In the wake of the Ched Evans retrial in October last year, it has been announced that the government will conduct a review of the operation of section 41 of the Youth Justice and Criminal Evidence Act 1999 in sexual offence cases.

Section 41 governs the admissibility of evidence relating to the sexual history of the complainant in sexual offence trials. It prohibits the introduction of such evidence except with the leave of the court, which must be satisfied, first, that the (main) purpose of its admission is not to impugn the credibility of the complainant and, second, that without it the safety of the jury’s conclusion on a relevant issue may be compromised.

Further, any such material can be introduced only through one of the four ‘gateways’ set out in subsections (3) and (5). In the Ched Evans retrial, new evidence of the complainant’s sexual behaviour with third parties on other occasions was deemed similar enough to her alleged behaviour with Evans that it could be admitted through the ‘similar fact’ gateway in section 41(3)(c). The inclusion of this new evidence ultimately led to Evans’ acquittal.

It is generally accepted among criminal practitioners that the Ched Evans case did not represent a departure from the current law and that section 41 should continue to operate as it has always done (i.e. excluding sexual history evidence in the vast majority of cases). However, there was a strong current of outrage in mainstream media reporting of the decision. It was widely suggested that admitting this evidence in such a notorious case would, in practice, lead to the widening of the section 41 gateway, erode the protection for complainants, and ultimately dissuade victims of sexual assault from reporting the crime.

No doubt prompted by this criticism, there have been two recent moves within the government to re-examine section 41. The justice secretary, Elizabeth Truss, confirmed on 13 February 2017 that the government is conducting a review into the operation of section 41 in rape cases. She vowed to ensure that the provision is not used ‘as an excuse to shame victims of serious crimes’. Meanwhile, a separate initiative in the form of a private member’s bill proposing the amendment of section 41 has already had its first reading in parliament. This bill, the Sexual Offences (Amendment) Bill 2016–2017 introduced by Liz Saville Roberts of Plaid Cymru, would enable courts to rule out entirely the cross-examination of the complainant on their appearance, behaviour, and sexual behaviour with unrelated third parties.

Legislation on this point must seek to exclude irrelevant evidence and to protect complainants from unjustified and harmful questioning, while at the same time ensuring that the defendant’s article 6 right to a fair trial is not compromised. Importantly, the legislation must also be applied correctly on a day-to-day basis by courts dealing with sexual offence trials. Concerns have, in the past, been voiced in relation to both the procedural and substantive application of section 41 by counsel and courts, and a new study on this subject, initiated by Dame Vera Baird QC, is due to be published shortly.

Diminished responsibility

On 30 November 2016, the Supreme Court handed down judgment in the case of R v Golds [2016] UKSC 61 and, in doing so, provided useful clarification on the defence of diminished responsibility. The partial defence of diminished responsibility is available only to those accused of murder and, if made out, results in a lesser conviction for manslaughter. Section 2 of the Homicide Act 1957, as amended by the Coroners and Justice Act
2009, sets out the statutory test for the defence. It must be established that the defendant’s actions in killing the deceased were caused (or significantly contributed to) by an abnormality of mental functioning which ‘substantially impaired’ his ability to understand the nature of his conduct, to form a rational judgment, or to exercise self-control.

The defendant in Golds had been convicted of the murder of his partner, following a trial in which he unsuccessfully raised the defence of diminished responsibility. He appealed this decision on a number of grounds, including the lack of direction by the judge to the jury on the meaning of ‘substantial impairment’ and the possibility that the jury had, as a result, misapplied this term. Further, he contended that the correct interpretation of ‘substantial impairment’ was an impairment which was ‘more than merely trivial’. The Court of Appeal dismissed the appeal but submitted these questions for consideration by the Supreme Court.

The Supreme Court also dismissed the defendant’s appeal. Lord Hughes, with whom the other Supreme Court justices agreed, clarified that in most cases there will be no need for the judge to direct the jury as to the meaning of ‘substantial’. Rather, the jury should be reminded that in most cases there will be no need for the judge to direct the jury as to the meaning of ‘substantial’. Rather, the jury should be reminded that it is an ordinary English word, that it ‘import[s] a question of degree’, and that whether the relevant threshold is met is a matter for them.

However, if there has been argument in front of the jury about this threshold, or where the impairment lies on the spectrum between trivial and total, the judge must then address the issue. In these circumstances, the judge should clarify for the jury that it is not any non-trivial impairment which will suffice to establish the defence. Such a clarification should also be offered in other situations where the trial judge considers that there is a risk of the jury misunderstanding the term.

Reform of police powers

The Policing and Crime Act 2017, which received royal assent on 31 January, addresses a diverse range of issues including the operation of the emergency services, police complaints and discipline, firearms and pyrotechnics, and alcohol licensing. Of most relevance to many practitioners is the current regime

sections 135 and 136 of the Mental Health Act 1983, which deal with the assessment and transfer to a ‘place of safety’ of individuals suffering from mental disorders. The use of a police station for this purpose is now prohibited where the detained individual is a young person under the age of 18. For both adults and young people, the maximum period of detention at the place of safety is also reduced, from 72 hours down to 24 hours, with the possibility of a further 12-hour extension if the individual’s condition does not allow for an assessment to be completed within that period.

However, it is the Act’s revisions of the pre-charge bail provisions in the Police and Criminal Evidence Act 1984 (PACE) which have attracted the most attention. Under chapter 1, there is now a presumption that a suspect who has been arrested should be released without bail unless bail is necessary and proportionate in all the circumstances.

A decision that these conditions are satisfied must be approved by an officer of inspector rank or above. If bail is then imposed, it can only be for a period of 28 days in standard cases, after which an extension to a total of three months can be granted by a superintendent, with any further extensions requiring an application to the court.

The introduction for the first time of a statutory time limit in respect of the pre-charge bail period squarely addresses the criticisms made of the current PACE regime, under which suspects can remain on bail indefinitely while awaiting a charging decision. When combined with the imposition of oppressive bail conditions, this can have a profoundly negative impact on the individual over a period of many months or even years. If the 28-day deadline proves effective at expediting police investigations and providing a swift resolution for suspects, then the reforms will certainly be hailed as a success.

However, doubts have been expressed by practitioners as to whether it is realistic to expect that the police will, even in a standard case, be able to complete their investigations within 28 days. The new statute will not eliminate a delay which occurs, for example, because forensic analysis is required to progress the investigation, because witnesses are unavailable, or simply because the police service is under-resourced. In these circumstances, the only change will be that the officer must satisfy the additional administrative requirement of seeking extensions of the bail period as and when required.

The introduction of a statutory time limit in respect of the pre-charge bail period squarely addresses the criticisms made of the current regime