaviour’ and ‘sexual offence’;*
- (b) *section 34, which prohibits cross-examination by a defendant in person of the complainant of a sexual offence (Part 23 contains relevant rules).]*

**Exercise of court’s powers**

**22.2.** The court—

- (a) must determine an application under rule 22.4 (Application for permission to introduce evidence or cross-examine)—

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(1) 1999 c. 23.

(2) 1999 c. 23; section 42 was amended by paragraph 73 of Schedule 3 and Schedule 37 to the Criminal Justice Act 2003 (c. 44).

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- (i) at a hearing in private, and
- (ii) in the absence of the complainant;
- (b) must not determine the application unless—
  - (i) each party other than the applicant is present, or has had at least 14 days in which to make representations, and
  - (ii) the court is satisfied that it has been able to take adequate account of the complainant’s rights;
- (c) may adjourn the application; and
- (d) may discharge or vary a determination where it can do so under—
  - (i) section 8B of the Magistrates’ Courts Act 1980(3) (ruling at pre-trial hearing in a magistrates’ court), or
  - (ii) section 9 of the Criminal Justice Act 1987(4), or section 31 or 40 of the Criminal Procedure and Investigations Act 1996(5) (ruling at preparatory or other pre-trial hearing in the Crown Court).

*[Note. See also section 43 of the Youth Justice and Criminal Evidence Act 1999(6), which among other things requires an application under section 41 of the Act to be heard in private and in the absence of the complainant.*

*At a pre-trial hearing a court may make binding rulings about the admissibility of evidence and about questions of law under sections 31 and 40 of the Criminal Procedure and Investigations Act 1996(7) and section 8A of the Magistrates’ Courts Act 1980(8).]*

## **Decisions and reasons**

**22.3.—**(1) A prosecutor who wants to introduce the evidence of a complainant in respect of whom the court allows the introduction of evidence or cross-examination about any sexual behaviour must—

- (a) inform the complainant of the court’s decision as soon as reasonably practicable; and
- (b) explain to the complainant any arrangements that as a result will be made for him or her to give evidence.

(2) The court must—

- (a) promptly determine an application; and
- (b) allow the prosecutor sufficient time to comply with the requirements of—
  - (i) paragraph (1), and

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- (3) 1980 c. 43; section 8B was inserted by section 45 of, and Schedule 3 to, the Courts Act 2003 (c. 39) and amended by paragraph 51 of Schedule 3, and Part 4 of Schedule 37, to the Criminal Justice Act 2003 (c. 44).
  - (4) 1987 c. 38; section 9 was amended by section 170 of, and Schedule 16 to, the Criminal Justice Act 1988 (c. 33), section 6 of the Criminal Justice Act 1993 (c. 36), sections 72, 74 and 80 of, and paragraph 3 of Schedule 3 and Schedule 5 to, Criminal Procedure and Investigations Act 1996 (c. 25), sections 45 and 310 of, and paragraphs 18, 52 and 54 of Schedule 36 and Part 3 of Schedule 37 to, the Criminal Justice Act 2003 (c. 44), article 3 of, and paragraphs 21 and 23 of S.I. 2004/2035, section 59 of, and paragraph 1 of Schedule 11 to, the Constitutional Reform Act 2005 (c. 4) and Part 10 of Schedule 10 to the Protection of Freedoms Act 2012 (c. 9). The amendment made by section 45 of the Criminal Justice Act 2003 (c. 44) is in force for certain purposes; for remaining purposes it has effect from a date to be appointed.
  - (5) 1996 c. 25; section 31 was amended by sections 310, 331 and 332 of, and paragraphs 20, 36, 65 and 67 of Schedule 36 and Schedule 37 to, the Criminal Justice Act 2003 (c. 44).
  - (6) 1999 c. 23; section 43(3) was amended by section 109(1) of, and paragraph 384(g) of Schedule 8 to, the Courts Act 2003 (c. 39).
  - (7) 1996 c. 25; section 31 was amended by sections 310, 331 and 332 of, and paragraphs 20, 36, 65 and 67 of Schedule 36 and Schedule 37 to, the Criminal Justice Act 2003 (c. 44).
  - (8) 1980 c. 43; section 8A was inserted by section 45 of, and Schedule 3 to, the Courts Act 2003 (c. 39) and amended by SI 2006/2493 and paragraphs 12 and 14 of Schedule 5 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (c. 10).

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- (ii) the code of practice issued under section 32 of the Domestic Violence, Crime and Victims Act 2004<sup>(9)</sup>.
- (3) The court must announce at a hearing in public—
  - (a) the reasons for a decision to allow or refuse an application under rule 22.4; and
  - (b) if it allows such an application, the extent to which evidence may be introduced or questions asked.

*[Note. Under section 43 of the Youth Justice and Criminal Evidence Act 1999—*

- (a) the reasons for the court's decision on an application must be given in open court; and*
- (b) the court must state in open court the extent to which evidence may be introduced or questions asked.]*

#### **Application for permission to introduce evidence or cross-examine**

**22.4.**—(1) A defendant who wants to introduce evidence or cross-examine a witness about any sexual behaviour of the complainant must—

- (a) serve an application for permission to do so on—
  - (i) the court officer, and
  - (ii) each other party;
- (b) serve the application—
  - (i) as soon as reasonably practicable after becoming aware of the grounds for doing so, and in any event
  - (ii) not more than 14 days after the prosecutor discloses material on which the application is based.
- (2) The application must—
  - (a) identify the issue to which the defendant says the complainant's sexual behaviour is relevant;
  - (b) give particulars of—
    - (i) any evidence that the defendant wants to introduce, and
    - (ii) any questions that the defendant wants to ask;
  - (c) identify the exception to the prohibition in section 41 of the Youth Justice and Criminal Evidence Act 1999 on which the defendant relies; and
  - (d) give the name and date of birth of any witness whose evidence about the complainant's sexual behaviour the defendant wants to introduce.

#### **Application containing information withheld from another party**

**22.5.**—(1) This rule applies where—

- (a) an applicant serves an application under rule 22.4 (Application for permission to introduce evidence or cross-examine); and
- (b) the application includes information that the applicant thinks ought not be revealed to another party.
- (2) The applicant must—

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<sup>(9)</sup> 2004 c. 28; section 32 was amended by article 8 of, and paragraph 10 of the Schedule to, S.I. 2007/2128.

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- (a) omit that information from the part of the application that is served on that other party;
  - (b) mark the other part to show that, unless the court otherwise directs, it is only for the court; and
  - (c) in that other part, explain why the applicant has withheld that information from that other party.
- (3) If the court so directs, the hearing of an application to which this rule applies may be, wholly or in part, in the absence of a party from whom information has been withheld.
- (4) At the hearing of an application to which this rule applies—
- (a) the general rule is that the court must consider, in the following sequence—
    - (i) representations first by the applicant and then by each other party, in all the parties' presence, and then
    - (ii) further representations by the applicant, in the absence of a party from whom information has been withheld; but
  - (b) the court may direct other arrangements for the hearing.

*[Note. See section 43(3)(c) of the Youth Justice and Criminal Evidence Act 1999.]*

### **Representations in response**

- 22.6.**—(1) This rule applies where a party wants to make representations about—
- (a) an application under rule 22.4 (Application for permission to introduce evidence or cross-examine); or
  - (b) a proposed variation or discharge of a decision allowing such an application.
- (2) Such a party must—
- (a) serve the representations on—
    - (i) the court officer, and
    - (ii) each other party; and
  - (b) do so not more than 14 days after, as applicable—
    - (i) service of the application, or
    - (ii) notice of the proposal to vary or discharge.
- (3) Where representations include information that the person making them thinks ought not be revealed to another party, that person must—
- (a) omit that information from the representations served on that other party;
  - (b) mark the information to show that, unless the court otherwise directs, it is only for the court; and
  - (c) with that information include an explanation of why it has been withheld from that other party.
- (4) Representations against an application under rule 22.4 must explain the grounds of objection.
- (5) Representations against the variation or discharge of a decision must explain why it should not be varied or discharged.

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### **Special measures, etc. for a witness**

**22.7.**—(1) This rule applies where the court allows an application under rule 22.4 (Application for permission to introduce evidence or cross-examine).

(2) Despite the time limits in rule 18.3 (Making an application for a direction or order)—

(a) a party may apply not more than 14 days after the court’s decision for a special measures direction or for the variation of an existing special measures direction; and

(b) the court may shorten the time for opposing that application.

(3) Where the court allows the cross-examination of a witness, the court must give directions for the appropriate treatment and questioning of that witness in accordance with rule 3.9(6) and (7) (setting ground rules for the conduct of questioning).

*[Note. Special measures to improve the quality of evidence given by certain witnesses may be directed by the court under section 19 of the Youth Justice and Criminal Evidence Act 1999 and varied under section 20(10). An application for a special measures direction may be made by a party under Part 18 or the court may make a direction on its own initiative. Rule 18.13(2) sets the usual time limit (14 days) for opposing a special measures application.]*

### **Court’s power to vary requirements under this Part**

**22.8.** The court may shorten or extend (even after it has expired) a time limit under this Part.”

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(10) 1999 c. 23; section 20 was amended by paragraph 384 of Schedule 8 to the Courts Act 2003 (c. 39).