

# **YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

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

#### ***Chapter III: Protection of complainants in proceedings for sexual offences***

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

147. *Subsections (2)-(6)* set out the circumstances in which courts may allow evidence to be admitted or questions to be asked about the complainant's sexual behaviour.
148. Courts may only grant leave if:
- The evidence or questioning relates to any issue that has to be proved in the case other than whether the complainant consented (*subsection (3)(a)*). The defendant's honest but mistaken belief in consent falls into the category of a relevant issue in the case other than consent.
  - The issue that is being argued in the case is whether the complainant consented and the evidence or questioning relates to behaviour that took place as part of the alleged offence, or at or about the same time (*subsection (3)(b)*). It is expected that "at or about the same time" will generally be interpreted no more widely than 24 hours before or after the offence.
  - The issue is whether the complainant consented and the evidence or questioning relates to behaviour that is so similar to the defence's version of the complainant's behaviour at the time of the alleged offence (whether as part of the alleged offence or at or about the same time) that it cannot reasonably be explained as a coincidence.
  - The evidence or questioning that the defence wishes to introduce is intended to dispute or explain evidence that the prosecution have introduced about the complainant's sexual behaviour, whether it was alleged by the prosecution to have taken place as part of the alleged offence or at some earlier or later date (*subsection (5)*). Such evidence must go no further than to directly contradict or explain claims made by or on behalf of the complainant.
149. Before allowing any evidence of sexual behaviour to be introduced, the court must be satisfied not only that one of the above criteria is met but also that, if the evidence were not heard, the jury or magistrate in the case might make an unsafe decision on an issue that had to be proved in the case (ie, an element of the offence or defence). *Subsection (6)* requires any such evidence to relate to a specific instance, or instances, of sexual behaviour.

*These notes refer to the Youth Justice and Criminal Evidence  
Act 1999 (c.23) which received Royal Assent on 27 July 1999*

150. *Subsection (4)* provides that if the defence seek to introduce questioning or evidence purportedly under *subsection (3)* - by claiming that it relates to an issue that has to be proved in the case - but the court considers that its real main purpose is to undermine or diminish the complainant's credibility, the court will not allow it. But it is not envisaged that evidence that seeks to do no more than show that the complainant has a history of making unproved complaints of sexual offences would be treated as evidence of sexual behaviour.