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## **Beyond R v A: Sexual History Evidence and the Reform of S.41**

**Jennifer Hey**

### **Abstract**

This thesis deals with the legal regulation of sexual history evidence in rape trials over the last four decades, primarily focusing on the legislative restrictions imposed throughout that time. It works chronologically from the formation of the Heilbron Committee and the subsequent change in law in 1976 under Section 2 of the Sexual Offences Amendment Act. It goes on to judge both this piece of legislation as well as its successor; Section 41 of the Youth Justice and Criminal Evidence Act 1999 in terms of how successful they are in achieving their aims; namely to increase the conviction rate and encourage more women to report rape. The thesis aims to suggest a new way forward with regard to sexual history evidence and its use in the courts which has thus far encountered many problems and come up against many critics. It looks at scholars' recent proposals for legislative and procedural change and discusses each on its own merits before using them as a springboard to suggest the best idea for reform.

**Beyond R v A: Sexual History Evidence and the Reform of S.41**

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**2011**

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### **Acknowledgements**

I would like to thank Professor Clare McGlynn and Mr Neil Cobb for their continued support, guidance and constructive criticism throughout this process.

### **Dedication**

I would like to dedicate this thesis to my parents, without whom none of this would have been possible. And not simply because they picked up the bill!

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## 1. Introduction

1.1 Over ten years after the implementation of the Youth Justice and Criminal Evidence Act 1999, which introduced significant restrictions on the use of sexual history evidence in rape trials, this thesis looks back on the treatment of such evidence in the last four decades and makes recommendations for legislative improvement in the future. Section 41 of the 1999 Act was introduced to replace S.2 of the Sexual Offences (Amendment) Act 1976 and to restrict the use of sexual history evidence by removing judicial discretion and permitting such evidence only in very limited circumstances. Unfortunately, shortly after the implementation of s.41 the case of *R v A (No. 2)*<sup>1</sup> came before the House of Lords and the decision in this case essentially restored a measure of judicial discretion thus throwing the legal situation into chaos.

1.2 The two pieces of legislation to be assessed are Section 2 of the Sexual Offences Amendment Act 1976 and Section 41 of the Youth Justice and Criminal Evidence Act. It is important to look at the legislative situation prior to S.41 in order to put the law in context and to make an informed assessment as to the best course of action for the future. As the subsequent chapters will show, the success of these pieces of legislation can be judged on a number of bases directly relating to their aims. In both circumstances the legislation was introduced to limit the use of sexual history evidence in rape trials and therefore success can firstly be measured on the amount of evidence which is still being allowed in. Other factors will include the number of women coming forward to report rape and seeing trials through to the end and the conviction or attrition rate. In assessing the successes and failures of both S.2 and S.41 this thesis hopes to suggest a more lasting solution for legislative and procedural reform.

1.3 There are a number of reasons for limiting sexual history evidence in rape trials. The first being the low conviction rate for rape<sup>2</sup> which continues to cause controversy. This can

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<sup>1</sup> [2001] UKHL 25

<sup>2</sup> There has been much debate surrounding the actual percentage of rape convictions in the UK and much controversy too. There is disagreement as to how the figure should be represented. For example, it can be said that, 58% of defendants of charges of rape which are brought before the courts are convicted. This figure looks a lot better than 6% but only takes into account those cases which result in a trial. I attended a conference last year at London South Bank University during which the Sapphire Unit of the Metropolitan Police spoke about how the 6% figure is misleading. Misleading though it may be, it is the number which is mostly commonly recognised both in the media and in

be linked to the fact that women are reluctant to report and see the complaint through to trial as they know that their sexual past may be brought into the court and used against them. As the Home Office found in their study in 1999, this is perceived, by women, as “unjust and an invasion of privacy.”<sup>3</sup> The misuse of this evidence could exacerbate the already troubling culture of rape myths.<sup>4</sup> Underlying these issues is also a more theoretical issue which is the question of whether or not sexual history evidence actually is relevant to consent. If it is not relevant then it is surely just being brought into the trial to prejudice the jury against the complainant. This approach will be discussed further in the thesis.

1.4 The thesis will be divided up into four sections. The first section will look briefly at the common law and the situation which led to the creation of the Heilbron Report and the subsequent drafting of S.2 to limit sexual history evidence. It will discuss the ideas put forward in Heilbron as well as the limitations of the report. S.2 did not implement some of the valid suggestions given by the Committee, for instance their model of how third party evidential admission should be decided upon and therefore the chapter will go on to look at S.2 and assess its success in accordance with the provisions set out above to see if the legislation has fulfilled its aims. Having concluded that S.2 was not a success the next chapter goes on to look at the build up to the implementation of S.41 following the *Speaking Up for Justice Report*<sup>5</sup> in 1999. In the same way that S.2 was assessed, the second chapter will discuss the success of S.41 by looking at each of the gateways through which sexual history evidence is allowed. The positives of this approach mean that later on in the thesis when new provisions are being suggested, each gateway has been assessed on its own merits so the entirety of S.41 will not automatically be discounted as a failure simply because the overall stance has not been entirely successful.

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research papers. See Whitstead, Tom, ‘Rape conviction rate figures ‘misleading’’, 15 March 2010, The Telegraph for further debate.

<sup>3</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p VII

<sup>4</sup> Rape myths are incorrect perceptions held within society surround issues around rape, many of them about consent. For example that a woman dressed provocatively is somehow ‘asking for it’ and thus has less right to withhold consent to sex. For more on rape myths see Temkin, Jennifer, *Rape and the Legal Process* (2<sup>nd</sup> Edn Oxford University Press, Oxford 2002), Lees, Sue, *Carnal Knowledge Rape on Trial* (2<sup>nd</sup> Edn The Women’s Press, London 2002) and Adler, Zsuzsanna, *Rape on Trial* (Routledge & Kegan Paul Ltd, New York 1987)

<sup>5</sup> *Speaking up for Justice*, Home Office Report 1998

1.5 As S.41 is the current legislative stance on the admittance of sexual history evidence specific detail will be paid to judging exactly where it has failed in order to correct this in any suggestion for reform. As such, a chapter will be devoted to empirical studies carried out over the last decade. This includes reports by Kelly, Temkin and Griffiths for the Home Office,<sup>6</sup> Neil Kibble<sup>7</sup> and also the Burman<sup>8</sup> study of the situation in Scotland to offer comparison. These studies, as well as others discussed in the third chapter offer tangible evidence of the successes and failures of S.41 and the current legislative stance on sexual history evidence in England and Wales. In particular they will focus on the attrition rate, the conviction rate and judicial opinion of the gateways.

1.6 The thesis culminates in the fourth chapter which critiques the current options for reform which have been put forward in the last decade, following the implementation of the YJCEA. It evaluates each option in order to suggest which combination of ideas would be the best way to proceed. Whilst some ideas for a full legislative overhaul have been made, this has not been successful in the past therefore it is also important to look at the other, more procedural ideas as well. This thesis supports the idea of overturning *R v A*, thoroughly enforcing the crown court rules and ensuring S.41 is allowed to run as it was meant to. Only then can a judgement be made as to whether it will be successful.

1.7 This research is crucial for three main reasons. Firstly because the law regarding sexual history evidence has become incredibly confused following the two major legislative changes and the current stance is lacking in clarity. And, more broadly, because the current conviction rate for rape is incredibly low.<sup>9</sup> Whilst the use of sexual history evidence may be only one contributing factor to this problem, if the situation can be improved upon, it should

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<sup>6</sup> Kelly, Temkin and Griffiths, 'Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials.' Home Office Report 2006

<sup>7</sup> Kibble, 'Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999' (2004) as well as the two articles in the Criminal Law Review written to discuss the findings of his report; Kibble, Neil, 'Judicial Perspectives on the operation of Section 41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1' (2005) Crim LR 190 and Kibble, Neil, 'Judicial Discretion and admissibility of prior sexual history evidence under Section 41 of the YJCEA 1999: sometimes sticking to your guns mean shooting yourself in the foot: Part 2' (2005) Crim LR 263

<sup>8</sup> Burman, Jamieson, Nicholson, 'The Law of Evidence in Sexual offence trials – Base Line Study' (2005)

<sup>9</sup> *Op. cit 2*

be. It is also the view of this thesis that sexual history evidence is rarely relevant to rape trials and therefore on principle, anything which can be done to restrict its use, should be done.

## 2. The Background and History of the Use of Sexual History Evidence in England and Wales

### 2.1 Introduction

2.1.1 This chapter will offer a background for the thesis as a whole. Firstly it will concern itself with outlining how sexual history evidence has been treated by the common law in the past. It will then go on to investigate how the law's stance on the inclusion of this evidence changed following the Heilbron Report in 1975, and the subsequent 1976 Sexual Offences (Amendment) Act that it catalysed. This background will be coloured by real case examples that directly influenced the state of the law to date. It will cover theories and arguments both prior, and subsequent to, the Heilbron Report and the creation of Section 2 surrounding the use of sexual history evidence in order to set the scene for this thesis as a whole.

2.1.2 The focus of the thesis is on the legislative restrictions on the use of sexual history evidence; and to ultimately suggest how the current legislation could be reformed. As such, this chapter and the subsequent chapters must analyse the previous legislative stances which have resulted in the current climate. This chapter will focus on the build up to s.2 and the ways in which the case of *R v Morgan*<sup>10</sup> and the Heilbron report brought about this legislative change and will then proceed to assess the success of s.2 by looking at the way subsequent cases have interpreted it.

### 2.2 Common Law

2.2.1 Prior to s.2 the regulation of sexual history evidence in rape trials was regulated by the common law. The common law in relation to the use of a woman's sexual history in rape trials '[appears] to have crystallised in the nineteenth century,'<sup>11</sup> at which time Temkin suggests that such evidence was put into two main categories; firstly to suggest that the complainant was not a trustworthy witness and secondly as being relevant to whether she had consented to sexual intercourse with the defendant on the occasion in question.<sup>12</sup> There

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<sup>10</sup> (1975) 2 WLR 913

<sup>11</sup> Temkin, Jennifer 'Regulating Sexual History Evidence – The Limits of Discretionary Legislation' (1984) 33

J.C.L.Q p. 942

<sup>12</sup> *Ibid* at p. 943

was a definite divide between evidence of past sexual intercourse with the defendant and evidence with third parties.

2.2.2 In order to discuss the situation at common law thoroughly sexual history evidence can be separated out into categories as they would have been looked at in the courts in the 19<sup>th</sup> and 20<sup>th</sup> Century. These can be labelled as previous sexual intercourse with the defendant, evidence of prostitution<sup>13</sup> and evidence with third parties. This final category could be split into two further groups to differentiate between sexual history evidence that was widely known; for example if she was a known prostitute or was reputed to be promiscuous and evidence which was, to the general public and most likely the defendant, unknown. Evidence on prostitution or promiscuity will be tackled separately.

### 2.3 Evidence of Previous Sexual Intercourse with the Defendant

2.3.1 Kibble notes the assumption that evidence of prior sexual relations with the defendant will obviously be admissible and has rarely been challenged.<sup>14</sup> Previous sexual intercourse with the defendant “was considered to be relevant both to the complainant’s credit as well as to the issue of whether she had consented to the defendant on the occasion in question. Thus, where in cross-examination she denied previous sexual intercourse with the defendant, evidence could be led to contradict her,”<sup>15</sup> for examples see *R v Riley*<sup>16</sup> and *R v Cockcroft*.<sup>17</sup>

### 2.4 Evidence of Prostitution or ‘Notorious for Want of Chastity’<sup>18</sup>

2.4.1 In the same way that evidence could be brought to contradict a woman who says she had not previously had sexual relations with the defendant, so too, could evidence be

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<sup>13</sup> Though I label this category as relating to prostitution, it will become apparent that this will also refer to woman whose behaviour was at the time considered not to be much better than that of a prostitute. I.E. she was ‘notorious for want on chastity’ as was said in *Greatbanks* (1959) Crim. L. R. 450.

<sup>14</sup> Kibble, Neil, “The Relevance and Admissibility of Prior Sexual History with the Defendant in Sexual Offences Cases” (2001) 32 L. Cambrian Rev 27 at p. 32

<sup>15</sup> *Ibid*

<sup>16</sup> (1887) 18 Q.B.D. 481 Evidence was brought in to contradict the complainant by proving there had been a prior connection between herself and the defendant. This evidence was admissible.

<sup>17</sup> (1870) 11 Cox C.C. 410

<sup>18</sup> *Greatbanks* (1959) Crim. L. R. 450

brought to contradict her on issues of prostitution. The complainant could be asked if she was a prostitute and the defence could lead evidence to the same effect.<sup>19</sup> *R v Clarke*<sup>20</sup> held that “general evidence could be called to establish that a woman was a prostitute, ‘a woman of abandoned character’” in that it might be relevant and was, therefore, admissible as tending to prove consent.<sup>21</sup> Confirmed in *R v Tissington*,<sup>22</sup> evidence of solicitation, “general want of decency,” could be called. But the court noted “there is a difference between the woman who has acts of sexual intercourse with men and a prostitute who regularly sells her body.”<sup>23</sup> Notorious behaviour was often used to imply that the woman was or had been a prostitute. This could mean, as in the case of *R v Clay*<sup>24</sup> that the woman had been a prostitute decades ago.

2.4.2 However, to be considered “notorious for want of chastity”<sup>25</sup> a woman does not have to have been a prostitute at all. The evidence was considered relevant, not only to the issue of credit, but also to consent. So, for example, in *R v Barker*<sup>26</sup> it was held that evidence could be used to show the “general light character of the prosecutrix” to suggest she was a streetwalker. Other cases like *R v Clarke*<sup>27</sup> and *R v Tissington*<sup>28</sup> take the link between a woman of “bad” or “abandoned” character and prostitution itself even further. Heilbron picks up on this link “in these cases the descriptive phrases such as “notoriously loose or bad character” which were used, referred to a prostitute or woman behaving in a similar manner.”<sup>29</sup>

2.4.3 If the complainant were a prostitute, or where her behaviour fell just short of prostitution,<sup>30</sup> or as the courts phrased it, was “notorious for want of chastity,”<sup>31</sup> she “could

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<sup>19</sup> *Op cit* 14

<sup>20</sup> (1817) 2 Stark 241

<sup>21</sup> *Report of the Advisory Group on the Law of Rape* (the Heilbron Committee) Cmnd 6352 (1975) at para 94

<sup>22</sup> (1843) 1 Cox 48

<sup>23</sup> *Bashir* (1969) 3 All E.R. at p. 693 and quoted in Temkin, Jennifer ‘Regulating Sexual History Evidence – The Limits of Discretionary Legislation’ (1984) 33 I.C.L.Q p. 943

<sup>24</sup> *R v Clay* (1851) 5 Cox 146 Evidence was admitted that the victim had been seen twenty years earlier ‘on the streets of Shrewsbury as a reputed prostitute.’

<sup>25</sup> *Op. cit* 18

<sup>26</sup> (1829) 3 C. & P. 589

<sup>27</sup> (1817) 2 Stark 241

<sup>28</sup> (1843) 1 Cox C.C. 48

<sup>29</sup> *Report of the Advisory Group on the Law of Rape* (the Heilbron Committee) Cmnd 6352 (1975) at para 99 and quoted in Temkin, Jennifer ‘Regulating Sexual History Evidence – The Limits of Discretionary Legislation’ (1984) 33 I.C.L.Q p. 944

<sup>30</sup> See for example *Krausz* (1973) 57 Cr. App. R. 466 in which it was decided that a high degree of promiscuity which just falls short of prostitution would be regarded in the same light.

<sup>31</sup> *Op. cit* 18

not merely be cross examined about this but witnesses could be called by the defence, as this evidence was regarded as being relevant not merely to credit but also to whether she had consented to the defendant on the occasion in question.”<sup>32</sup>

## 2.5 Evidence of Sexual History with Third Parties

2.5.1 This type of evidence and cross examination, as opposed to allegations of prostitution or similar, “has always stood on a different footing and understandably so.”<sup>33</sup> The reason for pursuing this line of questioning was put forward in Heilbron as being, that it casts doubt on the credibility of the woman. “The fact that she has had prior sexual experiences, it is said, tends to prove she is an untruthful or unreliable witness, or as it is sometimes put ‘it tends to destroy her credit.’”<sup>34</sup> The logical reasoning for why this is, is not explained.

2.5.2 The case law shows that a woman’s sexual history evidence with third parties “tended to fall into two major categories; first, that she was notoriously immoral, and second that she had previously had sexual contact with someone other than the defendant.”<sup>35</sup> The second of these categories goes without saying; of course a woman who has had sexual intercourse with third parties has had sexual intercourse with someone other than the defendant. The first category however, about being notoriously immoral, is extremely judgemental. A complainant who has had sexual relations before the incident in question cannot be deemed immoral simply for this reason. This kind of attitude demonstrates exactly why a woman’s sexual history evidence was deemed so relevant. However it is extremely narrow minded. Evidence of sexual relationships in the past, with third parties, was considered evidence which was relevant to a woman’s credibility or as Temkin puts it “her sexual activity was regarded as an indication of a lack of truthfulness or reliability as a witness.”<sup>36</sup> Therefore cross examination about any previous relationships was allowed to be

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<sup>32</sup> Temkin, Jennifer ‘Sexual History Evidence – the ravishment of Section 2’ (1993) Crim LR 3, p. 3

<sup>33</sup> *Report of the Advisory Group on the Law of Rape* (the Heilbron Committee) Cmnd 6352 (1975) at para 101

<sup>34</sup> *Ibid* at para 102

<sup>35</sup> Adler, Zsuzsanna, *Rape on Trial* (Routledge & Kegan Paul Ltd, New York 1987) p. 69

<sup>36</sup> *Op. cit* 32



carried out by the defence. Though it should be noted that the answers given by her were final and further evidence could not be led to contradict her.<sup>37</sup>

2.5.3 However, “where the complainant’s sexual activities were not a matter of public knowledge...the common law generally treated any acts of sexual intercourse between herself and men other than the defendant as relevant to credit but not to consent.”<sup>38</sup> Temkin thinks that “some writers have blurred the clear conceptual distinction which the common law drew between those women whose sexual behaviour was public or notorious and those who might have been sexually active but did not fall into this category.”<sup>39</sup> The difference being that it is possible that the complainant could have had many sexual partners which the defendant has no idea about and therefore they cannot have influenced his state of mind in the alleged rape.

## 2.6 The Heilbron Report<sup>40</sup>

### 2.6.1 The formation of the committee

2.6.1.1 Although *R v Morgan*<sup>41</sup> was not specifically focused on the use of sexual history evidence it is crucial to set the background for rape law as it forced attention to be paid to this area. On the other hand, the decision in any one case is not usually enough to spark such a reaction and therefore, having looked at the state of rape law in the UK over the previous century it is obvious the report was needed to assess what needed to be done. Essentially, *R v Morgan* acted as a final straw. The Advisory group was established as a result of widespread concern from society as a whole to the decision in *R v Morgan* or as Temkin puts it, “to assuage public wrath over the decision.”<sup>42</sup>

2.6.1.2 By the time the case of *R v Morgan* came along the law regarding rape was in a state for concern. This case has been labelled the “event which sparked second wave feminist

<sup>37</sup> See for example; *Cockcroft* (1870) 11 Cox C.C. 410 and *Holmes* (1871) L.R. 1 C.C.R. 334

<sup>38</sup> Temkin, Jennifer ‘Regulating Sexual History Evidence – The Limits of Discretionary Legislation’ (1984) 33 J.C.L.Q p. 944 however note the exception to this rule in *R v Krausz* (1973) 57 Cr. App. R 466

<sup>39</sup> *Op. cit* 11 at p. 945

<sup>40</sup> *Ibid*

<sup>41</sup> (1975) 2 WLR 913

<sup>42</sup> *Op. cit* 11 at p 948

activism in relation to rape law<sup>43</sup> when the House of Lords declared that a man could not be found guilty of rape if he had an honest, even if unreasonable, belief that the woman was consenting. Hailed as the “rapist’s charter,”<sup>44</sup> it would remain good law for twenty-five years or so.<sup>45</sup> However the decision in this case caused “widespread concern...by the public, the media and in parliament”<sup>46</sup> and as a result the Heilbron report which was commissioned after the judgment to “give urgent consideration to the law of rape in the light of recent public concern and to advise the Home Secretary whether early changes in the law are desirable.”<sup>47</sup>

2.6.1.3 The facts of *R v Morgan* were as follows: Morgan (37) and three co-defendants; McDonald (21), McClarty (27) and Parker (20) spent the evening of 15 August 1973 together. They were all members of the RAF though Morgan was older and more senior to the others. He was married and he invited the men home to have intercourse with his wife telling them that she may struggle a bit but that this excited her and would welcome the intercourse with all of them. She struggled violently but all three men had intercourse with her, by force and without her consent. After the three men left the room her husband also forced her to have intercourse with him. Afterward she grabbed her coat and ran from the house, to the hospital making an immediate complaint of rape. Although this case does not specifically relate to sexual history evidence, it brought about the Heilbron Report and therefore is an integral part of this history.

2.6.1.4 “Much of the criticism [received is directed] against the practice and procedure followed in rape cases,”<sup>48</sup> most notably for the purposes of this thesis, the report was very critical of the way in which a complainant’s sexual history was used to prejudice the jury against her.<sup>49</sup> For the purposes of this chapter, and this thesis, I shall only refer to the sections of the report which focus on the use of sexual history evidence.

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<sup>43</sup> McGlynn, Clare, *Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?* in McGlynn & Munro, ‘Rethinking Rape Law’ (Routledge – Cavendish, 2010)

<sup>44</sup> Temkin, Jennifer, *Rape and the Legal Process* (2<sup>nd</sup> Edn Oxford University Press, Oxford 2002) at p. 119

<sup>45</sup> *Op. cit* 41

<sup>46</sup> *Report of the Advisory Group on the Law of Rape* (the Heilbron Committee) Cmnd 6352 (1975) at para 1

<sup>47</sup> *Ibid* at para 2

<sup>48</sup> *Op. cit* 33 at para 85

<sup>49</sup> Easton, Susan, ‘The Use of Sexual History Evidence in Rape Trials’ in Childs, Mary & Ellison, Louise, ‘Feminist Perspectives on Evidence’ (Cavendish Publishing, London 2000) at p. 169

## 2.6.2 Aims of the Committee

2.6.2.1 The aims behind the report and their recommendations were to “reduce the ordeal of the genuine rape victim” whilst “[achieving] fairness to the accused.”<sup>50</sup> It was argued this was justifiable both on humanitarian grounds and in encouraging rape victims to come forward.<sup>51</sup> If more rape victims came forward the hope is that the conviction rate would increase. Heilbron also felt the recommendations were justifiable on the ground that if irrelevant evidence was excluded, it would be “easier for juries to arrive at a true verdict.”<sup>52</sup>

## 2.6.3 The Recommendations made on Sexual History Evidence

2.6.3.1 Heilbron approaches evidence of sexual history with the defendant and with third parties as separate issues. The general stance taken is that evidence introduced simply to encourage a jury to have a negative opinion of the woman should not be allowed, as her general character cannot be considered an indicator as to whether she consented on any given occasion.

## 2.6.4 Evidence with Third Parties

2.6.4.1 Heilbron reached the conclusion that, “the previous sexual history of the alleged victim with third parties is of no significance so far as credibility is concerned, and is only rarely likely to be relevant to issues directly before the jury.”<sup>53</sup> This seems to be because of a societal shift to a position in which women can engage in sexual relations with men in a far more casual way than ever before. As the report puts it “There exists...a gap between the assumptions underlying the law and those public views and attitudes which exist today which ought to influence today’s law.”<sup>54</sup> This could be for several different factors. Firstly the lack of statutory definition of rape meant that the definition of rape has developed through the case law as opposed to any radical statutory means. Secondly, and very importantly, whilst Heilbron makes assumptions about societal attitudes, rape myths, as can be seen later on this thesis, are still extremely prevalent. Therefore whilst on some level a woman has more

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<sup>50</sup> *Report of the Advisory Group on the Law of Rape* (the Heilbron Committee) Cmnd 6352 (1975) at para 133

<sup>51</sup> *Ibid*

<sup>52</sup> *Ibid*

<sup>53</sup> *Ibid* at para 131

<sup>54</sup> *Ibid*

sexual freedom, she still risks all kinds of accusations and judgements if she exercises that freedom.

2.6.4.2 Whilst consent to one man should not be allowed to infer the consent to another man the committee accepted that there may be situations whereby third party evidence could be relevant. The test they devised to allow such evidence in can be called the “strikingly similar” test. The report concluded that evidence would be allowed in where the scenario in the evidence was ‘strikingly similar’ to the situation surrounding the incident of the alleged rape.

2.6.4.3 In short, the judges should permit cross-examination and allow evidence with third parties if he is satisfied;

“a) that this evidence relates to behaviour on the part of the complainant which was strikingly similar to her alleged behaviour on the occasion of, or in relation to, events immediately preceding or following, the alleged offence;

And

b) that the degree of relevance of that evidence to issues arising in the trial is such that it would be unfair to the accused to exclude it.”<sup>55</sup>

It was hoped that the legislation would adopt a similar format to what has been laid out. There were also procedural recommendations put forward which meant that the application to the judge to admit such evidence would be made in advance without the jury present.

### *2.6.5 Evidence with the Defendant*

2.6.5.1 Evidence of sexual history evidence with the defendant was considered differently to third parties. The committee decided that this type of evidence was generally “relevant to the issues involved in a trial for rape, subject always to the power of the judge to control improper questioning.”<sup>56</sup> Therefore the report concluded that evidence with the defendant should be allowed with restrictions as enforced by the judge. He would be allowed to use his discretion to allow in evidence where he felt that its exclusion would result in an unfair trial.

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<sup>55</sup> *Ibid* at para 137

<sup>56</sup> *Ibid* at para 134

## 2.6.6 Problems with Heilbron

2.6.6.1 The main problem of this approach to evidence with the defendant is that Heilbron is suggesting that we rely solely on the discretion of the judge in deciding what should and should not be allowed in. The judge will be given the guideline that it would result in an unfair trial to exclude such evidence however this would seem like a very subjective statement. There is also a hidden rape myth in this admittance which is that consent to the defendant on a previous occasion may automatically lead to the assumption of consent on a number of other occasions. It is not the case necessarily that when a woman consents to one man that she will always thereafter consent to him. Unfortunately this rule of inclusion, whilst not actively enforcing this myth, does nothing to counter it.

2.6.6.2 Later in this thesis the problem of judge's own opinions and their general lenience with regards to this type of evidence will be discussed. However, at this stage it is still important to note that the committee are putting a lot of faith in the judge being impartial. Particularly in the 70s when views of a woman's sexuality were even less progressive than they are today. Use of Section 2 will show that the judges did not manage to work as impartially as Heilbron had hoped. Giving the judge this control is a "compromise with the more extreme view which would exclude the complainant's sexual history completely" which was viewed as unfavourable as this could, in some cases, be unjust to the accused. As examples the report cites; *R v Krausz*,<sup>57</sup> *R v Tissington*,<sup>58</sup> *R v Clay*,<sup>59</sup> *R v Riley*,<sup>60</sup> *R v Greatbanks*<sup>61</sup> and *R v Bashir*.<sup>62</sup>

In comparison to some of the later restrictions recommended against sexual history evidence, Heilbron's suggestions seem relatively lenient however it may be that it only seems this way with hindsight. After all it was stated that the number of cases this was envisaged to effect was small as Heilbron labelled these cases "exceptional."<sup>63</sup>

2.6.6.3 Given that the government chose not to follow Heilbron on many of its most important recommendations; for example, the similar fact suggestion, the commentary on the report

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<sup>57</sup> (1973) 57 Cr. App R 466

<sup>58</sup> (1843) 1 Cox 48

<sup>59</sup> (1851) 5 Cox 146

<sup>60</sup> (1887) 18 QBD 481

<sup>61</sup> (1959) Crim L R 450

<sup>62</sup> (1969) 3 All ER 692

<sup>63</sup> *Op. cit* 50 at para 136

often goes hand in hand with the disappointment of Section 2. This is perhaps because, the report itself had some very good ideas which critics approved of. Adler saw the approach as a “radical challenge to the assumptions arguing as it does that whatever a woman’s sexual experience with partners of her choice, it cannot logically be construed as a general willingness to consent to sexual intercourse or as an indication of untruthfulness.”<sup>64</sup> The report was “very critical”<sup>65</sup> that a complainant’s sexual history was used in this way, to prejudice the jury against her. However the subsequent legislation and its use does not seem to echo this sentiment.

## 2.7 Section 2 of the Sexual Offences (Amendment) Act 1976

2.7.1 A copy of section 2 can be found in Appendix 1.

Section 2 did implement some of the proposals from the Heilbron report in order to “tackle the sexual history issue,”<sup>66</sup> but the “strikingly similar” formula did not make it onto the statute book. Instead it states that where sexual history evidence with a third party is concerned, it should not be admitted by the judge except where it would be unfair to the defendant to exclude it. But as Temkin points out the decision of unfairness rests with the judge who has contributed to such free use of sexual history evidence in the past.<sup>67</sup> Therefore it seems odd that section 2 essentially gave judges ultimate power when it comes to deciding which evidence to allow in and which to exclude. Adler describes the situation by saying “while, on the face of it, the Act appears to overrule the precedents established in the nineteenth century, it also seems to leave a good deal to the trial judge’s discretion.”<sup>68</sup> She goes on to say that because of this “broad discretionary legislation” there is “a very real possibility that the absence of specific guidelines will lead judges to incorporate the assumptions reflected in nineteenth century case law into their interpretation of the new Act.”<sup>69</sup>

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<sup>64</sup> Adler, Zsuzsanna, *Rape on Trial* (Routledge & Kegan Paul Ltd, New York 1987) p. 72

<sup>65</sup> *Op. cit* 50

<sup>66</sup> *Op. cit* 32 at p. 4

<sup>67</sup> *Ibid*

<sup>68</sup> *Op. cit* 64

<sup>69</sup> *Ibid*

## 2.8 Judicial Interpretation of Section 2

2.8.1 The proof of legislation is how it works once enacted. This section will analyse the direction in which the cases and legislative interpretation went following the enactment of section 2 in order to provide a thorough overview of the history of the use of sexual history evidence. At the same time this section will voice some of the academic views on section 2 and its enactment.

2.8.2 In practice applications under Section 2, “although not universal, are certainly a good deal less exceptional than the Heilbron Group or Parliament intended’ at a success rate of 75%.<sup>70</sup>In terms of the case law Temkin argues that ‘matters got off to a bad start’<sup>71</sup> in *Lawrence*<sup>72</sup> where it was decided that questions about the complainant’s relationships with other men should only be allowed where they “might reasonably lead the jury, properly directed in the summing up, to take a different view of the complainant’s evidence from that which they might take if the question or series of questions was or were not allowed.” But as Temkin points out this is “the whole nub of problem” because if a jury is told about a woman’s sexual past they may well take a different view of the evidence presented.<sup>73</sup> This is partly because rape myths are still extremely prevalent in society as a whole and not just the courts. Section 2 is unsatisfactory because it attempts to solve the problem of sexual history evidence with the word “reasonably”<sup>74</sup> when clearly a more decisive statement was needed, like the “strikingly similar” doctrine offered in Heilbron. Empirical studies<sup>75</sup> show that the operation of Section 2 was still allowing irrelevant questions in, in order to discredit the complainant.<sup>76</sup> This empirical evidence in fact shows that Section 2 has had little effect on the admission of sexual history evidence.<sup>77</sup> Sadly, *R v Lawrence* was followed in *R v Mills*<sup>78</sup> and *R v Fenlon*.

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<sup>70</sup> *Op. cit* 64 at p. 73

<sup>71</sup> *Op. cit* 32 at p. 4

<sup>72</sup> (1977) Crim. L. R. 492 and then this formula was approved in the case of *Mills* (1978) 68 Cr. App. R. 327

<sup>73</sup> *Op. cit* 32 p. 4

<sup>74</sup> *Ibid* for a discussion of this.

<sup>75</sup> For example Adler, Zsuzsanna, *Rape on Trial* (Routledge & Kegan Paul Ltd, New York 1987)

<sup>76</sup> Kelly, Temkin and Griffiths, ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials.’ Home Office Report 2006 at p 12

<sup>77</sup> See Adler, Zsuzsanna, *Rape on Trial* (Routledge & Kegan Paul Ltd, New York 1987)

<sup>78</sup> (1978) 68 Cr App R 327 (CA)

2.8.3 Shortly after the implementation of the legislation academic commentary already seemed unfavourable. “On the face of it, this solution appears to have been less than satisfactory.”<sup>79</sup> Easton explains the limited impact of Section 2, not having the desired effect “as counsel continued to ask questions on sexual history, and when leave was requested it was rarely refused.”<sup>80</sup> She goes on to say how even when evidence is refused entry, appeals are often successful in allowing it in.<sup>81</sup> The main problem being that whilst recommendations had been made in the law, the “myths and stereotypes underpinning the old law survived”<sup>82</sup> and in many ways, still do. Firth backs this up by saying that since Parliament’s failure to implement these provisions to reform the common law “this area of law has been steeped in controversy.”<sup>83</sup>

2.8.4 Perhaps one of the main problems was that whilst section 2 contained a provision to deal with sexual history evidence with third parties, meaning that it was not, in theory, freely admitted, sexual history evidence with the defendant “continued to be freely admissible.”<sup>84</sup> The Heilbron proposals aimed to give the judges “far less scope to decide when such evidence should be admitted.”<sup>85</sup> As Henning and Bronitt state “the principal structural flaw of these legislative schemes is their failure to define the key concepts for determining admissibility” which leaves judges to their own “common sense assumptions.”<sup>86</sup> Unfortunately, other jurisdictions, namely Victoria and Tanzania were also working on similar reforms at the time section 2 came in and Temkin says it “compares unfavourably with both provisions.”<sup>87</sup> And perhaps the most shocking revelation Adler reveals “is that defending counsel often ignored section 2 altogether and not infrequently with the connivance of the judge.”<sup>88</sup> Temkin closes by saying that even after the Sexual Offences (Amendment) Act,

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<sup>79</sup> *Op. cit* 77 at p 11

<sup>80</sup> Easton, Susan, ‘The Use of Sexual History Evidence in Rape Trials’ in Childs, Mary & Ellison, Louise, ‘Feminist Perspectives on Evidence’ (Cavendish Publishing, London 2000)p. 171

<sup>81</sup> *Ibid*

<sup>82</sup> For more on rape myths see Temkin, Jennifer, *Rape and the Legal Process* (2<sup>nd</sup> Edn Oxford University Press, Oxford 2002), Lees, Sue, *Carnal Knowledge Rape on Trial* (2<sup>nd</sup> Edn The Women’s Press, London 2002) and Adler, Zsuzsanna, *Rape on Trial* (Routledge & Kegan Paul Ltd, New York 1987)

<sup>83</sup> Firth, Georgina, ‘The Rape Trial and Sexual History Evidence – R v A and the (Un)worthy Complainant’ (2006) NILQ [Vol. 57, No.3] p. 445

<sup>84</sup> *Ibid* at p. 446

<sup>85</sup> Henning, T. And Bronitt, S. ‘Rape victims on trial: regulating the use and abuse of sexual history evidence. In P. Eastaerl (Ed.) *Balancing the Scales: Rape, Law Reform and Australian Culture*. Sydney: The Federation Press quoted in Kelly, Temkin and Griffiths, ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials.’ Home Office Report 2006 at p 12

<sup>86</sup> *Ibid*

<sup>87</sup> Temkin, Jennifer ‘Regulating Sexual History Evidence – The Limits of Discretionary Legislation’ (1984) 33 J.C.L.Q p 962

<sup>88</sup> Discussed in Temkin, Jennifer ‘Regulating Sexual History Evidence – The Limits of Discretionary Legislation’ (1984) 33 J.C.L.Q p 976



“victims of rape are still victimised by the criminal justice system” and that the Criminal Law Revision Committee’s Report did little to dispel this belief.<sup>89</sup>

2.8.5 Despite Heilbron’s stance that sexual history evidence was generally irrelevant to consent, it declared that in cases like *R v Krausz*,<sup>90</sup> it could be so relevant. The defendant, Krausz, claimed the complainant had consented to intercourse but afterward had demanded money. Upon refusal he submits that she cried rape. He wished to introduce evidence that she was in the habit of having sex with men she did not know and then asking for money. Heilbron concluded that, in such a case, evidence of the complainant’s previous sexual conduct would be relevant to the issue of consent.<sup>91</sup> Smith argues that this is actually not an issue of consent but one of credibility similar to the reasoning applied in *R v Boardman*<sup>92</sup> on similar fact.<sup>93</sup> That is, that is was not her conduct or how many people she’d slept with in the past *per se*, simply that this set of facts is too similar to a previous incident to be a coincidence.

2.8.6 In *Viola*, Lord Lane apparently overlooked the common law position and deemed sexual history evidence generally relevant to the issue of consent.<sup>94</sup>This was subsequently followed by *R v Redguard*,<sup>95</sup> *R v Bogie*,<sup>96</sup> *R v SMS*<sup>97</sup> and *R v Brown*.<sup>98</sup> *R v Viola*<sup>99</sup> approved the *Lawrence* test<sup>100</sup> and furthered this by saying “if the questions are relevant to an issue in the trial in the light of the way the case is being run, for instance relevant to the issue of consent, as opposed to merely credit, they are likely to be admitted.”<sup>101</sup> The facts of *R v Viola* were that during an incident with the police the defendant had thrown his car keys into the doorway of the complainant’s home. He had knocked so that she might help him find them to which she obliged as she was slightly acquainted with him. She brought a lighted

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<sup>89</sup> *Ibid* at p 978

<sup>90</sup> (1973) Cr App R 466

<sup>91</sup> McColgan, Aileen, ‘Common Law and Relevance of Sexual History Evidence’ (1996) 16 OJLS HL 275 p 294

<sup>92</sup> (1975) AC 421

<sup>93</sup> Smith, J. C., ‘The Heilbron Report’ (1976) Crim L R at 103-4 cited in McColgan, Aileen, ‘Common Law and

Relevance of Sexual History Evidence’ (1996) 16 OJLS HL 275 p 294

<sup>94</sup> *Op. cit* 92 at p 283

<sup>95</sup> (1991) Crim L R 213

<sup>96</sup> (1992) Crim L R 301

<sup>97</sup> (1992) Crim L R 310

<sup>98</sup> (1989) 89 Cr App R 97

<sup>99</sup> (1982) 75 Cr App R 125

<sup>100</sup> (1977) Crim. L. R. 492 The test states that questions about the complainant’s sexual relationships with other men should be allowed only where they “might reasonably lead the jury, properly directed in the summing up, to take a different view of the complainant’s evidence from that which they might take if the question or series of question was or were not allowed.”

<sup>101</sup> (1982) 1 WLR at 130

paper to aid the search and permitted him to enter the maisonette so that he could see from the window if the police were still there. It is then that she alleges he raped her. He claims she invited him in for a drink and that the sexual intercourse which took place between them was consensual. He did however, initially deny the intercourse to the police but later changed his story. The defence wished to call evidence relating to a few different scenarios; one happened earlier in the evening and concerned friends of the complainant's boyfriend during which the complainant supposedly consumed alcohol with the men and then suggested they may wish to try out her new bed before massaging one of them. The second related to a sighting of a naked man in her house save for his slippers nine hours after the rape. Both pieces of evidence were allowed. The problem here is that the defence can make it look like she "may well have been in the mood for sexual intercourse with any man."<sup>102</sup> The relevance was said to rest on the proximity of the alleged rape and the consensual sexual behaviour.<sup>103</sup> Temkin says this "took us from bad to worse" because "it left the door open for rulings that evidence of past sexual experience was in any particular case relevant to the issue of consent and therefore admissible."<sup>104</sup> The issue of promiscuity was covered again in *R v Brown*<sup>105</sup> where the appeal was based on the fact that the trial judge had excluded evidence of the complainant's alleged promiscuity. (She had a 6 month old son, a casual relationship with a man who was not the father of the child and at a later date found to have a trace of venereal disease.)<sup>106</sup> The appeal was allowed. After *Viola* the court concluded that this case neared the borderline because "the complainant was prepared to have intercourse with a number of different men."<sup>107</sup> The court went on to say that with cases which were near the border it may help the jury to know about her past in order to explain what happened in this incident. For example, as Temkin explains, in *Brown* her failure to shout for help as she was dragged away or her failure to tell the taxi driver who brought her home were seen as indications of her attitude toward sexual relations.<sup>108</sup> The implication is one of promiscuity.

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<sup>102</sup> This is not the view held in the article – simply a comment made that the jury may see it this way. Temkin, Jennifer 'Regulating Sexual History Evidence – The Limits of Discretionary Legislation' (1984) 33 I.C.L.Q p. 971

<sup>103</sup> *Op. cit* 92 at p 283

<sup>104</sup> Temkin, Jennifer 'Sexual History Evidence – the ravishment of Section 2' (1993) Crim LR 3 p. 5

<sup>105</sup> (1989) 89 Cr App R 97

<sup>106</sup> Temkin references research at St. Mary's Hospital, London, which found 30% of women who attended a clinic after being raped were suffering from, venereal diseases. Temkin, Jennifer 'Sexual History Evidence – the ravishment of Section 2' (1993) Crim LR 3 p. 6

<sup>107</sup> (1982) 75 Cr App R at p 130 and discussed in Temkin, Jennifer 'Sexual History Evidence – the ravishment of Section 2' (1993) Crim LR 3 p. 6

<sup>108</sup> *Op. cit* 32 at p. 6

2.8.7 In many cases the defence often failed even to make an application to the judge and would simply use it in courts without permission. In the case of *R v Bogie*<sup>109</sup> this situation arose in relation to promiscuity. The complainant had no regular income or permanent residence and was staying with friends. On the night of the alleged rape however she was offered a place to stay in a building which an acquaintance of hers was the caretaker for. She agreed and upon arrival at the building he suggested she remove her clothes so they did not crease and offered her a shirt instead. It was then that she alleged, whilst lying on a mattress, he raped her. She was found shortly after leaving the premises, by a security guard who described her being “in quite a state, sobbing as if broken-hearted.”<sup>110</sup> He took her to the police and she reported the rape. The police returned to the building where they arrested the defendant, who denied the charge and threatened that his mates would kill the complainant. During the complainant’s medical examination it was found that she was scratched and bruised. In court the prosecution asked the defendant why he thought the complainant would be willing to have sex with him. He said she was an “easy lay” and had intercourse with his friends. Only after this had been said did the judge intervene to prevent further questions. As Temkin points out, since the defendant had made similar accusations to the police, the prosecution should have anticipated this type of response and if they wanted to pursue this line of questioning, an application under section 2 should have been made.<sup>111</sup>

## 2.9 Conclusion

2.9.1 This chapter has offered a background to the use of sexual history evidence in rape law in the UK. It documents the first major legislative change in this area and how it came about as well as the reaction to that legislation and how the courts have handled it since.

2.9.2 It is important to note the growing sense of unease with the legislative situation and the way sexual history evidence was being used at the time because this sets the context for

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<sup>109</sup> (1992) Crim L.R. 301

<sup>110</sup> (1992) Crim L.R. 301 at p. 3 of the transcript

<sup>111</sup> *Op. cit* 32 at p. 8

the next legislative change in Section 41. The judiciary may well have supported S.2 because it allowed them a great deal of discretion. The volume of cases in which sexual history evidence was introduced was high with three in four applications being accepted.<sup>112</sup> Heilbron suggested that the cases in which such evidence would be allowed were “exceptional.”<sup>113</sup> 75% is not an exception, but a majority. And not only was the legislation being over used, it was also being under-used in the respect that often cases would simply by-pass the provisions and raise the evidential matters in court rather than creating the proper application.<sup>114</sup>

2.9.3 This misuse led to the *Speaking up for Justice* Home Office report in 1999 after a committee was formed in order to decide how to deal with the growing concern and considerable misuse of S.2 and the use of sexual history evidence. The next chapter will continue to look at how the dissatisfaction and misuse of S.2 led to the Home Office report of 1999 and subsequently the implementation of S.41 YJCEA 1999.

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<sup>112</sup> *Op. cit* 64 at p. 73

<sup>113</sup> *Report of the Advisory Group on the Law of Rape* (the Heilbron Committee) Cmnd 6352 (1975) at para 136

<sup>114</sup> For example in the case of *Bogie* [1992] Crim L.R. 301

### 3. S.41 of the Youth Justice and Criminal Evidence Act 1999

#### 3.1 Introduction

3.1.1 As we have seen from the previous chapter, the legislation regulating the use of sexual history evidence, found in S.2 has been heavily criticised. As a result of this, the government decided it was time to review the law in this area and consequently S.41 of the Youth Justice and Criminal Evidence Act 1999 was produced to deal with these issues. This chapter will provide a detailed analysis of Section 41 of the YJCEA 1999. It will set out the aims and ideas behind the implementation of S. 41 by looking to the *Speaking up for Justice* Report and the legislative process which led to its enactment. The problems of S.2 have already been discussed in the previous chapter so they will not be fully discussed again here, however it can be stated that while the new legislation had several aims behind its inception, one of the main reasons for its creation was because of the problems Section 2 had previously caused which needed to be rectified in the new legislation. It will then go on to provide a detailed analysis of each of the gateways in Section 41 through which sexual history evidence can be introduced in court. It will highlight the positives and the flaws with each gateway. Having analysed the wording of each of the gateways the chapter will go on to look at how the courts have interpreted S. 41 by looking at the case law and commentary for each of the exceptions.

#### 3.2 The Aims of S.41

3.2.1 First we must ask, from where the need for new legislation came. Birch says that S. 41 was “enacted on a wave of invective against the courts for failing to give proper effect to earlier legislation on sexual history evidence.”<sup>115</sup> Temkin sees Birch’s work as “[harking] back wistfully to the good old days when S.2 prevailed” however she describes the legislation as “deeply flawed, permitting a wide use of sexual history evidence whenever it was deemed by the trial judge to be relevant to the issue of consent.”<sup>116</sup> Therefore she points out that “[it was]

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<sup>115</sup> Birch, Di, ‘Rethinking Sexual History: Proposals for fairer Trials’ (2002) Crim LR 531

<sup>116</sup> Temkin, Jennifer, ‘Sexual History Evidence – Beware the Backlash’ (2003) Crim LR 217 at p 218

concluded the legislation has not achieved its aims<sup>117</sup> and this is the reason for fresh legislation in S.41. Spencer on the other hand considers that s.41 was introduced simply because “feminists complained that judges gave leave too readily.”<sup>118</sup> I must agree with Temkin here when she asserts that the feminist complaints are not actually unfounded and it is as though he thinks there is “nothing at all to support such complaints.”<sup>119</sup> However, as the chapter will go on to discuss there was large amounts of empirical evidence available at the time which would suggest sexual history evidence was being used far too frequently and that the attrition rate for rape was very high. For these reasons, Spencer’s argument that this was brought about purely due to feminist action with nothing to back up the complaints seems rather ineffective.

3.2.2 What can be said however is that in 1999 the government was “spurred into action”<sup>120</sup> by a Home Office report; *Speaking up for Justice*. The report itself was commissioned in order to decide whether or not the current legislation was working effectively and to decide how best to proceed. We can look to this report, as well as Hansard for the parliamentary debates on this matter.

### 3.3 The Home Office Report *Speaking up for Justice* 1999

#### 3.3.1 Introduction

3.3.1.1 The Home Office report *Speaking up for Justice* was published in 1999 with the purpose of “addressing concerns that the present law [was] not working effectively.”<sup>121</sup> It considers the legislation in the context of a high attrition rate for rape and empirical evidence showing that sexual history evidence was being used in around 75% of cases, often to discredit victims in the eyes of the jury.<sup>122</sup> So we can gather an aim here is to limit the use of sexual history evidence. Research evidence of S.2 being used in courts shows that “interpreting the provision is widely variable and that it frequently is at variance with the

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<sup>117</sup> *Ibid* at p 221

<sup>118</sup> Spencer, “Rape Shields and the Right to a Fair Trial” [2001] C.L.J. 452 commented on in Temkin, Jennifer, ‘Sexual History Evidence – Beware the Backlash’ (2003) Crim LR 217 at p 222

<sup>119</sup> *Op. cit* 117 at p 222

<sup>120</sup> *Ibid*

<sup>121</sup> From the insert by Alun Michael in *Speaking up for Justice* 1999, Home Office.

<sup>122</sup> Paras 9.56 and 9.57 on *Speaking up for Justice* 1999, Home Office

intention of S.2.”<sup>123</sup> This suggests a desire for tighter and clearer restrictions. The fact that evidence shows it was being used in 75% of cases backs this up as the point of S. 2 was that the use of sexual history evidence was to be restricted. The working group concluded that “there [was] overwhelming evidence that the present practice in the courts is unsatisfactory and that the existing law is not achieving its purpose.”<sup>124</sup>

### 3.3.2 Options that the Working Group Considered

3.3.2.1 The working group saw that there were two possible options with how to proceed in order to improve the law on sexual history evidence. Either to adapt the existing law or to change the law. They looked at improving the law through further guidance to courts in the form of a Court of Appeal judgment or by a practice discretion in order to bring judicial practice in to line with the actual wording of the current legislation. The working group were not convinced that this non-legislative option would be successful given that S.2 had 20 years of operation behind it. It seems highly likely that this was the correct decision to make given that following such a vast amount of time under S.2 more weight was probably needed to effect change than simply a guidance in court. Creating new legislation is a far more forceful act. In addition to this, considering that judicial interpretation has been highly criticised under S.2 it would also seem wise to remove some of the power from the judges’ hands. Therefore they favoured a change in legislation.

3.3.2.2 Having decided that a change in legislation was more favourable, the working group considered two different ways of changing the legislation to improve the problems that S.2 created. The first option would be to remove the judge’s discretion to admit evidence of previous sexual history entirely while the second approach would be to more closely define the circumstances in which a judge may exercise his discretion. They concluded that to follow the first option would be to go against the recommendations set down in Heilbron because “there may be instances, albeit infrequent in which a complainant’s previous sexual history may be relevant to the case, and excluding this might not only be unfair, but could lead to the wrongful conviction of innocent defendants.”<sup>125</sup> Therefore the second approach;

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<sup>123</sup> Para 9.63 in *Speaking up for Justice* 1999, Home Office

<sup>124</sup> Ibid

<sup>125</sup> Para 9.67 in *Speaking up for Justice* 1999, Home Office

creating detailed legislative guidelines as to when the judge may use his discretion, was favoured by the working group. It is the solution which has been adopted in other jurisdictions such as Scotland, Canada and Australia.

3.3.2.3 So “the working group [concluded] that the law should be amended to provide a more structured approach to decision taking and to set out more clearly when evidence of previous sexual history can be admitted in cases of rape.”<sup>126</sup> It suggests possible models in Section 274 and 275 of the Criminal Procedure (Scotland) Act 1995 or the New South Wales legislation favouring the Scottish approach with the precise formulation being the subject of consultation.

### 3.4 The Legislative Process

3.4.1 To fully understand S.41 and therefore judge its success it is essential to know how it came about. As the previous sections have covered, there was much dissatisfaction with S.2 and the state of the law relating to sexual history evidence. However this section will focus on the legislative process which brought about S.41. It will look at the original bill, how it was initially received, what changes were made from it and why, in order to better understand the legislation in its final form.

3.4.2 S.41 came out of the Youth Justice and Criminal Evidence Bill of 1998-1999, the relevant section being Chapter 3 clauses 40 to 42. Clause 40 described restriction on evidence or questions about complainant’s sexual history; clause 41 the interpretation and application of section 40 and; clause 42 procedure on applications under section 40. Whilst the provisions do appear stricter than those of the 1976 Act, it was suggested by Lord Thomas of Gresford that they went no further than the current practice of the courts.<sup>127</sup> The reactions to the bill were somewhat mixed. Whilst many of the commentators admitted there was an issue, there was also a consensus that perhaps legislative change was too radical. However, there was much acknowledgement of the need for change when it comes to the law of rape. In the Lord’s debate of July 8<sup>th</sup> it was said “undoubtedly, the law needs to give

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<sup>126</sup> Para 9.70 in *Speaking up for Justice* 1999, Home Office

<sup>127</sup> Lord Thomas of Gresford, HL Deb 15 December 1998 c1299



better protection to witnesses.”<sup>128</sup> This would suggest that any legislation that came out of this debate would be more focussed on the claimant’s rights than the defendant’s. This is because they recognise “all too often in the past, sexual history evidence has been brought into rape trials.”<sup>129</sup> There is however, they point out, a problem with doing everything they had hoped for<sup>130</sup> when it comes to limiting sexual history evidence. This is because “the rules on the admissibility of evidence must be framed in the light of the definition of rape contained in the Sexual Offences Act 1956. Understandably, we cannot have two inconsistent laws.”<sup>131</sup> In this respect Parliament appears to be very restricted but it is important to note that whilst they seem to desire more room to manoeuvre in terms of restricting sexual history evidence, they would not restrict the use of such evidence totally because, as they rightly point out, “it is inevitable that, in many rape cases, witnesses will have to give intimate and detailed sexual evidence.”<sup>132</sup> The point here seems to be that the law wishes to offer as much protection as possible and only admit evidence where it is genuinely relevant. The aim therefore cannot be to remove the trauma of giving evidence of this sort entirely but to reduce it. The definition of rape on the statute book contains a defence in honest belief in consent which inevitably means that sexual history evidence cannot be limited totally. It does, however, beg the question why has this issue not been dealt with first?

3.4.3 Tangible opposition can be seen in the debates when a number of the members of the House of Lords, including the Lord Chief Justice at the time (Lord Bingham of Cornhill) argued that “in their experience the current provisions of the 1976 Act, together with the guidance given by the courts, were sufficient, and that to tighten the legislative restrictions further could result in the exclusions of relevant evidence.”<sup>133</sup> They moved to delete all of clause 40 but on a vote the suggestion was defeated by 143 votes to 56.<sup>134</sup> Oddly enough, there was also opposition by those who felt the provisions would not go far enough<sup>135</sup> but the government felt it “got the parliamentary structure right, by excluding not all evidence of

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<sup>128</sup> Hansard 8<sup>th</sup> July 1999 Column 1268

<sup>129</sup> *Ibid* Column 1269

<sup>130</sup> *Ibid* Column 1268

<sup>131</sup> *Ibid* Column 1269

<sup>132</sup> *Ibid*

<sup>133</sup> HL Deb 15 December 1998 cc1271-2 (Lord Bingham of Cornhill) and discussed in House of Commons research paper 99/40 ‘The Youth Justice and Criminal Evidence Bill’ [HL] Bill 74 of 1998-1999

<sup>134</sup> HL Deb 8<sup>th</sup> March 1999 c38

<sup>135</sup> HL Deb 8 February 1999 cc51-2 and 23<sup>rd</sup> March 1999 cc1211-2 (Lord Desai) and HL Deb 8<sup>th</sup> February 1999 cc52-3 (Baroness Ludford)

previous sexual behaviour but only irrelevant evidence.”<sup>136</sup> There were however, some who backed the provisions in their original format. For example, Lord Lester, who said they were “well structured, carefully balanced and fair to both the accused and the witness.”<sup>137</sup>

3.4.4 There was a notable change made to clause 40(3)(b)(i) which initially would have only allowed behavioural evidence within 24hrs of this alleged incident. There was, however, “considerable”<sup>138</sup> opposition to time limit and therefore it was removed and replaced with “at or about the same time”. In many ways this was an odd amendment since the explanatory notes detailed that this was still meant to be interpreted as meaning “no more widely than 24 hours before or after the offence.”<sup>139</sup> There was also a government amendment to the Bill which added in a similarity element following a hypothetical situation suggested by Baroness Mallalieu in which it would be unreasonable to exclude such evidence.<sup>140</sup> There had initially been no mention of a similarity gateway because the government took the view that a complainant’s sexual history is “simply not relevant to the question of whether there was consent on the occasion in point.”<sup>141</sup> However, after careful consideration of the treatment of such a gateway in other jurisdictions it was decided that such a provision would be added.

3.4.5 So we can see that one of the main aims was to limit the use of sexual history evidence, but that this could not be achieved to the degree to which the government initially would have liked. They did however manage to introduce restrictions. These are “that refusing to give such evidence could lead the jury to an unsafe conclusion, that the main purpose of the evidence must not be to undermine the victim’s credibility, and that the evidence must relate to specific instances of sexual behaviour of the complainant.”<sup>142</sup> The first restriction is crucial because it provides the balance between the complainant’s rights and the defendant’s rights. The second is a little more difficult because the defence could bring in evidence arguing the purpose is not to impugn the complainant’s credibility and try to show that this is simply an unfortunate side effect. However, how can the judge tell when the main purpose is to impugn her? And the final restriction is important as it prevents the

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<sup>136</sup> HL Deb 15 December 1998 cc1238 and 8<sup>th</sup> February 1999 c61 (Lord Williams of Mostyn.)

<sup>137</sup> HL Deb 8<sup>th</sup> February 1998 cc47-8

<sup>138</sup> House of Commons research paper 99/40 ‘The Youth Justice and Criminal Evidence Bill’ [HL] Bill 74 of 1998-1999 at p 52

<sup>139</sup> Explanatory notes to the Youth Justice and Criminal Evidence Act 1999 At para 143

<sup>140</sup> HL Deb 8<sup>th</sup> February 1999 cc45-6

<sup>141</sup> The Home Office Minister Lord Williams of Mostyn, HL Deb 15 December 1998 cc238-9

<sup>142</sup> Hansard 8<sup>th</sup> July 1999 Column 1270

defence asking questions of the complainant that they do not necessarily know the answer to, or perhaps they know half the story. To limit the defence to specific instances is to try to limit them to knowledge they already possess. The implication of the debate is that parliament would have gone further but for the “ridiculous defence”<sup>143</sup> which is available in the statute. They eloquently put it “as long as the defence of unreasonable, but honest belief in consent remains, unreasonable evidence may be admitted.”<sup>144</sup> However one cannot help but wonder whether or not this similarity gateway could have been more tightly drafted so that this loophole would have at least partially been corrected.

3.4.6 Lord Lester made an excellent observation during one debate when he stated “consent to engage in sexual relations in the past does not give a blank cheque for consent to engage in sexual relations in the future.”<sup>145</sup> Firth agrees with this argument saying that she would generally argue “there is no logic in allowing evidence of a woman’s sexual history either as an assessment of her truthfulness or to show that the man believed that she consented.”<sup>146</sup> She says that this is because “there is a difference between what a man has heard, which makes him think that she might consent if he makes an advance, and how she behaves when he does.”<sup>147</sup>

3.4.7 Later on in the debate the aims behind restricting sexual history evidence are highlighted. A comment was made in debate that; “we are particularly concerned about the attrition rate in rape cases and the fact that so many vulnerable people will not come forward because of the sort of evidence that has been brought forward in the past.”<sup>148</sup> The severity of this situation seems to have been realised in this debate and it is acknowledged within the discussion that the government are tackling the larger problem of the definition of rape. As she says, this is an essential because until the matter is resolved they “will not be able to give women victims confidence that the law will always protect them.”<sup>149</sup> The problem of course being that there can be an unreasonable belief in consent as a defence. So whilst the short term aim may be to restrict sexual history evidence it is for the larger purpose of raising

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<sup>143</sup> *Ibid*

<sup>144</sup> Hansard 8<sup>th</sup> July 1999 Column 1271

<sup>145</sup> Lord Lester of herne Hill, Report Stage, 8 March 1999, Column 23

<sup>146</sup> Firth, Georgina, ‘The Rape Trial and Sexual History Evidence – R v A and the (Un)worthy Complainant’ (2006) NILQ [Vol. 57, No.3] p 447

<sup>147</sup> *Ibid*

<sup>148</sup> Hansard 8<sup>th</sup> July 1999 Column 1271

<sup>149</sup> *Ibid*

the attrition rate by making it easier for women to come forward without fear of their sexual history being brought up solely to humiliate them.

### 3.5 S.41

3.5.1 Thus under the Youth Justice and Criminal Evidence Act 1999 S.41 was introduced to restrict the use of sexual history evidence. It adopts a blanket ban on sexual history evidence with a “categories approach”<sup>150</sup> to the exclusions. In the first instance it is important to note how controversial a decision this was. On the surface it greatly reduces judicial discretion and prevents a lot of previously admissible evidence from entering the trial. Broadly speaking it prevents sexual history evidence and cross examination on such matters unless the result would be an unsafe verdict. On top of this, the evidence the defence wish to bring must fall into one of the gateways. The next section will go into each in detail but they can be defined as; an issue not relating to consent; an issue relating to consent, at or about the same time as the event in question; an issue relating to consent which is so similar that it cannot reasonably be explained as a coincidence and the rebuttal gateway.

3.5.2 Unfortunately it is difficult to assess the effectiveness of the legislation in its original form because shortly after its inception the Law Lords pronounced judgment in the case of *R v A* which interpreted the legislation in to an almost unrecognisable state. They put the judicial discretion back into S.41 and thus, to a degree, undermined the gateways approach. More will be said on this case after the analysis of the gateways however it is important to bear in mind that this case has altered the way the section works. A copy of Sections 41 and 42 can be found in the appendix. S.41(1) contains the blanket ban on sexual history evidence, the exceptions to this rule can be found in S.41(3) and more information on these exceptions can be found in the rest of this chapter. S.42 gives some additional interpretative guidance.

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<sup>150</sup> *Op. cit* 117 at p 223

## 3.6 Analysis of the Gateways

### 3.6.1 Introduction

3.6.1.1 The exceptions are contained in S.41 and can be separated into four different gateways. In plain English these can be defined as, an issue not relating to consent; an issue relating to consent, at or about the same time as the event in question; an issue relating to consent which is so similar that it cannot reasonably be explained as a coincidence and the rebuttal gateway. In order to accurately assess whether or not the legislation has been a success this chapter will look at each of the gateways individually so that if some are more valuable than others the legislation can be judged fairly.

### 3.6.2 Not an Issue of Consent, S.41(3)(a)

3.6.2.1 Issue of consent is defined in S.42(1)(b) as “means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented).”

3.6.2.2 Temkin gives several suggestions of the type of evidence that this gateway could include. These are: belief in consent; denial of sexual act by the defendant; motive to lie and instances where consent is not the issue.<sup>151</sup> These can be dealt with individually because it may be the case that some will present more problems than others.

### 3.6.3 Belief in Consent

3.6.3.1 According to S.42(1)(b) “belief in consent” is not an issue of consent so it is not restricted by S.41(3)(c). It is a problematic defence discussed earlier in the aims section. It is allowed under this gateway as belief in consent is considered to be a separate issue to actual consent. This would include any evidence which could affect the defendant’s belief that the complainant consented. Unsurprisingly some “woman’s groups have objected

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<sup>151</sup> *Op. cit* 122 at p 227

strongly to this exception, contending that it will create a substantial loophole in the law.”<sup>152</sup> A gateway that allows in a defence of this kind could be very damaging to women. As was said in the parliamentary debates, this only highlights that whilst the current statutory definition of rape stands “they cannot give complainants the complete assurance that they will not [be] subjected in court to humiliating or intimidating questions about their sexual history.”<sup>153</sup> So on the one hand, in parliamentary debates the belief in consent is referred to as a “ridiculous defence”<sup>154</sup> and yet this gateway freely allows in this evidence. A good example of the effect this could have can be found within one parliamentary debate. Vera Baird commented; “I had a conversation with a famous female broadcaster – almost a household name – and the director of a prominent female equality lobby group. We three, confident middle-class woman, decided that, if we were raped by someone we knew, we would be unlikely to report it. Now that I have read the inspector’s report and the case of the Crown v A, it seems even less likely that any of us would report the offence.”<sup>155</sup>

3.6.3.2 McEwan says that “on one view, whenever consent is an issue in a sexual case, it is accompanied by that of belief in consent.”<sup>156</sup> Because the defendant is unlikely to allege that the complainant consented to intercourse while also stating that he thought she did not.<sup>157</sup> McEwan says that because the prosecution must prove all elements of the offence, it is misleading to describe the denial of *mens rea* as a defence.<sup>158</sup> She references the case of *R v Morgan* in which Lord Hailsham says; “Once one has accepted...that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit, it seems to me to follow as a matter of inexorable logic that there is no room either for a ‘defence’ of honest belief or mistake, or a defence of honest reasonable belief or mistake. Either the prosecution proves that the accused had the required intent, or does not.”<sup>159</sup> In reality the defendant’s belief in consent, with the issue of consent itself, stands or falls with the plausibility of his version of events. And she notes that the evidence for consent

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<sup>152</sup> *Op. cit* 122 at p 227

<sup>153</sup> Hansard 8<sup>th</sup> July 1999 Column 1269

<sup>154</sup> *Ibid* Column 1270

<sup>155</sup> HC Deb 24 April 2002 vol 384 cc 121-7WH

<sup>156</sup> McEwan, Jenny ‘I thought she consented: Defeat of the Rape Shield or the Defence that shall not run?’ (2006) Crim LR 969 at p 970

<sup>157</sup> Tapper, C. *Cross and Tapper on Evidence* (Lexis/Nexis, London, 2004), p 357 in McEwan, Jenny ‘I thought she consented: Defeat of the Rape Shield or the Defence that shall not run?’ (2006) Crim LR 969 at p 970

<sup>158</sup> McEwan, Jenny ‘I thought she consented: Defeat of the Rape Shield or the Defence that shall not run?’ (2006) Crim LR 969 at p 970

<sup>159</sup> [1976] AC 182

will likely also be the evidence on which belief in consent is also based and therefore a separate defence of mistaken belief is “necessary only where it rests of *different* evidence from that which suggests actual consent.”<sup>160</sup>

3.6.3.3 In *Davies*,<sup>161</sup> in accordance with the decision in *R v RT; R v RH*<sup>162</sup> that a complainant’s statements about her sexual history fall outside s.41, it was accepted that she could be cross-examined about telling the defendant she had previously slept with two other men. The Court of Appeal also took into account the defence argument that whether or not the statement was true, was crucial because “if it were true, it was more likely that she had indeed told him this, and if so, that would be relevant to his belief in consent.”<sup>163</sup> However, it was held that examination could go no further than asking for confirmation that she had slept with two men. McEwan comments that even this level of detail ‘is likely to have a serious effect on juror perception of the complainant’s credibility, it is reassuring to find the Court of Appeal more recently in *R v W* taking the view that *R v RT; R v RH* applies only to allegedly false complaints in the past. Cross-examination for other reasons on a complainant’s statement to the accused about sexual experience invokes s.41.<sup>164</sup> Kibble uses four rape case scenarios in order to analyse judicial perspectives on the operation of s. 41. A discussion of this study can be found in chapter 4.

### **3.6.4 Denial, by the Defendant, of the Sexual Acts**

3.6.4.1 Secondly the denial of sexual acts exists for situations the defendant denies sexual intercourse even took place. It would allow him to present evidence to show that sexual relations did not take place. The problem I can see with this type of evidence is that evidence which is from the occasion in question would be allowed anyway as each side has the right to present the facts as they see them. Therefore this would seem to be sacrificing more ground to the defendant at the expense of the complainant’s privacy.

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<sup>160</sup> *Op. cit* 158 at p 974

<sup>161</sup> [2004] EWCA Crim 1389

<sup>162</sup> [2002] All ER 683

<sup>163</sup> *Op. cit* 158

<sup>164</sup> *Op. cit* 158 at p 979

### 3.6.5 Motive to Lie

3.6.5.1 Thirdly Temkin suggests that evidence of the complainant's motive to lie could be brought in through this exception. Birch gives the example of the woman scorned.<sup>165</sup> The type of evidence this exception refers to is where her previous sexual behaviour could show that she might lie or that she has lied in the past. So for example, it could be that she has a history of reporting rape. Interestingly this type of evidence would not be allowed in the Canadian or Michigan systems which the UK is often compared to and would only be allowed in a limited fashion in New South Wales. Whilst I can see that where a woman has a history of such lies it may be useful for the jury to know in order to prevent a wrongful conviction, there does need to be careful consideration of such matters because the prejudicial value of such evidence will almost certainly turn the jury against the complainant. It is concerning that there seems to exist some unwritten rule that a woman can only ever claim rape once in a lifetime and that any subsequent rape allegation is automatically considered false. It also seems odd that the UK is choosing to ignore the experiences of other countries. For this reason it is good that there are additional hurdles for evidence to overcome before it can be admitted. (More information on the additional hurdles can be found later in this chapter at para 3.7)

3.6.5.2 One of Kibble's four scenarios<sup>166</sup> is a case in which the 14 year old victim could be said to have a motive to fabricate. It involves a 14 year old girl who tells her teacher that her stepfather had raped her. He however, claims there was no sexual contact at all and in fact that he believes that the complainant has made such accusations because he had discovered her having sex with her boyfriend a few days before and had forbidden them to see each other again. In his study he shows that the "judges were almost unanimous in deciding that leave should be given to allow cross-examination of the complainant in relation to the defendant's discovery of her having sexual intercourse with her boyfriend."<sup>167</sup> One reason given is that it "goes to a central issue, her credibility, on the basis that he is alleging a) she has made up the allegation and b) that she has specific motive to make up her allegation and if there is any evidence of such a motive, then it ought to be before the jury"

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<sup>165</sup> Birch, Di, pp.550-1.Cm 5668(2002)

<sup>166</sup> Kibble, Neil, 'Judicial Perspectives on the operation of Section 41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1' (2005) Crim LR 190 at p 203

<sup>167</sup> *Ibid* at p 193



because it would be “manifestly unfair in my view to deny him the opportunity to present evidence of a motive where that would affect the jury’s consideration of her credibility.”<sup>168</sup> However, the judges also agreed that there need be no questioning as to the details of the sexual intercourse itself. The judge needs to point out that it gives a motive to lie as opposed to “dwell on what they were doing or how often they’ve done it or anything else.”<sup>169</sup> A very worrying comment that was recorded during the analysis of this scenario was a suggestion that the judge decides whether or not he wants to admit the evidence and then simply finds a way to get it in through s.41. He says “I must say I find Section 41 very difficult and I must confess I am inclined to look at the thing and decide what’s fair then see how I can get it in. Because in a sense it does impugn her credibility but then that’s what fighting cases is all about.”<sup>170</sup> Kibble points out that many of the judges seemed to think S.41(4) was only “intended to eliminate a generalised attack on the credibility of the complainant. One said: ‘In our scenario, it is her credibility in the allegation she makes which is an issue and which the defence say goes directly to a motive to lie on her part. Plainly that’s an attack on her credibility but an entirely understandable and proper one because it is relevant to a specific factual issue. It’s not just a general attack to discredit her in general terms; it’s an attack on her credibility on something specific, her motive for making an allegation.’”<sup>171</sup> Basically, as long as there’s another purpose, aside from impugning her credibility, it is seen as acceptable. There were a few judges who thought that evidence was relevant but felt that s 41(4) restricted them.

3.6.5.3 In the case of *R v AM*<sup>172</sup> questioning was initially not allowed on the issue of a previous allegation of rape. However, on appeal it was held that judge had erred in his decision because “the judge had not asked himself whether the jury could have been satisfied whether on the basis of the evidence that her previous allegation of rape had been untrue.” It was alleged that the initial complaint had been made so that the complainant could be re-housed. Therefore the conviction was ruled unsafe. The problem with the verdict in this case is that it could offer women yet another reason not to report rape because any complaint which is not followed through is viewed as suspicious.

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<sup>168</sup> *Ibid*

<sup>169</sup> *Ibid* at p 194

<sup>170</sup> *Ibid*

<sup>171</sup> *Ibid*

<sup>172</sup> [2009] All ER (D) 173 (Mar)

### 3.6.6 Consent is Not the Issue

3.6.6.1 Finally Temkin suggests a fourth, general area of evidence which could come under this gateway and that is simply situations where consent is not the issue. This seems extremely reminiscent of a catch all. However she does suggest that perhaps this could cover situations where the defendant wishes to prove for example that the complainant has gained knowledge of sexual behaviour from men other than himself.<sup>173</sup> This could readily apply in situations where the complainant asserts that she was a virgin before the alleged rape. In such cases she may use sexual language or describe sexual acts when she gives her evidence and the defendant might want to try and suggest that she learnt such language or acts from other occasions and partners. Temkin does say that “great care is clearly required before such evidence is admitted.”<sup>174</sup> however whilst this statement is very true, there are no guidelines to help enforce this in the legislation and so this is clearly another failing of this gateway. Lindsay Armstrong was raped at 16 years old.<sup>175</sup> She gave evidence at the trial and later committed suicide. In court she was asked to hold up her underwear and read the words written on them. The defence said they simply wanted to show that her knickers had not been torn. However if this were the case then what exactly was the purpose of asking her to read what was written on them. Her parents believe that it was brought up so that the jury would make assumptions about Lindsay, who, they maintain, was a virgin. Kibble raises a scenario connected to this whereby the defendant wishes to cross examine the 11 year old complainant to explain the knowledge she has of sexual matters. Lord Hope in *R v A* gave this as one example where the issue is not one of consent<sup>176</sup>.

### 3.6.7 ‘At or About the Same Time’

3.6.7.1 S.41(3)(c)(ii) refers to “any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event, that the similarity cannot reasonably be explained as a coincidence.”

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<sup>173</sup> *Op. cit* 116 at p 228

<sup>174</sup> *Ibid*

<sup>175</sup> ‘She couldn’t take any more’ The Guardian 2<sup>nd</sup> August 2002

<sup>176</sup> *Op. cit* 166

Sexual behaviour is defined in S.42(1)(c) as “any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused.” In *R v AM*<sup>177</sup> on appeal “sexual behaviour” was interpreted very broadly and a previous complaint of rape was taken to be included within the meaning. This seems exceptionally broad when a woman reporting rape can be considered “sexual”.

3.6.7.2 Found in S.41(3)(b) this gateway is a logical addition to S.41 in many ways. If the evidence in question took place at the same time as the alleged rape then it goes to the central set of facts. This type of evidence must automatically be included because each side has the right to present the facts as they see them. Birch is pleased that “S. 41 does not set out to threaten the principle, recently and rightly identified by the law commission as fundamental to a fair trial, that both sides should be free to tender evidence bearing on the ‘central set of facts’ in issue in the case.”<sup>178</sup> She sees these as “obviously relevant facts.”<sup>179</sup> In that regard is there a specific need for this gateway if the evidence is of a type that should be admitted anyway on a general reading of the facts? And if the answer is no, that we don’t need a specific gateway then it may actually be damaging to add one in as it give the illusion of a liberal stance on sexual history evidence.

3.6.7.3 During parliamentary debate the issue was raised as to whether such a gateway was actually required. There could be a situation where the evidence to which the gateway is referring to could have happened at or about the same time but not involving the defendant. In which case this is not general facts of the case. However, the debate only briefly touches on this because they were not given an “example of behaviour with anyone other than the complainant which would be relevant to consent.”<sup>180</sup> What was really needed from the debate and was not given was clarity as to what ‘at or about the same time’ actually means. After all, if it is possible it could have involved a man other than the defendant this will likely

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<sup>177</sup> [2009] All ER (D) 173 (Mar)

<sup>178</sup> Birch, Di, ‘Rethinking Sexual History: Proposals for fairer Trials’ (2002) Crim LR 531 at page 534

<sup>179</sup> *Ibid*

<sup>180</sup> Hansard 8<sup>th</sup> July 1999 Column 1271/1272

have been a different “event”. *R v Mukadi*<sup>181</sup> involved an incident earlier on in the evening where the complainant had got into a car with another man. Because that had happened on the same evening it was deemed to be relevant. In *R v A* Lord Slynn backs this up saying that he had imagine it to be a wide meaning “certainly a few hours, perhaps a few days if the couple were continuously together”<sup>182</sup> though once again this refers to the defendant and not other men. It seems that given the decision in *R v Mukadi* that “at or about the same time” has been interpreted as the same day.

3.6.7.4 Interestingly though, when put together with the phrase “took place as part of the event” the definition does become narrower. It has been suggested to me that if the word “event” was replaced with the word “act” then the definition would be narrower still. However, is it the case that this loose nature of interpretation was desired? It seems that these two provisions; “at or about the same time” and “took place as part of the event” mean to be quite restrictive. And whilst “at or about the same time” could possibly be extended to third parties, it is difficult to see how; unless there was a third party actually present during the alleged incident that ‘took place as part of the event’ could be extended past the defendant. “The event” may sound less restrictive than “the act” but the intention behind it seems the same.

### **3.6.8 So Similar it Cannot Reasonably be Explained as a Coincidence**

3.6.8.1 S.41(3) (c) states that it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

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<sup>181</sup> [2003] EWCA Crim 3765

<sup>182</sup> [2001] UKHL 25

that the similarity cannot reasonably be explained as a coincidence.

3.6.8.2 The section above was not part of the original bill but was added to S.41(3)(c) in response to criticism in the House of Lords.<sup>183</sup> It was the Heilbron report that initially suggested a “strikingly similar” format and therefore, considering one of the suggestions put forward in the *Speaking up for Justice* report was that the new legislation should return to the principles set out in Heilbron, this seems like a very sensible gateway to include. However one must wonder why, when the report has already pointed out the use Heilbron’s conclusions are, they did not simply chose to adopt the “strikingly similar” wording. However, in practice this could work just as well, or possibly better with the caveat that it cannot be reasonably explained as a coincidence. It certainly helps to fulfil the aim to clarify the law by adding this caveat and one would hope that the clearer the legislation is, the easier it will be to interpret in court.

3.6.8.3 The idea of this type of exception, being based on similarity, was “firmly rejected in New South Wales, where it was pointed out that there would be difficulties in determining when a similarity in the sexual context was sufficiently striking.”<sup>184</sup> Although this is an obvious issue that the courts will come up against with a provision like this, it was a strong recommendation in the Heilbron report and it seems like a sensible exception to the rules against admitting sexual history evidence. Whilst similar facts should not be taken as definitive evidence either way, similar instances in the past can help put the facts in context. This will mean less reliance on assumptions of sexual norms. Kibble raises a scenario involving an alleged rape by several defendants. A discussion of this scenario can be found in chapter 4.

3.6.8.4 In 2009 the case of *R v Harris*<sup>185</sup> came before the court in which “similarity” evidence was disallowed at trial in accordance with S.41. The defence wished to use documents that had been disclosed from her psychiatric and medical records showing a history of depressive episodes in which she put herself as risk of abuse from others. It was stated that

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<sup>183</sup> H.L. Deb., vol. 597, col. 45 (Feb 8, 1999)

<sup>184</sup> *Op. cit* 116 at p 229

<sup>185</sup> [2009] EWCA Crim 434; [2010] Crim LR 54 (CA (Crim Div))

she engaged in excessive alcohol intake and casual sex during these episodes. The argument from the defence was that, this incident had been one such episode where she put herself in a risky sexual encounter. The judge refused the application and the appeal was also rejected. Kibble comments that “while difficult to disagree with the court’s decision that the trial judge’s refusal of the application to cross-examine the complainant ‘was open to him within the margin of judgment open to a decision maker’ the refusal nevertheless appears somewhat harsh.”<sup>186</sup> He goes on to say that most of the cases in this area seem only to have “underlined the awkwardness of the provision.”<sup>187</sup> In particular the case of *R v T*<sup>188</sup> which involved prior incidents of sexual activity in the same place, with the same person and the same sexual acts as well as other similar incidents and yet the evidence was not allowed in due to it not being sufficiently contemporaneous. On the one hand, it is good that the judges are restricting certain aspects of sexual history evidence as that is what the legislation intended to do, however, what is less satisfactory is the lack of clarity judges and commentators see with the legislation.

### 3.6.9 Rebuttal

3.6.9.1 Section S.41(5) applies if the evidence or question—

(a)relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b)in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

S.41(5) allows the defence to challenge any evidence brought by the prosecution about the complainant’s sexual behaviour. Their questioning “must go no farther than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained” and it should “relate to a specific instance or instances of alleged sexual behaviour on the part of the complainant.”<sup>189</sup> Despite these obvious restrictions Temkin says that S.41(5) has “the

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<sup>186</sup> Kibble, Neil, ‘*R v Harris*: Case Comment.’ (2010) Crim LR 54 at p 58

<sup>187</sup> *Ibid*

<sup>188</sup> [2004] EWCA Crim 1220; [2004] 2 Cr App R 32

<sup>189</sup> Youth Justice and Criminal Evidence Act S.41(5) and (6)

potential to be very broadly interpreted.”<sup>190</sup> For this reason the unsafe test in S.41(2)(b) will become an important safeguard.

3.6.9.2 The case of *R v Humadi*<sup>191</sup> involved a statement from the complainant that she would never have had sex with a stranger, or in fact, anyone but her partner. The defence wished to bring evidence in that she had, whilst being with her partner, been sexually active on a number of occasions with another man. The application was refused on the grounds that it carried no probative value and would “drive a coach and horses” through S.41.<sup>192</sup> Once again, we can see evidence of judges trying to use S.41 to keep sexual history evidence out of trials which is definitely a good sign. The appeal was also dismissed. Kibble states that this decision was correct given that the evidence did not rebut her actual statement.<sup>193</sup> She had said she would not have engaged in sexual intercourse with a stranger and the evidence the defence wanted to introduce was with a friend. What appears to be at work here is a very careful consideration by the courts as to whether or not the evidence in question genuinely rebuts her statement or whether or not it would simply cast doubt on her character. This shows that S.41 is at least causing judges to think more carefully before allowing evidence in.

3.6.9.3 This gateway makes sense because it abides by general evidence law and the defence would usually be able to counter evidence which the prosecution put forward, regardless of the type of case in question. Birch makes a point that S. 41 is unusual in that it “provides a one-sided exclusionary rule affecting only defence evidence and questioning.”<sup>194</sup> In this respect however, it remains a two-sided affair. It would be difficult to argue against the implementation of such a gateway.

### 3.7 Additional Hurdles

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<sup>190</sup> *Op. cit* 116 at p 229

<sup>191</sup> [2007] EWCA Crim 3048 (CA (Crim Div))

<sup>192</sup> *Ibid* and referenced in Kibble, Neil ‘Case Comment’ (2010) Crim LR 54

<sup>193</sup> Kibble, Neil ‘Case Comment’ (2010) Crim LR 54

<sup>194</sup> *Op. cit* 178

### 3.7.1 Introduction

In addition to coming under one of these gateways evidence also needs to overcome several other hurdles before it can be admitted. The hurdles are; that refusing to give such evidence could lead the jury to an unsafe conclusion, that the main purpose of the evidence must not be to undermine the victim's credibility, and that the evidence must relate to specific instances of sexual behaviour of the complainant. These are analysed separately below.

### 3.7.2 To Prevent an Unsafe Conviction

3.7.2.1 S.41(2)(b) states that that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

3.7.2.2 In the case of *R v R*<sup>195</sup> the appeal against the conviction was allowed on the grounds that "pursuant to the Youth Justice and Criminal Evidence Act 1999 s.41(2)(b) , evidence was admissible and cross examination permissible in relation to the alleged incident prior to the alleged offence because it was relevant to the issue of consent."<sup>196</sup> This was because "if it was the case that the complainant had had consensual sexual intercourse with first R and then H, then a jury might take the view that her behaviour was so similar to the alleged rape that it could not reasonably be explained as a coincidence. Both the alleged rape and the previous incident were alleged to have taken place at R's home. The evidence of the previous sexual relationship and of the alleged post rape sexual relationship was so relevant to the issue of consent that its exclusion deprived R of a fair trial."<sup>197</sup>

### 3.7.3 That the Main Purpose of the Evidence is not to Undermine the Victim's Credibility

3.7.3.1 S.41 (4) states that for the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

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<sup>195</sup> [2003] EWCA Crim 2754

<sup>196</sup> *Ibid*

<sup>197</sup> [2003] EWCA Crim 2754



3.56 This is very difficult to judge because it will likely always be a purpose or a side effect of introducing the evidence. So how can you tell what the main purpose is? One can always just argue it wasn't the main purpose, merely a side effect. The then Lord Chief Justice, Lord Woolf himself made a comment that the "language of s.41(3)(a) could be used to ride a coach and horses through the desirable policy reflected in section 41(4)"<sup>198</sup> because it creates a back door for such evidence. In *R v Martin*,<sup>199</sup> Mr Justice Crane pointed out that although it could be one purpose to impugn her, it was not necessarily the main or only purpose and of this specific case he said the evidence was not "questions which went solely to the question of credibility." Importantly, as the case of *R v Winter*<sup>200</sup> points out, another thing to consider is whether or not disallowing the evidence will create the risk of an unfair trial. In this particular case, it was decided that leaving the evidence out had not deprived the defendant of a fair trial and therefore the decision was upheld.

### 3.7.4 The Evidence Must Relate to a Specific Instance or Specific Instances

3.7.4.1 S.41(6) states that for the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate). See chapter 4 (para 4.6.4) for a discussion of how this gateway could operate.

### 3.8 *R v A (No 2)* [2001] UKHL 25

3.8.1 Without looking at this case and its effects it would be impossible for us to assess the success of S. 41. It was the first major case to be decided under the Youth Justice and Criminal Evidence Act 1999 (YJCEA) and also involved the Human Rights Act 1998 (HRA). The judgment in the House of Lords unanimously upheld a challenge by the defendant, arguing that Section 41 and the inadmissibility of sexual history evidence with the complainant was a breach of his right to fair trial under Article 6 of the European Convention

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<sup>198</sup> *R v Mokrecovas* [2001] EWCA Crim 1644

<sup>199</sup> [2004] EWCA Crim 916

<sup>200</sup> [2008] EWCA Crim 3

on Human Rights (ECHR). The evidence he wished to use did not come under one of the four gateways provided for in S.41 and so instead suffered the effects of the blanket ban on sexual history evidence. (That is, the evidence was ruled not to be an issue relating to consent,<sup>201</sup> to have happened “at or about the same time,”<sup>202</sup> or to be such similar behaviour “that the similarity cannot reasonably be explained as a coincidence.”<sup>203</sup> The Law Lords considered that to follow the Act exactly as it was drafted would be a breach of the defendant’s right to fair trial as it would not allow him to bring evidence they felt relevant. They used Section 3 HRA to read Section 41 in a way they felt was compatible with the ECHR, reintroducing a discretionary element<sup>204</sup> back into the test of admissibility and thus seriously undermining the 1999 Act.

3.8.2 At the preliminary hearing on December 8<sup>th</sup> 2000 the trial judge was asked to rule on the matter of cross examining the complainant under Section 41 Youth Justice and Criminal Evidence Act 1999 (YJCEA). He ruled that whilst the complainant could be questioned about any sexual activity in the last few hours with the defendant and also any other sexual activity at or about the same time, she could not be questioned about the previous relationship with the defendant under Section 41 (3)(b) or (3)(c). Since the last occasion on which the defendant and the complainant last engaged in sexual intercourse was over a week ago it did not qualify under the “at or about the same time” definition. However, he also said that prima facie this ruling would result in a breach of Article 6 (Right to fair trial) of the European Convention of Human Rights as implemented under the Human Rights Act 1998. As such, he was given leave to appeal to the Court of Appeal. At which stage Rose LJ said the evidence of sexual activity with the defendant was admissible under Section 41 (3)(a) YJCEA 1999 as it went to the defendant’s belief in consent. Posing the following question the Court of Appeal granted leave to appeal to the House of Lords; “May a sexual relationship between a defendant and complainant be relevant to the issue of consent so as to render its exclusion under section 41 of the Youth Justice and Criminal Evidence Act 1999 a contravention of the defendant’s right to fair trial?”

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<sup>201</sup> S.41(3)(a)

<sup>202</sup> S.41(3)(b)

<sup>203</sup> S.41(3)(c)(i) and (ii)

<sup>204</sup> This test of admissibility, expressed by Lord Steyn at para 46 is ‘whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the convention. If this test is satisfied the evidence should not be excluded.

3.8.3 The defence wanted the House of Lords to read Section 41 in such a way as to be in accordance with Section 3 HRA 1998 to allow compatibility with Article 6 of the convention and if this was not possible to make a declaration of incompatibility under Section 4 HRA. The law lords were set the task of answering this question and being able to read the legislation in a way that was compatible with the right to fair trial. In doing so they went against the legislation; they gave back judicial discretion so that when it comes to sexual history evidence “where the line is to be drawn must be left to the judgment of the trial judges.”<sup>205</sup> This was because they foresaw situations where to exclude the evidence would be a contravention of the defendant’s right to fair trial. Lord Steyn went so far as to say that it was “a matter of common sense” that prior sexual relations between the defendant and the claimant could be relevant.<sup>206</sup> Lord Slynn took this one step further and demonstrated the effect this negative stereotype has had upon society by arguing that the “man or woman in the street would find it strange that evidence that two young people who had lived together or regularly as part of a happy relationship had had sexual acts together, must be wholly excluded on the issue of consent unless it is immediately contemporaneous.”<sup>207</sup>

3.8.4 The fact that the Law Lords have once again made the distinction between sexual history evidence with the defendant and with third parties has highlighted the idea of “real rape”. That is to say that there is a distinction made between stranger rape, where the defendant is unknown to the complainant, and rape where the defendant is known to the complainant. There can also be a reference to violence made in the stereotype of “real rape” in that the idea often conjures up a dark alley where the victim is held at knife point. In fact, most rape is not stranger rape and therefore the idea of “real rape” is a damaging stereotype. There appears to be general satisfaction with the legislation’s interaction with third parties. The main area of discontent is how the legislation treats evidence with the defendant. The Lords dismissed the appeal saying that S. 41(3)(c) YJCEA 1999 should be interpreted under S.3 of the HRA 1998. They answered the question posed by saying that evidence of the complainant’s sexual history would be admissible where it was so relevant to the issue of consent that to exclude it would be to render the trial unfair. They deemed this to be a matter for the trial judge to determine.

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<sup>205</sup> Per Lord Steyn, para 45

<sup>206</sup> *Ibid*

<sup>207</sup> Per Lord Slynn, para 10

3.8.5 *R v A* therefore, renders Section 41 somewhat obsolete because even where evidence does not fit under one of the four gateways the judge can decide, if it is in fact so relevant that it can be allowed anyway. McGlynn argues that section 41 had the intention to “restrict the use of sexual history evidence and, in doing so, to provide a structured approach to determining the situations in which it may be permitted.”<sup>208</sup> Therefore by placing a discretion back into the legislation the Lords have gone directly against parliament’s aims and the whole ethos of the act itself which is meant to encourage more women to report and take rape claims into court without the fear of being subjected to the unnecessary use of their sexual history evidence as a means to discredit them and thus make them appear an unreliable witness. And so whilst section 41 was once a very clear and specific piece of legislation after this case it will “likely engender a degree of uncertainty.”<sup>209</sup> However, this seems to have been the intention entirely. As Kibble says “there was a substantial consensus among the judges that S.41 was not a workable section prior to the decision of the House of Lords in *R v A (No 2)*, which restored a measure of judicial discretion in relation to the consent gateways and particularly s.41(3)(c).”<sup>210</sup>

3.8.6 The problem therefore, when judging the success of S.41 is that the current state of the law now links the legislation inextricably to this case. The two positions, the *R v A* stance and the initial wording of S.41, do not fit together comfortably yet it could be said that the original standpoint of the Act no longer exists as the case law, discussed earlier in this chapter, has developed following *R v A*. And whilst Kibble has suggested that many feel this to be a good thing due to the “unworkable”<sup>211</sup> former nature of the legislation, it does not change the fact that any critique produced now, of the current state of the law cannot solely focus on the wording of S.41. Thus it makes it very hard for us to see where the problem lies in terms of the high use of sexual history evidence at trial. Is the initial legislation to blame, or is it the way in which *R v A* has adapted that legislation?

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<sup>208</sup> Clare McGlynn *Feminist Judgment of R v A* [2001] UKHL 25 para 42, p 219 in *Feminist Judgments: from theory to practice* edited by Hunter, McGlynn and Rackley (Hart, 2010)

<sup>209</sup> *Op. cit* 116 at p 240

<sup>210</sup> Kibble, Neil, ‘Judicial Discretion and admissibility of prior sexual history evidence under Section 41 of the YJCEA 1999: sometimes sticking to your guns mean shooting yourself in the foot: Part 2’ (2005) *Crim LR* 263 at p 264

<sup>211</sup> *Ibid*

### 3.9 Conclusion

3.9.1 Despite this controversial case, much of the criticism of the current law on sexual history evidence is directed to s.41 itself as opposed to its use in cases. Dennis says S.41 “replaced former reliance on relevance and broad judicial discretion with tightly drawn categories of admissibility in an attempt to protect complainants from unwarranted intrusions into their privacy by harassment and humiliating questions.”<sup>212</sup> Birch, who labels these measures “draconian”<sup>213</sup> explains that the section “greatly restricts the use that defendants can make of evidence of complainants’ sexual history and in doing so creates serious problems for the fairness of trials.”<sup>214</sup> This is because there is no overriding judicial discretion to allow evidence. Her damning critique of the legislation goes on to say that it “buries a number of untenable evaluative judgements about the relevance of sexual history evidence within one of the most elaborate formulae possible.”<sup>215</sup> She highlights one of the main problems to be that judges have no “room to manoeuvre” and therefore “seek more radical solutions.”<sup>216</sup> Dennis however, does not seem to be convinced by this argument and says, “the legislation is undoubtedly complex and difficult, but that is no excuse for some judges and barristers to have only a vague or non-existent grasp of it.”<sup>217</sup> Whilst he may suggest the exceptions are narrow, Temkin actually feels they are wide enough to encompass a range of behaviour and are considerably broader than the exceptions in other jurisdictions.<sup>218</sup> In light of *R v A*, Birch’s fears could in fact have been somewhat absolved.

3.9.2 Firth references Nicholson<sup>219</sup> and Young<sup>220</sup> who are talking on a different matter but making a similar point that the judiciary jealously guard their discretion “through the admission of a test of relevance” to “maintain a strict control of the facts and themes summing up a case.”<sup>221</sup> She says this will mean they can “manipulate the rules of

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<sup>212</sup> Dennis, Ian, ‘Sexual History Evidence: Evaluating Section 41’ (2006) Crim LR 869

<sup>213</sup> Birch, Di, ‘Rethinking Sexual History: Proposals for fairer Trials’ (2002) Crim LR 531 at p 532

<sup>214</sup> *Ibid* at p 531

<sup>215</sup> *Ibid* at p 553

<sup>216</sup> *Ibid* at p 551

<sup>217</sup> Dennis, Ian, ‘Sexual History Evidence: Evaluating Section 41’ (2006) Crim LR 869 at page 870

<sup>218</sup> *Op. cit* 116 at p 227

<sup>219</sup> Nicholson, D, (1995) ‘Telling Tales: Gender Discrimination, Gender Construction and Battered Women’, *Feminist Legal Studies* 3(2) 185

<sup>220</sup> Young, A, (1996) ‘Femininity as Marginalia’ In McVeigh, Rush and Young (eds) *Criminal Legal Practices*, Open University Press, Oxford

<sup>221</sup> Firth, Georgina, ‘The Rape Trial and Sexual History Evidence – *R v A* and the (Un)worthy Complainant’ (2006) NILQ [Vol. 57, No.3] p 454

admissibility and the discourses of consent to privilege a particular notion of (hetero)sexuality and to reward women who exhibit 'approved characteristics', for example those who are seen to be 'respectable', in this case meaning, sexually inexperienced and thus worthy of the law's protection."<sup>222</sup> Birch suggests that we need to look for ways to re-educate the judiciary and common perceptions; to debunk rape myths within the trial process instead of excluding potentially relevant evidence. We need to "think of ways of taking the jury into the light rather than deliberately keeping them in the dark."<sup>223</sup> This argument can be extended to say that legislative reform was not necessarily what was needed but more a societal upheaval which changed the perceptions of rape in general and countered the myths. This however, is an extremely tall order. Purdom says this is because women do not have equal citizenship with men.<sup>224</sup> In some ways I see this view as very extreme and not necessarily relevant to the fact that rape myths exist.

3.9.3 Whilst the gateways do seem rather convoluted, I cannot agree with Birch to the extent to which she believes the gateways to be restrictive<sup>225</sup> because as the chapter has shown, several of the gateways have a lot of room for interpretation. Instead I favour Temkin's view<sup>226</sup> that they are in fact wide enough. In fact considerably wider than in many other jurisdictions. And whilst I would not advocate an even more wordy piece of legislation there are certainly aspects of S.41 particularly after the impact of *R v A* which would benefit from further guidance, for example the 'not an issue of consent' gateway.

3.9.4 Throughout the course of this chapter it has become obvious that there are still many problems with the way that sexual history evidence is handled in the courts and, more generally in society. To answer the question that this chapter set out to answer; "How successful has s.41 been?" there are various factors to take into account. The Act has been in use for over 10 years now and therefore we can expect that it will have had some tangible effect. Many of the cases pointed out in this chapter would suggest that it has in fact had

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<sup>222</sup> *Ibid* and for a definition of 'worthy' she references S 2 SO(A)A 1976 and the Court of Appeals decision in *R v Viola* [1982] 1 WLR 1138

<sup>223</sup> Birch, D, 'Untangling Sexual History Evidence: a Rejoinder to Professor Temkin' [2003] Crim LR 370

<sup>224</sup> Purdom, J (2000) 'Judging Women: Rethinking Shame through Corporeality' in Richardson, J & Sandland, R (eds) *Feminist Perspective on Law and Theory*, Cavendish Publishing, London at p. 209

<sup>225</sup> She see the measures as 'draconian' and 'greatly restrictive', Birch, Di, 'Rethinking Sexual History: Proposals for fairer Trials' (2002) Crim LR 531

<sup>226</sup> See Temkin, Jennifer, 'Sexual History Evidence – Beware the Backlash' (2003) Crim LR 217

some effect and therefore has not been entirely unsuccessful. This having been said, as the Kibble study<sup>227</sup> demonstrated, many of the judges have sometimes followed s.41 grudgingly even though they felt the evidence should have been allowed in. This will have a negative effect because it will encourage more appeals and shows that the judiciary have a lack of faith in the laws they are using which makes it less likely to gain public support. And whilst, some of the cases commented on in this chapter have followed s.41 and could be viewed as tangible aspects of its success, Kibble also comments that many judges do not know how to use it properly and of those who do, many would rather not.<sup>228</sup> Whilst it was a tall order for the legislation to achieve, the best outcome of s.41 would have been that it began to change the perceptions which society have of a woman's sexual history and how this reflects on her. This is not something that s.41 can currently claim to have achieved.

3.9.5 As discussed earlier in the chapter, the success of s.41 in its original form is difficult to judge because of the almost immediate decision of *R v A* which greatly changed the way in which the section is now interpreted as it allowed back in a strong element of judicial discretion. And whilst in some cases the judges do not necessarily seem to abusing this discretion, it goes against the aim of the Act. The difficulty it causes in judging the success of the law on sexual history evidence is that the current stance is inextricably linked to the decision in this case and yet, it is the legislation, as interpreted which this thesis seeks to judge. The result of this is that critics may be crediting negative effects to the legislation itself when in fact, had this case not come about, or had it been judged differently, then s.41 may have been more successful. Of course this is something which cannot realistically be imagined or sensibly discussed and yet it is still a consideration.

3.9.6 However, no matter whether or not the original wording of s.41, the judgment in *R v A* or, in fact societal views more broadly, are to blame; the current stance and treatment of sexual history evidence is in need of reform because as this chapter has shown, the situation is uncertain. The action to be taken needs careful consideration and will be discussed in depth in the next chapter.

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<sup>227</sup> *Op. cit* 166 at p 194

<sup>228</sup> *Ibid*

## 4. Assessing the successes of S.41

### 4.1 Introduction

4.1.1 The previous chapter analysed the provisions of S.41 in order to work toward answering the question of whether or not the legislation has been effective. The purpose of this chapter is to use the empirical studies which have been conducted in this area to assess the impact and success of s.41. One study in particular, a Home Office study; “Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial”, is focused specifically on this issue and seeks to “gauge to what extent this endeavour has been successful.”<sup>229</sup> This chapter will address several issues, taking a thematic approach to the matters raised in these studies. It will first look at the scope of the legislation; the number of gateways and the issues which these cover. Secondly, it will look at the procedural criticisms surrounding S.41; asking the questions; how often is S.41 being used and it is being used properly? Thirdly it will consider the inconsistency with which S.41 has been applied, due in part to the lack of clarity of the legislation. As a final test to assess the success, or perhaps more likely, the affects of S.41 this chapter will look at the effect on conviction rates. This chapter will also take a brief look at the less tangible effects of the legislation because whilst conviction and attrition could be seen as a measurable effect there are other less tangible effects that we may hope to have seen following the implementation of S.41. Studies such as the work Temkin and Krahe compiled on attitudes of rape and Kibble’s study of judicial perspectives to assess the reactions to S.41 will be referenced here.

### 4.2 Scope of the Legislation

#### 4.2.1 Introduction

4.2.1.1 This section will look at what recent studies have said about the legislation. By looking at this commentary on the scope of the legislation it will aid the chapter to assess the success of S.41 as it will bring to light any issues. This will include any problems that the

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<sup>229</sup> Kelly, Temkin and Griffiths, ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials.’ Home Office Report 2006 at p 4



reports detail about the lack of definition in the Act, the width of the gateways and whether or not the Act as a whole is too wide or narrow. Kibble offers more general comments on whether the Act went in the correct direction by using a non-discretionary regime. The most striking issue that seems to come out of these reports is the vast amount of sexual history evidence that is still allowed into trials. It has been suggested that there should be reiteration that this in fact a blanket ban and that “sexual behaviour evidence is not to be admitted by trial judges other than in the exceptional circumstances set out in the legislation.”<sup>230</sup> However, as the studies show, this may not be a scope issue but rather an implementation problem.

#### 4.2.2 Inclusion of the Prosecution

4.2.2.1 A problem the Home Office raised with section 41 was the way that it only applied to defence counsel. They want the embargo to be applied to the prosecution as well “as is the case in some other jurisdiction.”<sup>231</sup> This is a sensible suggestion because often the prosecution bring in evidence which then opens this evidence up to further questioning which may not be beneficial to the complainant.

#### 4.2.3 Is S.41 too Narrow?

4.2.3.1 The Home Office report feels that the lack of room for evidence about sexual behaviour with the accused is a mistake and that a further gateway needs to be added. The new gateway they suggest should “[allow] for evidence of previous or subsequent sexual behaviour with the accused” and they state that this exception could have a time limitation.<sup>232</sup>

4.2.3.2 Temkin and Krahe comment that “many judges and barristers were critical of the general approach taken in section 41.”<sup>233</sup> The main objection being that the “legislation was too limiting and that the circumstances in which sexual behaviour could be relevant could not

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<sup>230</sup> Kelly, Temkin and Griffiths, ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials.’ Home Office Report 2006 at p VII

<sup>231</sup> *Ibid*

<sup>232</sup> *Ibid*

<sup>233</sup> Temkin and Krahe, ‘Sexual Assault and the Justice Gap: A Question of Attitude’ Hart Publishing (2008) at p 146

be predicted in advance by an Act of Parliament.”<sup>234</sup> So it is both narrow and unclear. It seems that where the judges felt the legislation was too narrow they simply reverted to their discretionary ways. The Home Office report details “six out of the 17 judges in this study were plainly undeterred and, regardless of the new legislation, were not prepared to forego their discretion in these matters.”<sup>235</sup>

### 4.3 Lack of Clarity and Definition

#### 4.3.1 Specific Terms

4.3.1.1 The Home Office report commissioned to review S.41 took issue with the “lack of definition”<sup>236</sup> within the section. For example the terms “sexual behaviour” and “sexual experience” because they cause uncertainty among practitioners as to the scope of section 41.<sup>237</sup> As one of their ideas for reform of the Act they suggest making both of these terms more defined. They also want to make it clear that the terms include “implied as well as express behaviour.”<sup>238</sup>

#### 4.3.2 The Focus of S.41

4.3.2.1 A study was carried out in 2005 in Scotland on the law of evidence in sexual offence trials in order to assess the Scottish legislation. The Burman Report will be referenced throughout this chapter in order to provide further insight and a comparison to the stance in England and Wales. The Burman reports suggest they would like more emphasis put on why sexual history evidence is actually important. They say that the reasons for limiting the evidence is to “reduce the complainer’s ordeal of giving evidence in court,” but documentation of the Criminal Procedure (**Scotland**) Act **1995** indicates that these rules alone are simply insufficient to protect the complainer from distress and humiliation.<sup>239</sup> Therefore in the same way that reports on s.41 say the legislation is inadequate the Scottish

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<sup>234</sup> *Ibid*

<sup>235</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 53

<sup>236</sup> *Ibid*

<sup>237</sup> *Ibid*

<sup>238</sup> *Ibid*

<sup>239</sup> Burman, Jamieson, Nicholson, ‘The Law of Evidence in Sexual offence trials – Base Line Study’ (2005) at p 33

situation seems to be the same. The legislation was required but it does not go far enough to solve the problem of sexual history evidence. Burman concludes, “Whilst the reforms resulting from the 1995 Act were imperative, they nevertheless remain inadequate.”<sup>240</sup> Instead the report suggests that “real and marked changes in the prevalence of sexual assault and in the criminal justice response to such crimes may be dependent upon significant changes in social values and understandings of gender and sexuality.”<sup>241</sup> However, this creates a very difficult problem in terms of reform. Legislative reform can be difficult but if it is actually society and the attitudes they hold which are the problem, this is a much bigger issue because that type of change takes a much longer time to effect.

4.3.2.2 Kibble goes further than most commentators in describing the problems of s.41. He says that non discretionary legislation is “fundamentally flawed.”<sup>242</sup> Therefore it is not simply the wording of the legislation or its lack of focus on why sexual history evidence is actually relevant, but more the fact that it does not give judges enough power. He goes on to say that without *R v A*, Section 41 was unworkable.<sup>243</sup> This is because *R v A* added an element of discretion back into s.41. He says that non-discretionary legislation “can only operate fairly once the appellate courts have intervened and restored judicial discretion.”<sup>244</sup>

## 4.4 Procedural Criticisms

### 4.4.1 Introduction

4.4.1.1 This thesis takes the view that procedural issues are the biggest failing of S.41 as they mean that the legislation is not being applied correctly and therefore it is difficult to truly assess the success of S.41. Only when the legislation is being followed correctly can we see if it is making a difference. As it stands, the misuse confused the picture and makes it difficult to comment on S.41 as a standalone rather than evaluating the situation as a whole.

4.4.4.2 However, knowing how much s.41 is used is useful because it allows us to see if the legislation is being used properly and specifically which gateways are being used most.

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<sup>240</sup> *Ibid*

<sup>241</sup> *Ibid*

<sup>242</sup> Kibble, ‘Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999’ (2004) at p 8

<sup>243</sup> *Ibid* at p 10

<sup>244</sup> *Ibid* at p 9

Particularly the Home Office study which is focused solely on S.41 is very useful because it is rare for comprehensive studies to be carried out on new legislation only six years after it was enacted.

#### 4.4.2 Use of S.41

4.4.2.1 The Home Office study carried out by Kelly et al showed that S.41 applications were made in around a quarter of rape cases.<sup>245</sup> Considering that S.41 implements a blanket ban on the use of sexual history evidence this would seem to be a large proportion. Applications were allowed in just over two thirds of cases<sup>246</sup> and yet sexual history was raised in more than ¾ of trials.<sup>247</sup> This is because the proper procedure for applications is only used in a minority of cases, with most applications still being made at trial.<sup>248</sup>

#### 4.4.3 The Difficulties facing Assessment

4.4.3.1 It is difficult to say which gateways are being used most often because “the limited data on the specific paragraphs of section 41 which are being used in applications suggest that many continue to be phrased in general terms, thus evading the purpose of the legislation, which was only to allow sexual history evidence in the circumstances specified in the Act.”<sup>249</sup> This is problematic when trying to answer questions about the success of the legislation because to truly assess the effectiveness of the section, one would be able to say which gateways were used most often and which were used in the correct way whilst highlighting any abuses.

#### 4.4.4 Are the Procedures being Adhered to?

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<sup>245</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p VI

<sup>246</sup> *Ibid* at p 28

<sup>247</sup> *Ibid* at p 47

<sup>248</sup> *Ibid* at p 28

<sup>249</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 28

4.4.4.1 The previous chapter looked at the crown court rules which regulate the procedure of introducing sexual history evidence through s.41. However the basics of these regulations are fairly simple; applications are to be made in advance of the trial in written form detailing the questions to be asked. It is important to observe whether or not these are being followed as this will affect the judgment of whether s.41 has been successful. If research suggests that rules are being followed and yet the use of sexual history evidence is still high then the rules themselves may be at fault. However, as studies suggest, the procedures are not being followed. Therefore the question can be raised as to whether s.41 would be having more success if it were actually being adhered to correctly.

4.4.4.2 As the most of the research in to the use of S.41 plainly states, the legislation is often being ignored and applications are often “made and decided with[out] proper reference to the legislation.”<sup>250</sup> Or alternatively, an application may be made but the Home Office report gives an example of “two of the nine cases observed questioning [going] beyond the restrictions imposed” without challenge.<sup>251</sup> This is either an example, of the judiciary turning a blind eye to the legislation or being unaware of its provisions. Sexual history of complainants was introduced in nine of the 23 full trials observed without any reference to section 41. This was the case in both trials involving current or ex-partners.<sup>252</sup> Once again there is little evidence of judges preventing or intervening when this happens.

#### 4.4.5 Procedural Avoidance

4.4.5.1 It would appear that even where critics do not take issue with the legislation they are however, often highly critical of the way in which the legislation is adhered to, or rather not adhered to. This is to say that the legislation itself may be correct, but that it is the implementation which is unsatisfactory. To illustrate Temkin and Krahe comment that “some judges” knowledge of the section 41 regime was vague.<sup>253</sup> The Home Office report says that

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<sup>250</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 43

<sup>251</sup> *Ibid*

<sup>252</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 44

<sup>253</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 146

“Half of the judges interviewed were entirely unaware of [the crown court rules] or had no idea of their content.”<sup>254</sup>

4.4.5.2 The Home Office report suggests that whilst S.41 may be being used, it is not being correctly adhered to. The proper procedures for applications, are set out in the Crown Court (Amendment) (No 2) Rules 2000, they were “used in a minority of cases, with most applications being made verbally at court.”<sup>255</sup> The Act therefore, cannot be having the effect that was initially intended. It cannot be successful if it is not being used properly. The Home Office report showed that the Crown Court Rules were “frequently ignored or avoided, with the vast majority of applications being made at trial and presented verbally.”<sup>256</sup> The problem with this is that it makes the specifics of s.41 easier to avoid. The report says that because the written applications have to be specific and detailed questions to be asked, when verbal applications are made, such formalities “could be more easily evaded.”<sup>257</sup> For this reason verbal applications disadvantage the prosecution as it means that “counsel [has] minimal opportunity to consider the arguments in detail,” and less time to “consult with either the CPS or the complainant about possible objections.”<sup>258</sup> Furthermore it seems that the timing of the defence’s verbal applications are often maliciously motivated. The report says they “appeared to time their applications to come just before or during cross examination to create the most pressure on the complainant.”<sup>259</sup> This is in direct opposition to the purposes of the Act. The purpose of the Act was to limit the use of sexual history evidence which in turn was thought would make the trial less traumatic for the victim and therefore encourage more people to report. To make matters worse, the judges do not seem to be preventing this. The report noted that they either “failed to notice or failed to sanction the defence for their breach.”<sup>260</sup> In the same way that applications were generally not carried out in the correct way, when agreements were made between the prosecution and defence, these too did not necessarily follow section 41.<sup>261</sup>

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<sup>254</sup> *Ibid* at p 56

<sup>255</sup> *Ibid*

<sup>256</sup> *Ibid* at p VII

<sup>257</sup> *Ibid*

<sup>258</sup> *Ibid*

<sup>259</sup> *Ibid*

<sup>260</sup> *Ibid*

<sup>261</sup> *Ibid*

#### 4.4.6 Applications made at Trial

4.4.6.1 By reading the Home Office report's recommendations it becomes apparent that the main problems they find are that the Crown Court Rules are not being followed and that "steps should be taken to ensure that [they] are observed," that every application should be made in writing and that they should generally be made pre-trial.<sup>262</sup> Those made at trial "should be accepted only if the defence can show that they were unaware of the information on which the application is based until trial" and even then they should be made in writing and the prosecution given time to consider the application and the judges should submit their reasons for allowing or disallowing, in writing.<sup>263</sup> Complainants should be made aware of what information is going to be brought on them so that they "know what was in store in any ensuing trial."<sup>264</sup> It seems that these provisions would be extremely useful given that "all the barristers save one admitted that, when defending, they would leave the application until the trial."<sup>265</sup>

#### 4.4.7 Moving Forward

4.4.7.1 The Consultation paper; "Convicting Rapists and Protecting Victims – Justice for Victims of Rape" aims to, "improve the outcome of rape cases through further strengthening the existing legal framework and improving our care for victims and witnesses,"<sup>266</sup> which suggests that the existing framework is not particularly strong. This report also references the late applications "made by the defence for previous sexual history evidence to be admitted." They argue that "such late applications frustrate the effectiveness of the legislation as victims are unprepared for such cross-examination and fail to give their best evidence."<sup>267</sup>

4.4.7.2 In the same way that the 2006 Home Office report shows a lack of adherence to the formal applications procedure required to admit sexual history evidence, so to, does the

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<sup>262</sup> *Ibid* at p VIII

<sup>263</sup> *Ibid*

<sup>264</sup> *Ibid*

<sup>265</sup> *Ibid* at p 56

<sup>266</sup> Office for Criminal Justice Reform; 'Convicting Rapists and Protecting Victims – Justice for Victims of Rape' A consultation paper (2006) at p 4

<sup>267</sup> *Ibid* at p 11

Burman study in Scotland. "Sexual history or sexual character evidence of the type prohibited by the 1995 Act was introduced by the defence without an application to the court in half (9 out of 18) of the sample of High Court trials without an application which were scrutinised as part of the research."<sup>268</sup> This suggests that the situation in Scotland is similar to the situation with s.41. In the Scottish cases the prosecution and judiciary did not always prevent such evidence; the prosecution objected in 3 cases, all of which were upheld by the judge<sup>269</sup> which is the entirety of the study, does not seem like a large enough number. Where an application had been partially successful and the defence strayed beyond what was agreed in the application, the judge intervened to remind the defence of the parameters in 2 cases.<sup>270</sup> In the same way that s.41 was needed and yet seems unsatisfactory, so too does the current Scottish restriction on sexual history evidence; "documentation of the 1995 Act indicates that the rules alone or their implementation are simply insufficient to protect the complainant from distress and humiliation."<sup>271</sup>

#### 4.5 Inconsistency of application

4.5.1 As this thesis has shown S.41 is not being correctly followed, due in large part to the lack of support from the judiciary, and is therefore having little success. The application of S.41 is inconsistent. Applications are being made during the trial, instead of pre-trial. Verbally instead of in writing and for evidence which is excluded under S.41. It is the judiciary's responsibility to ensure that applications are made correctly in adherence to the proper procedures set out in S.41 and the crown court rules. This section will look at why the application has been inconsistent by looking at judges and barristers comments on the legislation.

4.5.2 Kibble stated that the decision in *R v A* has made s.41 a workable provision, or at least, without that decision, the provision was unworkable.<sup>272</sup> With one exceptions, all the judges familiar with the decision interpreted *R v A* to mean that they now had a very broad

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<sup>268</sup> The Home Office report 'Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial' (2006) London at p vi

<sup>269</sup> *Ibid* at p 25

<sup>270</sup> *Ibid*

<sup>271</sup> *Ibid* at p 33

<sup>272</sup> Kibble, 'Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999' (2004) at p 8 at p 10



residual discretion in order to ensure a fair trial under Article 6.<sup>273</sup> However, this has essentially created a whole new gateway of discretion and completely gone against the ethos of s.41 as it was originally drafted. So even if s.41 could now be said to be effective, if this is only because it has been re-interpreted by case law – is this actually the success of s.41? As it is, s.41 has not been deemed to be successful however it could be argued that it has never had the chance to work in its original form as the decision in *R v A* quickly changed it.

4.5.3 The creation of sections 41-43 of the YJCEA 1999 “was an attempt to cut through the myths and stereotypes in order to produce fair outcomes in trials for sexual offences.”<sup>274</sup> And the Home Office report seeks to “gauge to what extent this endeavour has been successful.”<sup>275</sup> It does this by examining case files, observing trials and conducting interviews; all of which suggest that “both prosecution and defence share stereotypical assumptions about ‘appropriate’ female behaviour and that these continue to play a part when issues of credibility are addressed in rape cases.”<sup>276</sup> This seems to reiterate the conclusions which were made in *Burman* that the legislation alone is “simply insufficient to protect the complainant from distress and humiliation.”<sup>277</sup> Interviews suggested that complainants themselves saw the “use of sexual history evidence in trials as unjust and an invasion of privacy.”<sup>278</sup>

4.5.4 In the Home Office report interviewees were asked for their general opinion of legislation. Most were in favour of it to a degree because they felt that insufficient control had been enforced in the past.<sup>279</sup> A female judge said: “Well I would’ve said no it’s not a good idea, but I think it’s necessary, because too many judges have let in sexual history in the past...partly because they’re persuaded by the arguments and partly because they’re men. There you are, that’s not a very PC remark to make, but I think that we all tend to do that, we

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<sup>273</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p VI

<sup>274</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 4

<sup>275</sup> *Ibid*

<sup>276</sup> *Ibid* at p VII

<sup>277</sup> *Burman, Jamieson, Nicholson, ‘The Law of Evidence in Sexual offence trials – Base Line Study’ (2005) at p 33*

<sup>278</sup> The Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p VII

<sup>279</sup> *Ibid* at p 49

say 'There but for the grace of God go I,' In this circumstance or the other."<sup>280</sup> But four of them said it was "unnecessary and was not a good idea" and another considered it an "impertinence" on the part of the legislature to intervene in this way.<sup>281</sup> On the question of whether or not sexual history evidence is actually relevant "three judges (including both the female judges interviewed) considered that sexual behaviour evidence was very rarely of any relevance but the majority did not share this view."<sup>282</sup>

4.5.5 Many judges and some barristers were critical of the general approach taken in the new law.<sup>283</sup> This was because they felt that it was too narrow and it was difficult to predict which bits of sexual history evidence would count as being relevant.<sup>284</sup> Four judges regretted the lack of confidence in the judiciary which, in their view, had led to the legislation<sup>285</sup> being so against judicial discretion. A few of the judges did welcome it for "providing a structure for decision-making and for demanding a rigorous scrutiny of the relevance of sexual history."<sup>286</sup>

4.5.6 Despite these opinions the report documents that some judges' knowledge of the section 41 regime was vague.<sup>287</sup> Several gave the lack of section 41 applications as their reason for this.<sup>288</sup> A number commented that the drafting rendered the legislation hard to understand<sup>289</sup> which is backed up in the report which believes terms like "sexual behaviour" are ill-defined. And yet, several comments were made about the actual differences between the old legislation in S.2 and S.41. One judge makes the comment that whilst he doesn't think much has changed, "it has put people on the alert that previous sexual history is not automatically fair game, and that you're going to need the judge's leave to ask about it, and you're going to have to have decent reasons before you get leave."<sup>290</sup>

4.5.7 The crucial case of *R v A* changed the way the legislation works and the Home Office report shows that "the judges who were familiar with the decision were unanimous in their

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<sup>280</sup> *Ibid*

<sup>281</sup> *Ibid*

<sup>282</sup> *Ibid*

<sup>283</sup> *Ibid* at p 51

<sup>284</sup> *Ibid*

<sup>285</sup> *Ibid*

<sup>286</sup> *Ibid*

<sup>287</sup> The Home Office report 'Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial' (2006) London at p 52

<sup>288</sup> *Ibid*

<sup>289</sup> *Ibid*

<sup>290</sup> *Ibid*

approval of it”<sup>291</sup> and the way that it gives judicial discretion back to the judges. This basically means that in its original form the judges disapprove of S.41 because it removes discretion. Once again this relates back to what Kibble says about s.41 being “unworkable” before *R v A*.<sup>292</sup>

4.5.8 Several barristers felt that section 41 was proving to be an effective instrument for controlling the flow of sexual behaviour evidence. Only one openly stated that it needed to be better enforced.<sup>293</sup> One judge thought that if victims knew that they would not be subjected to unnecessary and unpleasant cross-examination, then not only would they be more likely to come forward to give evidence, but they would make better witnesses.<sup>294</sup> This would fulfil some of the aims that s.41 initially set out to achieve. The fact that it does not seem to currently be fulfilling these aims means that s.41 cannot be deemed to be a success. And yet, “Judges and barristers were mainly in favour of legislation to control sexual history evidence as they considered that there had been abuses in the past and, without legislative intervention, such evidence would certainly be widely introduced.”<sup>295</sup> The question however, is not whether legislation was needed, as most will agree it was. The question is whether or not this piece of legislation has been successful. And it would appear from everything that has been said in the reports discussed in this chapter that it has not. The judges seem to take the view that s.41 cannot be a success because the need “a residual discretion to allow in sexual history evidence where they considered it was fair to the defence to do so.”<sup>296</sup> The Home Office report shows that “some operated as if section 41 did contain a discretion, [and] some were prepared to ignore the letter of the legislation and latched on to the decision in *A*, for which there was unanimous approval and which was interpreted as giving them a broad discretion.”<sup>297</sup>

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<sup>291</sup> Kibble, Neil ‘*Judicial perspectives on the operation of s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1*’ (2005) Crim LR at p 54

<sup>292</sup> Kibble, ‘Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999’ (2004) at p 10

<sup>293</sup> Kibble, Neil ‘*Judicial perspectives on the operation of s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1*’ (2005) Crim LR at p 59

<sup>294</sup> *Ibid*

<sup>295</sup> *Ibid*

<sup>296</sup> *Ibid*

<sup>297</sup> *Ibid*

## 4.6 Kibble's Study

4.6.1 In 2003 Kibble interviewed 70 circuit judges in England and Wales; 4 high court judges, 3 Lords Justices of Appeal and a Lord of Appeal in Ordinary. They were asked to respond to four scenarios and also interviewed about the "structure and operation of s.41 and about the judges perceptions of problems and issues in this area."<sup>298</sup> The scenarios included sexual history evidence with the defendant, of a minor, in a gang rape situation and a case involving medical evidence. This type of research is very important because the judiciary are the ones who use and interpret statutes and put them into action. Knowing how s.41 is being interpreted and whether or not the judges are using it in a way that remains faithful to the initial aims of the Act itself. He makes a case for judges acting in a far more "thoughtful and considered approach"<sup>299</sup> to sexual history evidence than perhaps is often suggested however he does say that the judges are critical of the legislation but that this is to be expected given that it restricts their discretion. This is shown by one judges comment; "We would say that wouldn't we" with regard to the legislation being constraining.<sup>300</sup> However, whilst Kibble argued their approach is thoughtful, upon studying the research findings it is also obvious that whilst the judges may consider the Act carefully, they often chose to disregard it because they feel evidence is still relevant.

4.6.2 Judges took issue with S.42(4) as it seems to prevent any attack on the credibility of the complainant. One judge said;

"I must say I find section 41 very difficult and I must confess I am inclined to look at the thing and decide what's fair then see how I can get it in. Because in a sense it does impugn her credibility but then that's what fighting cases is all about. I think what it's getting at in a rather muddled way is it's trying to prevent questioning that simply attacks the reputation of the witness – because she's had sex, she lies, she's that sort of girl. But it's very difficult; the wording does make it very difficult."<sup>301</sup>

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<sup>298</sup> Kibble, 'Judicial Perspectives on Section 41 of the Youth Justice and Criminal Evidence Act 1999' (2004)

<sup>299</sup> Kibble, Neil 'Judicial Discretion and the Admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: part 2' (2005) Crim LR 263

<sup>300</sup> *Ibid* at p 265

<sup>301</sup> Kibble, Neil '*Judicial perspectives on the operation of s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1*' (2005) Crim LR 190 at p 194

As this quote shows, judges still want to make a decision themselves about whether the evidence is relevant, instead of looking to the Act to see what should be brought in. And whilst a certain degree of interpretation of the section can be expected, this would appear to suggest unnecessary manipulation of a kind which the legislation cannot have been aiming for. It seems there are two ways of dealing with the dissatisfaction judges appear to be feeling in reference to the restrictive nature of the Act. There are those who allow the evidence anyway as they feel it is relevant and there are those who want to allow the evidence but “feel obliged to exclude” it because of s.41(4).<sup>302</sup> Neither of these is the ideal situation but perhaps, by employing the latter way of coping, the definition of “relevant evidence” in this context, will change over time.

4.6.3 It would seem that in the same way the judges seem to take a view of what relevance should mean in this context, there is also a conceptualising of what types of sexual Act are normal and this affects what types of evidence the judges want to allow in. For example, Kibble presented the judges with a gang rape scenario and asked whether or not they would introduce evidence from three weeks earlier, in which the complainant, immediately after meeting men in a bar had suggested, whilst dancing with them, that they all go somewhere for drugs and some fun and had subsequently engaged in sexual intercourse with them.<sup>303</sup> Most of the judges concluded that questioning should be allowed because it is out of the ordinary. One judge said; “Having a group rape itself infers violence and no consent, but if this is a girl who is in the habit of chatting up groups of men and going off with them, well that sets it in a different context. It may still be rape, but it would be rather unfair not to tell the jury about that, I would have thought.”<sup>304</sup> However it was commented that evidence about “picking up chaps in bars”<sup>305</sup> probably wouldn’t be allowed in which suggests that certain aspects of sexual activity are deemed to be more perverse than others. One of the judges did however say that the complainant is “entitled to conduct herself generally as she wishes.”<sup>306</sup> This is an admirable sentiment but she will still have to face the consequences of her actions as it is likely her sexual history evidence would be brought into court, particularly in a scenario like this.

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<sup>302</sup> *Ibid*

<sup>303</sup> *Ibid* at p 195

<sup>304</sup> *Ibid* at p 197

<sup>305</sup> *Ibid*

<sup>306</sup> *Ibid* at p 198

4.6.4 The hurdle found at S.41(6) states that evidence must relate to a specific instance or specific instances and could be seen as a way to limit the above issue from occurring however there is no further detail on the types of specific referred to. The scenario Kibble presents involving the 11 year old girl is given as an example where this particular hurdle will come into play. In this case some of the judges said it was not necessary for the defence to know when these instances occurred or with whom they had occurred with. However this seems to be very contradictory; what exactly are the specifics required? One judge suggests how this could be possible; “suppose the defence had medical evidence consistent with an act of intercourse or perhaps some other kind of penetration. I think that’s arguably a specific instance. Maybe you can’t say who it was or what it was, but you’re talking about an occurrence. I think I would approach it in that way. One can see how it could be a situation in which to shut this out would simply prevent a fair trial taking place.”<sup>307</sup>

4.6.5 Several points were made in the research about the jury being entitled to know the full story so that they might make a proper decision. Particularly when this evidence relates to the defendant the judges thought that the jury should know the extent of their relationship.<sup>308</sup> One judge who was very much in favour of this position stated; “I think it’s nonsensical to suggest that prior sexual history evidence with the defendant doesn’t go to consent, as the Lords in *R v A* said. I mean if you went out in the street and asked a hundred people they would say, of course it’s relevant. The people who say that none of this should ever be asked make a leap saying, ‘Oh, you’re saying that a woman can never say no.’ Well nobody is saying that it’s relevant to whether a woman did or didn’t say no.”<sup>309</sup> But to counter this one judge said; “I can’t see how they are going to be assisted by either knowing or not knowing that on some previous occasion two weeks ago she happened to say yes.”<sup>310</sup> This argument comes down to the central issue of what evidence is actually relevant and as many of the judges did actually emphasise in the study, consent on a previous occasion will not automatically mean consent in the case in question and whilst many judges said they

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<sup>307</sup> *Op. cit* 166 at p 203

<sup>308</sup> *Ibid* at p 200

<sup>309</sup> *Ibid*

<sup>310</sup> *Ibid* at p 201

would give directions to that effect; that may not be enough to prevent the jury from prejudice. In another example, in a scenario involving a 14-year old girl claiming her stepfather had raped her, the defendant argues that she is making this claim because he had found her having sex with her boyfriend and forbidden her to see him again. One judge said that it was not enough to ask juries to decide the outcome on the basis of an argument between the parties, leading the boyfriend to be banned from the house as this was “unreal and artificial” and the “jury would only be able to assess the plausibility of the defendant’s claim if they knew of the substance of the argument.”<sup>311</sup> However, this argument can lead to a slippery slope of allowing in all evidence so that the jury can simply make up their own mind. This would not be appropriate given the prejudicial effects this evidence is known to create. It seems though, that the judges interviewed in the study were “sceptical of the argument that the inevitable consequence of allowing any questioning or evidence in relation to the prior incident would be to prejudice the jury against the complainant.”<sup>312</sup> This may be because they think that warnings they themselves give the jury about not attaching too much weight to certain evidence is very effective but given the prevalence of rape myths as discussed earlier in this thesis, their argument seems to fail.

4.6.6 Judges themselves seem highly convinced by arguments about sexual history evidence being relevant when it concerns the defendant. In the aforementioned scenario of the young girl who was caught having sex with her boyfriend the judges were “almost unanimous” in deciding to allow the evidence.<sup>313</sup> Many of them said that this was because it went to the central issue in the case; “My reaction would be to allow the defence to question her about that incident because it goes directly to a central issue, her credibility, on the basis that he is alleging that a) she has made up the allegation and b) that she has specific motive to make up her allegation and if there is any evidence of such a motive, then it ought to be before the jury. It would be manifestly unfair in my view to deny him the opportunity to present evidence of a motive where that would affect the jury’s consideration of her credibility.”<sup>314</sup> As with a lot of the statements made by judges throughout Kibble’s study, there is little reference to s.41 and instead they choose to make judgments based on their

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<sup>311</sup> *Ibid* at p 194

<sup>312</sup> *Ibid* at p 199

<sup>313</sup> *Ibid* at p 192

<sup>314</sup> *Ibid*

own ideas of relevance. The study would suggest that some of the judges do exclude evidence; even where they feel it is relevant. For instance in the scenario of the 14 year old girl and her stepfather several of the judges realised it would be excluded under s.41(4) but they expressed their views at disliking leaving this evidence out.<sup>315</sup> However this was not a common theme throughout the research. It seemed more likely that a judge would let evidence in he technically knew should be disallowed rather than disallow on the grounds of s.41.

4.6.7 Kibble appears to strongly defend the judges against the considerable criticism they have come under for their use of s.41. He has said he feels the research shows “judges are generally taking a more thoughtful and considered approach to the question of admissibility than is often suggested in the literature.”<sup>316</sup> The judges however, are critical of s.41 because of its restrictive nature. The “consensus among the judges that s.41 was not a workable provisions prior to the decision of the House of Lords in *R v A (No. 2)*, which restored a measure of judicial discretion in relation to the consent gateways and particularly s.41(3)(c).”<sup>317</sup> He references the “determination” of judges to “avoid injustice” and yet at the same time the research must acknowledge the willingness of the judges to disregard the Act. To illustrate this one judge said “I’d be prepared to bend one or two things, on timing whether it’s contemporaneous, if it’s a few days rather than 24hours and that sort of thing”<sup>318</sup> and went on to say that he must weigh up the fairness to both parties. Once again, while the sentiment is valid, the legislation is being ignored in favour of the judges’ own perspectives. This seems to be a common theme in getting around the Act. One judge commented that he had originally thought s.41 would make “life impossible...if a way wasn’t found around it.”<sup>319</sup> The majority of judges praised *R v A* for making s.41 “workable.”<sup>320</sup>

4.6.8 The conclusions therefore, which can be made from Kibble’s research suggest that whilst some of the judges may be working hard to ensure justice, many of them do so by disregarding s.41. They particularly criticise the legislation in its original form before *R v A*

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<sup>315</sup> *Ibid* at p 194

<sup>316</sup> Kibble, Neil ‘Judicial Discretion and the Admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: part 2’ (2005) *Crim LR* 263 at page 263

<sup>317</sup> *Ibid* at p 264

<sup>318</sup> *Ibid*

<sup>319</sup> *Ibid*

<sup>320</sup> *Ibid*



interpreted back into it, a substantial amount of judicial discretion. This is significant in terms of answering whether or not s.41 has been successful because it gives us an insight into what the people actually using the legislation think about it and how they are using it. As much of the research looked at in the chapter has shown, it would seem that the proper procedures linked to s.41 are not being followed and therefore it cannot be said to have been successfully implemented. But at the same time, this piece of research, by Kibble, suggests that the reason it has not been implemented is because it was unworkable<sup>321</sup> without additional judicial discretion. The overall judgement from the judiciary is a negative one.

## 4.7 Effect on conviction rates

### 4.7.1 Introduction

4.7.1.1 Whilst the number of rape convictions has remained relatively stable, the number of rapes reported to the police is increasing year on year; meaning that the proportion of rapes resulting in a conviction has steadily declined.<sup>322</sup> The relationship between these two variables is highly complex and it cannot be said that encouraging women to report rape will automatically result in a rise in conviction rates. (For further discussion see para 5.1.1) National statistical data suggest section 41 has had no discernible effect on attrition, with the conviction rate for rape continuing to fall after its implementation.<sup>323</sup> Since lowering attrition and increasing conviction were both aims of the legislation, the fact that no effect has been gauged is a rather damning indictment on the success of s.41. What is more “victims said that they weighed up the issue of whether sexual history evidence would be raised in court in deciding whether to report the matter to the police and subsequently in deciding whether to withdraw the allegation.”<sup>324</sup> This suggests that the legislation has also been ineffective in changing people’s views and attitudes. It has not increased women’s confidence in the system. “Police Officers, SARC staff and support agencies all concur that sexual history

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<sup>321</sup> *Ibid*

<sup>322</sup> Office for Criminal Justice Reform; ‘Convicting Rapists and Protecting Victims – Justice for Victims of Rape’ A consultation paper (2006) at p 8

<sup>323</sup> Kelly, Temkin and Griffiths, ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials.’ *Home Office Report 2006*

at p VII

<sup>324</sup> *Ibid*

evidence plays a part in the decision-making of complainants, especially, but not exclusively, in the early stages.”<sup>325</sup>

4.7.1.2 Ironically, the Home Office research study “A gap or a Chasm? Attrition in reported rape cases”, does not list the use of sexual history evidence at trial, as one of the reasons for the high attrition rate.<sup>326</sup> This is contrary to the comments I have already referenced by the Home Office report which stated that victims “weighed up”<sup>327</sup> that fact that their sexual history may be raised in court. Burman et al reported that whilst the effect of evidence on the outcome of trials is difficult to gauge, “it is very likely that a high rate of admission of such evidence is an important factor in the low conviction rate for rape and other serious sexual offences.”<sup>328</sup> The report references US research which tends to show that “jury prejudice against the complainer is a consequence of the use of sexual history evidence.”<sup>329</sup> The report also backs up the claims that women are deterred from reporting by the possibility of having the sexual history brought into the court room.<sup>330</sup> Whilst Temkin and Krahe do not necessarily reference the use of sexual history evidence as the reason for it, they do comment that studies show “most victims never report the matter at all”<sup>331</sup> and say that one of the main reasons for this may be the “stereotypes at each stage of the process.”<sup>332</sup> This can be linked in with the way sexual history evidence is used in court because it is often used to make the complainant look less credible so that they will not be believed by the jury.

#### 4.7.2 Can we rely on these figures as a marker for success?

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<sup>325</sup> *Ibid*

<sup>326</sup> Home Office Research Study 293, ‘A Gap or a Chasm? Attrition in reported rape cases’ (2005) London

<sup>327</sup> Kelly, Temkin and Griffiths, ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials.’ Home Office Report 2006 at p VII

<sup>328</sup> Burman, Jamieson, Nicholson, ‘The Law of Evidence in Sexual offence trials – Base Line Study’ (2005) at p 33 with reference to (e.g. Chambers and Millar, 1986; Lees, 1996; Lees & Gregory, 1993, 1996; Temkin, 2000, 2002)

<sup>329</sup> Burman, Jamieson, Nicholson, ‘The Law of Evidence in Sexual offence trials – Base Line Study’ (2005) at p 33 with reference to Kalven and Zeisel, 1966.

<sup>330</sup> Burman, Jamieson, Nicholson, ‘The Law of Evidence in Sexual offence trials – Base Line Study’ (2005) at p 33

<sup>331</sup> Temkin and Krahe, ‘Sexual Assault and the Justice Gap: A Question of Attitude’ Hart Publishing (2008) at p 10

<sup>332</sup> *Ibid*

4.7.2.1 Generally it would appear that the provisions are often ignored in favour of verbal applications made in court. Such applications are rarely objected to. As a consequence, the use of sexual history evidence is still very high. The attrition rate is still extremely high and the conviction rate very low. Therefore the tangible effects of S.41 are not being felt. However, as this chapter has shown, the correct procedures are not being adhered to and therefore it may not be the legislation itself that is at fault but rather the lack of implementation. As such it is difficult to judge the tangible effects that S.41 has had on the use of sexual history evidence.

## 4.8 Conclusion

4.8.1 This chapter has focused on the empirical studies which have been carried out on sexual history evidence and s.41 in the last decade in order to further answer the question of how successful the legislation has been at combating the problems of sexual history evidence at trial. It is important that such studies have been carried out, specifically the Home Office report as such research is not carried out for every legislative reform. The fact that such studies have been conducted suggest that the government are well aware that this is a problem area for criminal law however the recent Stern Review which focused on rape all but disregarded sexual history evidence which somewhat suggests that evidential issues have been somewhat sidelined recently.

4.8.2 The Home Office report documents that whilst S.41 applications are being made in some cases,<sup>333</sup> in the vast majority, the evidence is simply being brought in at trial and not in accordance with the procedures which require written notice. This is evidence in the statistics which shows evidence being raised in three quarters of cases, whilst applications are only being made in one quarter.<sup>334</sup>

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<sup>333</sup> In fact, the report documents that they are made in around 25% of cases. The Home Office report 'Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial' (2006) London at p VI

<sup>334</sup> Kelly, Temkin and Griffiths, '*Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials.*' Home Office Report 2006 at p 47

4.8.3 The empirical studies seem fairly conclusive that section 41 has had little, if no tangible effect on the conviction rate or the use of sexual history evidence. In fact, the studies suggest the use of sexual history evidence is extremely high and the conviction rate has continued to fall. Ideas seem to differ as to whether or not this is the legislation itself that is the problem or whether it is the implementation of it. Given that the legislation is not being strictly adhered to, it would not be fair to automatically pronounce the legislation an entire failure. This issue will be considered in the next chapter which focuses on ideas for reform.

## 5. The future of S.41: Living with *R v A*

### 5.1 Introduction

5.1.1 Having looked at the background to the legislation on sexual history evidence over the last 30 years, this chapter will discuss the options for the future of s.41 and the regulation of sexual history evidence in the UK. It will discuss the various suggestions put down by academics as well as drawing on the examples of other jurisdictions' provisions for inspiration as to how to solve the UK's issues with sexual history evidence. It will look at ways that the legislation and the decision in *R v A* could be taken forward to improve on the current situation. It is important that the situation is improved upon because at the moment the conviction rate, which is around 6%<sup>335</sup> is unacceptably low. The use of sexual history evidence may only be one factor in this, but everything that can be done to improve on it should be. By reducing the amount of sexual history evidence allowed into the court room, the reluctance some women may feel to report rape could subsequently be seen to diminish, and furthermore result in less defendants being acquitted. However, as previously mentioned in para 4.7.1.1, increased reporting will not automatically result in a higher conviction rate. In fact it may result, at least initially, in a reduced rate in terms of the proportion of convictions to reporting. This is because the way that these two variables (reporting and conviction) interact is highly complex. Given that the majority of rape cases do not fit the stereotype of "real rape" a change is also needed in the societal views on "acquaintance rape" otherwise juries will still be reluctant to convict thus resulting in an ever-reducing rate of conviction.

5.1.2 The focus of the chapter is primarily on legislative enforcement, but the issue of judicial perceptions of sexual history evidence, and more general societal views, also play a large part in the potential success of the options. Therefore, whilst this chapter will recommend a way forward through working with the legislation to provide stronger procedural guidelines, there must be an acknowledgement that what is also required is a shift in societal views on women's sexuality and sexual behaviour. This could mean that evidence brought in to allow the defendant a fair trial would not necessarily be prejudicial to

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<sup>335</sup> There is a lot of controversy surrounding this figure. For example see 'Rape conviction rate figures 'misleading'', Tom Whitstead, 15 March 2010 [http://www.londonbb.com/popups/popup\\_41.html](http://www.londonbb.com/popups/popup_41.html)

the complainant whereas, at present, because of the pre-existing stereotypes surrounding sexual history, when evidence is brought in it is almost certainly of significant detriment to the complainant.

5.1.3 This chapter will suggest a combination of ways that the legislation can help the situation. It will analyse the various options that have been suggested by academics before concluding which of these options is likely to be more successful and why. Four main options will be discussed in this chapter. Firstly the possibility of adding further gateways to S.41. Propositions have been made for both a gateway incorporating evidence with the accused and for evidence with third parties. Secondly, a clarification of the current stance to provide a definitive set of guidelines for the future. Thirdly a thorough enforcement of the current rules to ensure that, going forward, for example, evidence will only be allowed in if it is permissible through the gateways and the request is made in accordance with the provisions set out. And finally the chapter will also set out the proposition that no action be taken at the present time. As the previous chapter described, this thesis takes the stance that the main failing of S.41 is the lack of enforcement and therefore it is enforcement that is required rather than a large legislative overhaul.

## 5.2 Does S.41 Need Additional Gateways?

### 5.2.1 Introduction

5.2.1.1 This thesis does not take the stance that s.41 is entirely unhelpful. Certainly there are many flaws to it; most worryingly its lack of clarity, but the ethos behind it, that is, limiting sexual history evidence, is essential and the gateways are a good way of preventing an unfair trial to the defendant. Therefore, the idea of abolishing S.41 will not be suggested here. However, the notion of adding in further gateways seems counter intuitive against the purpose of the Act itself. It is meant to be restrictive to sexual history evidence.

5.2.1.2 Birch has suggested that s.41 could benefit from more gateways as she sees the current stance as “overly restrictive”<sup>336</sup> because it was “not intended to encroach”<sup>337</sup> on the

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<sup>336</sup> Birch, Di, ‘Untangling sexual history evidence: a rejoinder to Professor Temkin’ [2003] Crim LR 370

<sup>337</sup> Birch, Di, ‘Rethinking Sexual History: Proposals for fairer Trials’ (2002) Crim LR 531 at p 532

right to fair trial. She sees limiting the use the defence can make of the complainant's sexual history evidence as breaching the defendant's right to fair trial. Therefore, it is not merely that she thinks further gateways would be helpful, more that the current gateways themselves are unhelpful as they themselves are too restrictive. In Birch's eyes, perhaps, it is not a question of needing more gateways, but rather re-evaluating the effectiveness of such a categorised approach in the first place. However, this said, the purpose of section 41 is to restrict sexual history evidence and without having certain categories of evidence being allowed as exceptions to that rule, no evidence would be allowed in. Therefore having gateways does seem like a good compromise to make as it aims to ensure a fair trial to both parties. For Birch, gateways can only be considered a good option for the future if more are created.

5.2.1.3 In due course this chapter will lend itself to the discussion of the creation of additional gateways; regarding both evidence of sexual history evidence with the accused as well as with third parties. However, in the meantime it is worth noting that some of the evidence Birch wishes to include under these new gateways could potentially already be included under s.41. This is just one of the reasons this thesis will not put the idea of further gateways forward, for as stated by McGlynn "all substantially relevant sexual history evidence is capable of being accommodated within section 41's four gateways."<sup>338</sup> I would tend to side with McGlynn here because it seems that the gateways of s.41 are, on the whole fairly generous. By creating more, one goes against the original model of the Act as a blanket ban on sexual history evidence. For example, Kibble has suggested that a gateway could be created for evidence related to "motive to fabricate" or "prior false allegations."<sup>339</sup> However, such evidence if it overcame the relevance hurdles is included under s.41(1)(a) which deals with issues not relating to consent. It can also be noted that at the time of drafting the legislation, Parliament could have included further gateways or indeed, more judicial discretion but did not.<sup>340</sup> The aim was to limit the amount of sexual history evidence. If further gateways are created they could result in s.41 being entirely pointless.

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<sup>338</sup> McGlynn & Munro, 'Rethinking Rape Law'(Routledge – Cavendish, 2010) p 209

<sup>339</sup> Kibble, Neil, 'Judicial Discretion and the admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: Part 2.' [2005] Crim LR 263 at p 274

<sup>340</sup> For further discussion of this see McGlynn & Munro, 'Rethinking Rape Law'(Routledge – Cavendish, 2010) p 219

5.2.1.4 In opposition to Birch, Temkin does not think that we need to add in any further gateways. In her opinion it is not as “draconian”<sup>341</sup> as might be portrayed by others and has sought to defend this approach in various articles. She acknowledges the legislation and moreover the current situation is not entirely flawless. For example the decision in *R v A*<sup>342</sup> is likely to engender a degree of uncertainty<sup>343</sup> however, her criticism is more concerned with the enactment and clarity of the legislation rather than its content. This thesis is more likely to favour the approach of Temkin as it reiterates the importance of the restriction of sexual history evidence and considers s.41 sufficiently generous in terms of how much evidence it allows in.

## 5.2.2 A Gateway for Evidence of Sexual History with the Accused

5.2.2.1 This is one of the most common suggestions amongst critics supporting the need for additional gateways. Papers have argued that instances of sexual contact with the accused, both prior to and subsequent to the alleged rape, should be considered as an influencing factor in the jury’s decision making process. But it is acknowledged by Kelly et al in the Home Office report that while such a gateway should be inserted, it should at least have a time limit.<sup>344</sup> There is however, no guideline for a time limit provided. It could be that they assume the courts would seek to follow the *R v A*<sup>345</sup> time suggestion of 24 hours. If this were the case perhaps the gateway would be little more than the inclusion of this ratio into the legislation. It could be suggested therefore that this does not need a gateway of its own but rather that it is simply a case of clarifying the current stance after *R v A*, which this chapter will go on to discuss. Birch would be very much in favour of such an addition to the legislation because she does not see why evidence of this kind, “if it is of some relevance...should...have to jump through hoops to ensure it is heard.”<sup>346</sup> And so, unsurprisingly, she also rejects Temkin’s suggestion to have a specific formulation through

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<sup>341</sup> Originally Professor Birch described the legislation in this way; Birch, Di, ‘Rethinking Sexual History: Proposals for fairer Trials’ (2002) Crim LR 531 at p 532, however Temkin refutes this in her article ‘Sexual history – beware the backlash: evaluating s.41’ [2003] Crim LR 217

<sup>342</sup> [2001] UKHL 25

<sup>343</sup> Temkin, Jennifer, ‘Sexual history – beware the backlash: evaluating s.41’ [2003] Crim LR 217 at p 240

<sup>344</sup> Kelly, Temkin & Griffiths, Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 76

<sup>345</sup> *Op. cit* 1

<sup>346</sup> Birch, Di, ‘Untangling sexual history evidence: a rejoinder to Professor Temkin’ [2003] Crim LR 370 at p 376 - 377



which existing or recent relationships can be advanced. This is because, in accordance with the current structure of s.41, “the defence would also have to demonstrate that exclusion would be an unsafe option.”<sup>347</sup> Birch therefore, remains “unconvinced” by the “limiting [of] the defence in this way.”<sup>348</sup>

5.2.2.2 It seems to me that relevant evidence of sexual history with the defendant, if it truly is relevant, can already be included under the Act. In her feminist judgment McGlynn deals with this issue and rejects, as flawed, the “common sense” assumption that a woman who has engaged in sexual activity with a particular man is simply by virtue of the fact more likely to do so at another time with that same man.<sup>349</sup> She draws strength for this argument from Canadian legislation which precludes admission of sexual history evidence solely to support inference that the complainant was more likely to have consented on the occasion in question.<sup>350</sup> I would certainly agree with these arguments and as a result would not support the idea of introducing a new category specifically drafted to automatically allow evidence of sexual history evidence with the defendant. The evidence that Birch describes as “crucial,”<sup>351</sup> that is, evidence with the defendant, is only crucial if one follows the assumption that consent on previous occasions will result in consent indefinitely. The Act itself was introduced to limit the admission of sexual history and therefore such a gateway would go against the ethos of the legislation.

### **5.2.3 A Gateway for Evidence of Sexual History with Third Parties**

5.2.3.1 One suggestion has been that S.41 would benefit from a gateway which accommodates third party evidence. This would mean evidence of the complainant’s sexual history with anyone other than the accused could be admitted even if it is not strikingly similar. Including evidence with third parties that does not fit the “strikingly similar” definition would create a far broader gateway than currently exists in the legislation. However, it seems to me that this is the exact type of evidence that S.41 sought to exclude and therefore adding in a gateway to admit this evidence would go against the purpose of the legislation. I would

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<sup>347</sup> *Ibid* at p 377

<sup>348</sup> *Ibid*

<sup>349</sup> McGlynn’s Chapter in Hunter, McGlynn and Rackley, *Feminist Judgements* (Hart, 2010).

<sup>350</sup> Section 276 of the Canadian Criminal Code

<sup>351</sup> Birch, Di, ‘Rethinking Sexual History: Proposals for fairer Trials’ (2002) *Crim LR* 531 at p 532

go further than this and refuse, not only on the grounds that it would go against the grain of S.41 but also that such evidence bears no relevance to the alleged crime and should therefore not be considered. I appreciated that the defence may wish to infer that consent to sexual contact with the accused in the past increased the likelihood of consensual sexual relations in the future. However I reject the notion that consent to one man in the past could have any bearing on consent to a completely different man in the future. Birch, though in favour of a less restrictive approach to sexual history evidence noted that “evidence of this kind, while of marginal relevance in most cases, can too easily be put to improper use, to upset the complainant and to create a smokescreen to divert the jury from the real issues in the case.”<sup>352</sup> There is in fact, little, if any support for such a gateway.

5.2.3.2 Therefore, having rejected both the idea of getting rid of s.41 and the idea that further gateways should be created, this thesis will seek out a middle ground. These two options have been disregarded due to their extreme nature. Whilst s.41 has its problems, the principle it is based upon is one which this thesis supports because it involves the restriction on sexual history evidence. Therefore, it does have value. Such value would be lost, were the restrictions to be decreased, for example, through the addition of further gateways. The other options available include clarification and enforcement as well as training – these are all ideas which will be supported in this chapter. As previously mentioned this thesis supports enforcing the existing procedures. Supporters of clarifying the current legislative stance can still vary hugely in their opinions because of the controversial nature of *R v A*. Clarification could involve an incorporation of the ratio into the legislation or go so far as to reiterate the original wording of the legislation and therefore effectively repeal the House of Lord’s judgment. Whilst this thesis would tend towards lessening the effects of the case and therefore lean toward the tightening up of the existing legislation in its more restrictive nature, it ultimately strives for clarity and therefore if that would mean incorporating *R v A*’s judgment into s.41 somehow, the main aim would be that this should be done in a transparent fashion with its parameters being very clearly defined. However, even if *R v A* was incorporated procedure would still require far stronger enforcement than currently exists.

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<sup>352</sup> Birch, Di, ‘Untangling sexual history evidence: a rejoinder to Professor Temkin’ [2003] Crim LR 370 at p 376

### 5.3 Clarifying the Current Stance

5.3.1 Clarification of the current stance is one of the most obvious solutions available in legislative reform. The intricacies are obviously more difficult in terms of which parts of the legislation actually get reworded and tightened up but the general idea of it is good and this thesis firmly supports the clarification of the current legislation. This process should be two fold; both clarifying what the existing wording means, for example where there have been difficulties interpreting the meanings in the past but also clarifying what changes the case law has had on the legislation and how far this will transcend into future cases.

5.3.2 Many academics agree that clarification is essential after the decision in *R v A*<sup>353</sup> because of the controversial decision made. Temkin states that it is “likely to engender a degree of uncertainty.”<sup>354</sup> Ellison also touches upon how critical the reaction toward the decision has been because it “undermin[es] the purpose of the legislation by effectively restoring to trial judges the very discretion that the YJCEA aimed to check.”<sup>355</sup> Therein lies the problem; this case essentially read down s.41. Many judges have said that this made it “work[able]”<sup>356</sup> whilst “many public lawyers, on the other hand, have been highly critical of the interpretative method adopted by the House of Lords, suggesting that the approach amounted to ‘judicial overkill’.”<sup>357</sup> She puts feminist “dismay” at the legislation down to the “lack of clear, well-founded reasoning within the judgment on the issue of the relevance of sexual history evidence to consent.”<sup>358</sup> Clarification of the stance therefore, would be extremely helpful and would show parliaments true intentions behind the Act.

5.3.3 Kelly, Temkin and Griffiths go one step further than other academics and present practical examples of the ways in which s.41 could be clarified. For example, one of their recommendations is that the terms “sexual behaviour” and “sexual experience” be clarified

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<sup>353</sup> [2001] UKHL 25

<sup>354</sup> Kelly, Temkin & Griffiths, Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 240

<sup>355</sup> Easton, Susan, ‘*The Use of Sexual History Evidence in Rape Trials*’ in Childs, Mary & Ellison, Louise, ‘*Feminist Perspectives on Evidence*’ (Cavendish Publishing, London 2000) at p 208

<sup>356</sup> Kibble, Neil, ‘Judicial Discretion and the admissibility of prior sexual history evidence under section 41 of the Youth Justice and Criminal Evidence Act 1999: sometimes sticking to your guns means shooting yourself in the foot: Part 2.’ [2005] Crim LR 263

<sup>357</sup> *Op. Cit* 355

<sup>358</sup> *Ibid*

and also be shown to include implied, as well as express, behaviour.<sup>359</sup> This is in accordance with the legislation in New South Wales.<sup>360</sup> This would certainly help however it seems that there are further clarifications that could be made to the wording of the section. In the Home Office report they also suggest that consideration be given to “amending and curtailing section 42(1)(b) (the belief in consent exception) to reflect both the Sexual Offences Act 2003 and the fact that it is not generally reasonable to formulate a belief in consent on the basis of past history.”<sup>361</sup> I would agree that this suggestion is valuable however it sits uncomfortably with the suggestion that a new gateway be made to include sexual history evidence with the defendant. In the same vein however, they also want a clear statement to be made about the exceptional nature of the admittance of sexual history evidence. Such a statement would be helpful as it would offer reiteration to the judiciary in particular the aims behind the Act.

5.3.4 Whilst I think clarification of the current stance, as well as an emphasis on the extreme and exceptional nature of the admittance of sexual history evidence is very important, it seems that there is little standing in the way of further judicial interpretation and continued neglect of the procedural requirements. However, clarification is not a simple matter. There are several questions which must be presented before parliament in order for the clarification to be well understood. Firstly, what opinion is taken of *R v A* and therefore will it be incorporated into the section? Secondly, whether or not any additional gateways will be included – in which case it is less about clarification and more about a full change in legislation.

5.3.5 As this chapter has already suggested, this thesis would not wish to support the idea of *R v A* being supplanted into s.41 because as well as going specifically against the section’s primary purpose of restricting sexual history evidence, it is also the submission of this thesis that the case was wrongly decided. In coming to this conclusion, I have been strongly convinced by the feminist judgment of McGlynn, which argued that whilst the evidence in question was not actually relevant to an issue of consent, even if it had been

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<sup>359</sup> Kelly, Temkin & Griffiths, Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 76

<sup>360</sup> S. 409B(3) Crimes Act 1990 New South Wales

<sup>361</sup> Kelly, Temkin & Griffiths, Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 76

relevant then the only possible option open to the Lords would have been to issue a declaration of incompatibility because the Act specifically precludes judicial discretion. Therefore it could not realistically be read in a compatible way without discarding the Act's ultimate purpose.<sup>362</sup> Essentially what this means is that *R v A* could not be read into s.41 in its current form without being incredibly contradictory.

## 5.4 Enforcing the Current Rules

5.4.1 Strong enforcement should go hand in hand with the clarification of the current stance. This is the main idea for reform that this thesis supports. It seems that enforcing the rules, both in terms of the legislative rules themselves and the Crown Court rules, should be done regardless; but in this case perhaps active enforcement is needed. There is disregard for the rules at all stages; from the way that the defence will seek to include evidence that is definitely excluded by S.41 right, down to the way that the Crown Court rules on procedure are ignored. For example, applications to include sexual history evidence are to be submitted in writing, in advance of the trial and yet it would seem that the most common time and place the evidence is first raised is in the court room itself. Temkin is in favour of tightening the current rules as she says "strong procedural provisions are an important accompaniment to laws which seek to control sexual history evidence."<sup>363</sup> Perhaps if the provisions are reiterated it will lessen their "[vulnerability] to judicial override."<sup>364</sup>

5.4.2 The Home Office report makes three procedural recommendations. Firstly that the Crown Court rules be observed.<sup>365</sup> For example that there be an absolute requirement for all applications be made in writing and pre-trial. The only exception being that counsel were unaware of the information before the trial. These too should, however be made in writing and the prosecution be given time to consider the application, adjourning if necessary. As well as this judges would be required to submit their reasoning for allowing or disallowing to both the defence and prosecution. This would be extremely useful as it would force the

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<sup>362</sup> McGlynn's Chapter in Hunter, McGlynn and Rackley, *Feminist Judgements* (Hart, 2010).

<sup>363</sup> Kelly, Temkin & Griffiths, Home Office report 'Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial' (2006) London at p 230

<sup>364</sup> McGlynn, Clare 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean Struggle?' in McGlynn & Munro, *Rethinking Rape Law* (Routledge – Cavendish, 2010) p 205

<sup>365</sup> Kelly, Temkin & Griffiths, Home Office report 'Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial' (2006) London at p 77

judges to use the law to justify their actions thus preventing them from simply using their own judgement as to what they consider relevant and fair.

5.4.3 They make a second recommendation that the complainant have the right to be present when the application for the admittance of evidence is made so that they know what to expect at the ensuing trial.<sup>366</sup> If one of the aims behind limiting sexual history evidence is that more women report rape then this may also be a valuable suggestion.

5.4.4 A final recommendation would be that the prosecution would have the right to appeal a decision made to permit sexual behaviour evidence.<sup>367</sup> This may give women a greater sense of control throughout the decision making process.

5.4.5 The first recommendation is merely an enforcement of rules which should already be followed, however it is still a valid suggestion. The second two are valuable additions because they would appear to make the trial more bearable for the complainant. The right to appeal a decision would of course only work if the procedure of writing in advance of the trial was followed therefore allowing enough time to appeal a decision. It would perhaps be a good idea to research how the release of the evidence in advance would affect a complainant's decision to go to trial.

5.4.6 In addition to these procedural recommendations the Home Office also recommends further research in to the trial process and training of the judiciary<sup>368</sup> which this thesis also supports. The aim of such training would be to ensure that judges and lawyers understand the explanatory notes and Crown Court rules to prevent ignorance and misuse. Training will extend across all levels of the criminal justice system, notably to the police. It may be that public knowledge of this increased level of care would encourage women to report rape to the police and increase their potential to see the case through to trial. This thesis will especially support the concept of further training for judges so that we might begin to tackle some of the long standing prejudices of women's sexual history, that the evidence might not be perceived in such a negative way.

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<sup>366</sup> *Ibid*  
<sup>367</sup> *Ibid*  
<sup>368</sup> *Ibid*

5.4.7 Research that Kibble has conducted has emphasised the importance of judicial training. He commented “the significance of judicial training was powerfully underlined when one of the judges acknowledged during the interview (speaking of the admissibility of sexual history evidence in relation to the alternative scenario in scenario three, which virtually all judges said would not be admissible), ‘Left to myself I would let it all in, but I know I can’t do that anymore.’”<sup>369</sup> This quote demonstrates two key issues. Firstly that s.41 is at least having some effect on the way the judiciary handle the evidence so that even when judges may want to bring in evidence that they feel is relevant, they may now exclude it on the grounds that it is inadmissible under the Act. The second point however, illustrates that while the legislation may be having some effect of the practices of the judges, it is not changing their mindset which is still to believe that the evidence is relevant. Kibble highlights this so called “bending the law”<sup>370</sup> by picking out a quote from one judge who states that he, or she, would “be prepared to bend one or two things, on timing whether it’s contemporaneous, if it’s a few days rather than 24 hours and that sort of thing” on the grounds that it’s “a question of fairness” and “you do what you think is right.”<sup>371</sup> But this judge has highlighted the exact behaviour that s.41 tries to stamp out. The legislation limits judicial discretion to a number of gateways and yet still judges are trying to make the decisions as to admissibility based on their own judgement of what is relevant and fair to the complainant and the defendant. Whilst there has been an improvement on the situation under s.2 it is by no means ideal because it seems that judges do not necessarily believe in the law which they are enforcing. Kibble believes that all judges see the benefit of training in this area, however he does elaborate on the personal benefit which he thinks judges receive from such training.<sup>372</sup> It cannot, overnight at least, change their mindset, but perhaps for now it will at least aid the enforcement of the legislation.

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<sup>369</sup> Kibble, Neil, ‘Judicial perspectives on the operation on s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1.’ [2005] Crim LR 190 at p 205

<sup>370</sup> *Ibid* at p 264

<sup>371</sup> *Ibid*

<sup>372</sup> Kelly, Temkin & Griffiths, Home Office report ‘Section 41: an evaluation of new legislation limiting sexual history evidence in rape trial’ (2006) London at p 205

## 5.5 Is Change Necessary?

5.5.1 There have been suggestions that we could simply leave the state of the law on sexual history evidence as it currently stands because *R v A* has made it “workable.”<sup>373</sup> As one of his three options for reform Kibble suggests maintaining the current stance “now that *R v A* (*No 2*) has reintroduced a measure of judicial discretion.”<sup>374</sup> He certainly believes that making the situation any more rigid than it already is would be to the detriment of the legislation. He references the comments of one judge who shares his opinion saying “it would be a terrible mistake for parliament to lay down rules which we must inflexibly apply” but seems to imply that such a stance would be to a large extent ignored by subsequently saying such a stance would “[fill] the court of appeal even further.”<sup>375</sup> This brings us back, once again, to the problem of enforcement. It should not be the case that if the legislation is reformed to a stance that the judiciary do not fully support, that, by default, it is not followed in the correct manner. If simply pleasing the judiciary is the aim behind reform then leaving the law in its current state would be highly effective as it would allow the judges a free reign. Since however, this is definitely not the aim behind the legislation, the option of leaving the situation, as it is, cannot be supported here.

5.5.2 Whilst Kibble supports the view that *R v A* has improved the situation, it does not therefore automatically follow that we should just leave the law as it currently stands. After all, even if the current law could be considered successful, there is still a chance that reform could improve it further. One of the judges in Kibble’s study argued that without the judgment in this case “we would have a straitjacket which at times would render unfairness”<sup>376</sup> and yet, even if this thesis was to conclude that the decision in *R v A* had been a positive one, which it won’t, it would still recommend reform of the legislation for the reason of clarity. I think that the legislation should clarify the stance after *R v A* so that the judges can be sure of exactly how far the ratio goes.

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<sup>373</sup> *Ibid* at p 264

<sup>374</sup> *Ibid* at p 274

<sup>375</sup> *Ibid* at p 264

<sup>376</sup> *Ibid* at p 265



5.5.3 Birch takes a similar view in this respect and argues that whilst the case may have “solved some of the problems,” a better solution would be to “rethink the legislation.”<sup>377</sup> Whilst this thesis will not support the decision in *R v A* I am still of the opinion that this view is a more sensible approach than that of leaving the situation as it is for as Birch is arguing, even if the situation has been improved, this does not imply that it is perfect. She points out that “the decision in *A(2)* also generates uncertainty as to how far it will be necessary in the future to stray from a natural construction in order to secure a fair trial; an uncertainty which is compounded by the absence of any real agreement in the House of the compulsion to do so on the facts of the case before them.”<sup>378</sup> Therefore, legislative intervention would ease this situation. However an obvious problem occurs concerning the fact that Parliament had and rejected the chance of putting judicial discretion into the Act. Perhaps the reason there has been no further legislative intervention is because there is an awareness that the judiciary will only accept it as written if it allows them some discretion.

5.5.4 This thesis takes the stance that far from clarifying the situation, this case has made the state of the law even more confusing; as well as introducing a whole new range of issues. Without some form of legislative direction or intervention this area of law will continue to suffer a fundamental lack of clarity. There has been much opposition to the proposition of leaving the situation as it stands, most probably because this case completely undermines S.41. Firstly, by putting judicial discretion back into sexual history evidence; something which the section deliberately sought to exclude. Secondly because of its lack of clarity. Therefore I see no way that the situation can simply be left to stagnate. *R v A* should be overturned and the current procedures and crown court rules should be strongly enforced.

## 5.6 Are These Solutions Adequate?

5.6.1 The idea supported here is for further clarification of legislation, strong affirmation of the crown court rules plus an explicit declaration that sexual history evidence is to be accepted only in exceptional cases. As the introduction of this chapter discussed, it is not

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<sup>377</sup> Birch, D, ‘*Untangling Sexual History Evidence: a Rejoinder to Professor Temkin*’ [2003] Crim LR 370 at p 381

<sup>378</sup> Birch, Di, ‘*Rethinking Sexual History: Proposals for fairer Trials*’ (2002) Crim LR 531 at p

only legislative action that is needed, but rather, a shift in perceptions and societal views. However, this kind of shift could take decades if not more, so whilst judicial attitudes in particular may obstruct notions of legislative reform, this is not a reason to ignore the situation. Kibble's study of judicial attitudes did suggest that S.41 is forcing judges to think much harder about what types of sexual history evidence should be allowed in and this is a very positive step.

## **5.7 Conclusion**

5.7.1 Ideally, sexual history evidence should rarely cause a problem in courts because there should not be stigma or stereotype attached to women who engage in regular sexual activity. The evidence should be viewed for what it is worth and should have no prejudicial effect to the case. However, it seems unlikely that such a reality can co-exist with current societal opinions and constructs. However, despite this bleak outlook this is no justification to avoid at least attempting to improve the situation. The options that this chapter has deliberately ruled out are the two extreme options of taking no action at all, in other words - leaving the law in the post *R v A* state; and the alternative extreme of creating more gateways. Therefore it favours an intermediate solution involving clarification of the current stance, enforcement of the procedural rules and continued restriction on sexual history evidence. If an application for the introduction of sexual history evidence is not made following the correct procedure then it will automatically be rejected.

## 6. Conclusion

6.1 Having mapped the progress of the legislative stance on sexual history evidence from the lead up to the implementation of S.2, to the present day, the thesis has commented and analysed the successes and failures of the various positions. Having set this context it then looked at the pressing issue of reform. The idea behind each stage of reform over the last forty years has been to restrict sexual history evidence, with the view to improve the trial process for the victim and to, in turn increase the conviction rate whilst maintaining the defendant's right to fair trial. As set out in the introduction of this thesis, there are many reasons why sexual history evidence should be restricted. For example, the idea that women are reluctant to report rape knowing that their sexual past could be brought into court. By restricting the amount of sexual history evidence which is allowed into the court room we may in turn encourage more women to report rape and therefore potentially increase the conviction rate.

6.2 Despite the emphasis being on legislative reform, as mentioned in previous chapters, there are other problems with the current situation such as perceptions of rape, in particular those surrounding consent and specifically how these perceptions affect the judiciary and juries. When certain irrelevant pieces of sexual history evidence are brought in to court it is arguably purely to prejudice the jury against the complainant. In turn this will unfortunately perpetuate rape myths. What is clear is that this problem cannot be easily fixed and therefore as rewarding as it would seem, this thesis has not suggested a full legislative rewrite. To do so would not be wise given the last two attempts. Problematically, as earlier referenced, the judges may follow the law but many as yet do not necessarily believe in it.<sup>379</sup> This tells us that a societal shift in opinion is needed before change truly takes place. However, the previous chapter assesses the recommendations from various proponents and in doing so recommends several key focuses going forward. These are, a clarification of the current stance; more rigorous enforcement of the procedural rules; and above all a continued restriction on sexual history evidence. This solution has been recommended after consideration of several, perhaps more extreme, options including taking no action at all and

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<sup>379</sup> Judges stated that they felt obliged to exclude certain evidence, not because they felt it was irrelevant but simply because S.41 insisted upon it. Kibble, Neil 'Judicial perspectives on the operation of s.41 and the relevance and admissibility of prior sexual history evidence: four scenarios: Part 1' (2005) Crim LR 190 at p 194

adding further gateways to S.41 because it remains true to the ethos of the legislation whilst attempting to move forward.

6.3 This research has maintained throughout that the decision in *R v A*<sup>380</sup> has made the legislative stance unclear and created further problems. It seems clear now that reform is needed if only to clarify how this case and S.41 are to interact, as at present they seem to act as opposites. The main ideas that the thesis looked at were the creation of additional gateways so that the judges would not seek to stretch the current gateways further. Given that this research is in favour of tighter restrictions this was never likely to be the solution favoured. The ideas favoured are clarification and enforcement of the current rules. As the empirical studies demonstrated, the legislation is not always being followed properly. In some cases this may be because the judiciary are a little unclear on what is now considered to be 'irrelevant' evidence but if there is clarification then there will be no excuse for breaching the existing requirements.

6.4 The other main idea supported here, as well as clarification and proper enforcement would be an additional declaration within s.41, of a declaration, similar to the Canadian provision that states sexual history evidence is to be brought in only in exceptional cases. This would enforce the mindset that such evidence is to be limited and only allowed in, in a small number of cases. Neither of these options are as extreme as a full scale legislative change or the other extreme of leaving the situation as it is post *R v A*.<sup>381</sup> However, the benefit of these approaches is that it makes the legislations intent more plain than before – particularly in the form of the declaration. It makes two points; firstly that the admission of sexual history evidence will only be accepted in exceptional cases and secondly it will enforce more rigorous procedural rules. For example; any application that is not made in advance and in writing, should not be considered save for very exceptional circumstances. By enforcing the procedures set out in the crown court rules, as intended, we can truly start to assess if S.41 in its original form will have any success.

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<sup>380</sup> *R v A (No 2)* [2001] UKHL 25  
<sup>381</sup> *Ibid*

## Appendix 1

### Section 2 Sexual Offences Amendment Act 1976

#### **2. Restrictions on evidence at trials for rape etc.**

(1) If at a trial any person is for the time being charged with a rape offence to which he pleads not guilty, then, except with the leave of the judge, no evidence and no question in cross-examination shall be adduced or asked at the trial, by or on behalf of any defendant at the trial, about any sexual experience of a complainant with a person other than that defendant.

(2) The judge shall not give leave in pursuance of the preceding subsection for any evidence or question except on an application made to him in the absence of the jury by or on behalf of a defendant; and on such an application the judge shall give leave if and only if he is satisfied that it would be unfair to that defendant to refuse to allow the evidence to be adduced or the question to be asked.

(3) In subsection (1) of this section "complainant" means a woman upon whom, in a charge for a rape offence to which the trial in question relates, it is alleged that rape was committed, attempted or proposed.

(4) Nothing in this section authorises evidence to be adduced or a question to be asked which cannot be adduced or asked apart from this section.

## Appendix 2

### Section 41 Youth Justice and Criminal Evidence Act 1999

#### **CHAPTER III PROTECTION OF COMPLAINANTS IN PROCEEDINGS FOR SEXUAL OFFENCES** **41 Restriction on evidence or questions about complainant's sexual history**

(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

(a) no evidence may be adduced, and

(b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial, about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

(a) that subsection (3) or (5) applies, and

(b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This subsection applies if the evidence or question relates to a relevant issue in the case and either—

(a) that issue is not an issue of consent; or

(b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or

(c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

(i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or

(ii) to any other sexual behaviour of the complainant which (according to such evidence) took place at or about the same time as that event,

that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of subsection (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This subsection applies if the evidence or question—

(a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and

(b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of subsections (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those subsections is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence—

(a) it shall cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but

(b) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this section authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this section.

#### **42 Interpretation and application of section 41**

(1) In section 41 —

(a) “relevant issue in the case” means any issue falling to be proved by the prosecution or defence in the trial of the accused;

(b) “issue of consent” means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented);

(c) “sexual behaviour” means any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in section 41(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused; and

(d) subject to any order made under subsection (2), “sexual offence” shall be construed in accordance with section 62.

(2) The Secretary of State may by order make such provision as he considers appropriate for adding or removing, for the purposes of section 41, any offence to or from the offences which are sexual offences for the purposes of this Act by virtue of section 62.

(3) Section 41 applies in relation to the following proceedings as it applies to a trial, namely —

(a) proceedings before a magistrates' court inquiring into an offence as examining justices,

(b) the hearing of an application under paragraph 5(1) of Schedule 6 to the [1991 c. 53.] Criminal Justice Act 1991 (application to dismiss charge following notice of transfer of case to Crown Court),

(c) the hearing of an application under paragraph 2(1) of Schedule 3 to the [1998 c. 37.] Crime and Disorder Act 1998 (application to dismiss charge by person sent for trial under section 51 of that Act),

(d) any hearing held, between conviction and sentencing, for the purpose of determining matters relevant to the court's decision as to how the accused is to be dealt with, and

(e) the hearing of an appeal,

and references (in section 41 or this section) to a person charged with an offence accordingly include a person convicted of an offence.

#### **43 Procedure on applications under section 41**

(1) An application for leave shall be heard in private and in the absence of the complainant.

- In this section “leave” means leave under section 41.

(2) Where such an application has been determined, the court must state in open court (but in the absence of the jury, if there is one) —

(a) its reasons for giving, or refusing, leave, and

(b) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave,

and, if it is a magistrates' court, must cause those matters to be entered in the register of its proceedings.

(3) Rules of court may make provision —

(a) requiring applications for leave to specify, in relation to each item of evidence or question to which they relate, particulars of the grounds on which it is asserted that leave should be given by virtue of subsection (3) or (5) of section 41;

(b) enabling the court to request a party to the proceedings to provide the court with information which it considers would assist it in determining an application for leave;

(c)for the manner in which confidential or sensitive information is to be treated in connection with such an application, and in particular as to its being disclosed to, or withheld from, parties to the proceedings



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