

**S41 YJCEA 1999**  
**HOW TO ADDUCE EVIDENCE OF SEXUAL BEHAVIOUR**

Is the Defendant charged with a sexual offence under Pt 1 of the Sexual Offences act 2003 or an offence under S62 of the YJCEA 1999 OR an offence of a sexual nature pre-2003 Act?



**DO YOU WISH TO ADDUCE EVIDENCE OF THE COMPLAINANT'S SEXUAL BEHAVIOUR?**

Sexual Behaviour: **Any sexual behaviour or other sexual experience, whether or not involving any accused or other person (s41(1)(c))**

*Examples: a. Sexual activity with the D or another*

*b. Sexualised messages*

*c. Sexualised quizzes on the internet*

*d. Secondary evidence of sexual behaviour (pregnancy/abortion)*

**Please note:** sexual behaviour does **not** include anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused.



**GATEWAYS TO ADMISSABILITY**

**G1:** Issue other than Consent (s41(3)(a));

**G2:** Evidence relates to consent and the sexual behaviour is alleged to have taken place "at or about the same time as" the event in issue (s41(3)(b));

**G3:** Consent and Similarity (s41(3)(c)); OR

**G4:** Evidence in Rebuttal (s41(5)).

***Restriction to the Gateways Under S41(3)***

*"no evidence or question shall be regarded as relating to a relevant issue in the case if the primary purpose is to impugn the credibility of the complainant as a witness"*



**RESTRICTIONS TO ALL GATEWAYS**

Having opened a gateway, you must also address the Court on the following test:

The court must be satisfied that the refusal of leave MIGHT have the result of rendering unsafe a decision of the jury OR the Court on any relevant issue.

**PROCEDURAL REQUIREMENTS FOR APPLYING TO ADDUCE EVIDENCE OF  
SEXUAL BEHAVIOUR**

**Section 43 of the YJCEA 1999 and Part 22 of the Criminal Procedure Rules 2020**

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

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

1. (a) serve an application for permission to do so on—
  - (i) the court officer, and
  - (ii) each other party;
- (b) serve the application—
  - (i) as soon as reasonably practicable after becoming aware of the grounds for doing so, and in any event
  - (ii) not more than 14 days after the prosecutor discloses material on which the application is based.

(2) The application must—

- (a) identify the issue to which the defendant says the complainant's sexual behaviour is relevant;
- (b) give particulars of—
  - (i) any evidence that the defendant wants to introduce, and
  - (ii) any questions that the defendant wants to ask;
- (c) identify the exception to the prohibition in section 41 of the Youth Justice and Criminal Evidence Act 1999 on which the defendant relies; and
- (d) give the name and date of birth of any witness whose evidence about the complainant's sexual behaviour the defendant wants to introduce.

**Part 22 of the Criminal Procedure Rules 2020 can be found at:**

**<https://www.justice.gov.uk/courts/procedure-rules/criminal/docs/2015/crim-proc-rules-2015-part-22.pdf>**

## Section 43 YJCEA 1999 - 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) Criminal Procedure Rules 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.

**The YJCEA 1999 can be found at:**

<https://www.legislation.gov.uk/ukpga/1999/23/section/43>

## USEFUL CASE LAW

### 1. Gateway 1: Issue is other than Consent

*R v A (No 2) [2002] 1 A.C 45* – Four examples given by Lord Hope, at para 79, of issues falling within gateway 1 (Issue not one of consent):

- a. The Defendant believed the C was consenting
- b. The complainant was biased against the accused and had a motive to fabricate
  - i. *R v Martin [2004] EWCA Crim 916*
- c. There is an alternative explanation to the physical convictions upon which the Crown relies to establish intercourse took place
  - i. *R v L [2015] EWCA Crim 741*
  - ii. *R v F [2008] EWCA Crim 2859*
- d. Detail of the complainant's account must have come from other sexual activity before or after event which provides explanation for knowledge of that activity.

### 2. Gateway 2: Consent and Contemporaneity

- i. *R v A [2001] EWCA Crim 4*
- ii. *R v A(No2) [2002] 1 A.C 45*

### 3. Gateway 3: Consent and Similarity

- i. *R v T [2004] EWCA Crim 1220*

### 4. Gateway 4: The Rebuttal Gateway

- i. *R v Hamadi [2007] EWCA Crim 3048*



PUMP COURT  
CHAMBERS