

YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part II: Giving of evidence or information for purposes of criminal proceedings

Chapter III: Protection of complainants in proceedings for sexual offences

145. The sections in this Chapter restrict the circumstances in which evidence or questions about a complainant's sexual behaviour outside the circumstances of the alleged offence can be introduced in rape or certain sexual offence cases (as listed in section 62). This includes sexual behaviour or experience with the defendant (section 42(1)(c)). The sections do not limit the meaning of evidence in this context, and it is therefore to be understood as including secondary evidence of sexual behaviour such as abortions.
146. If the defence wishes to introduce evidence or ask questions about the complainant's sexual behaviour, it will have to make an application to the court. The prosecution will be warned of the general grounds of the application and will have an opportunity to oppose it. The court will then consider whether or not to grant leave (which may only be granted on the strictly controlled grounds set out in section 41).

Section 41: Restrictions on evidence or questions about complainant's sexual history

147. *Subsections (2)-(6)* set out the circumstances in which courts may allow evidence to be admitted or questions to be asked about the complainant's sexual behaviour.
148. Courts may only grant leave if:
- The evidence or questioning relates to any issue that has to be proved in the case other than whether the complainant consented (*subsection (3)(a)*). The defendant's honest but mistaken belief in consent falls into the category of a relevant issue in the case other than consent.
 - The issue that is being argued in the case is whether the complainant consented and the evidence or questioning relates to behaviour that took place as part of the alleged offence, or at or about the same time (*subsection (3)(b)*). It is expected that "at or about the same time" will generally be interpreted no more widely than 24 hours before or after the offence.
 - The issue is whether the complainant consented and the evidence or questioning relates to behaviour that is so similar to the defence's version of the complainant's behaviour at the time of the alleged offence (whether as part of the alleged offence or at or about the same time) that it cannot reasonably be explained as a coincidence.
 - The evidence or questioning that the defence wishes to introduce is intended to dispute or explain evidence that the prosecution have introduced about the

complainant's sexual behaviour, whether it was alleged by the prosecution to have taken place as part of the alleged offence or at some earlier or later date (*subsection (5)*). Such evidence must go no further than to directly contradict or explain claims made by or on behalf of the complainant.

149. Before allowing any evidence of sexual behaviour to be introduced, the court must be satisfied not only that one of the above criteria is met but also that, if the evidence were not heard, the jury or magistrate in the case might make an unsafe decision on an issue that had to be proved in the case (ie, an element of the offence or defence). *Subsection (6)* requires any such evidence to relate to a specific instance, or instances, of sexual behaviour.
150. *Subsection (4)* provides that if the defence seek to introduce questioning or evidence purportedly under *subsection (3)* - by claiming that it relates to an issue that has to be proved in the case - but the court considers that its real main purpose is to undermine or diminish the complainant's credibility, the court will not allow it. But 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.

Section 42: Interpretation and application of section 41

151. *Section 42* (as well as assisting with the interpretation of section 41) provides that the Secretary of State may by order, subject to the *affirmative resolution procedure* (i.e. both Houses of Parliament must debate and approve any order), add or remove offences to or from the list of offences in section 62 which are sexual offences for the purposes of section 41.

Section 43: Procedure on applications under section 41

152. *Subsection (1)* requires applications to the court for permission to introduce sexual history evidence to be made in the absence of the public, the press, the jury (if any) and all witnesses (other than the defendant). Any other parties to the trial will be allowed to be present when an application is being made so that they can make representations to the court about whether the application should be allowed.
153. *Subsection (2)* requires courts to give reasons for allowing or refusing an application in open court, and specify the extent to which they are allowing evidence to be introduced into the trial or questions to be asked. This must take place in the absence of the jury (if there is one.) The intention behind this requirement is to ensure that it is clear to the defence, the prosecution and the witness exactly how far questioning can go, and in reference to which issues.