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

YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part I: Referrals to youth offender panels

Section 1: Referral of young offender to youth offender panel

34. Section 1 introduces a new power for magistrates' courts of making referral orders in respect of first time offenders under the age of 18. These orders will refer young offenders to youth offender panels. This section sets out when the new sentencing power will be available. A referral order is intended to be the main disposal for young offenders who have not previously been convicted, but there are certain circumstances in which it would not be appropriate. These circumstances include cases where a custodial sentence is appropriate to reflect the seriousness of the offence or to protect the public. It is also recognised that there will be cases where it will be appropriate for the courts to order an absolute discharge. The new power does not replace sentences which are already fixed by law. Nor does it preclude courts from ordering hospital admission in respect of mentally ill offenders. The circumstances that take precedence over the making of a referral order are set out in*subsection (1).*

35. The effect of the new order is to refer a young offender to a youth offender panel to be set up and administered by the local youth offending team. Multi-agency youth offending teams are provided for by the Crime and Disorder Act 1998 and are responsible for co-ordinating the delivery of local youth justice services. The availability of the new disposal will depend on whether a local youth offending team has been established to set up the youth offender panel. Accordingly s*ubsection (4)* limits the availability of the new order to those courts that have been notified by the Secretary of State that arrangements are in place for a youth offending team to implement referral orders.

36. The order-making power is available in the youth court and the adult magistrates' court. It is not available in the Crown Court, although, where the Crown Court is dealing with a young offender who may be suitable for a referral order, the case may be remitted to the youth court for sentencing. However, the Crown Court will have the same powers to award punishment as the lower court appealed against when sitting in its appellate jurisdiction (section 48(4) of the Supreme Court Act 1981) and so may make referral orders in cases where it allows an appeal against the sentencing of the youth court or adult magistrates' court.

Section 2: Referral conditions

37. Section 2 sets out the conditions which have to be satisfied before a referral order may be imposed by the court. *Subsection (1)* describes the conditions required to trigger a compulsory referral order. In circumstances other than those described in section 1(1), every young offender who has never previously been convicted (or bound over) and who pleads guilty to the offence (and any associated offences, i.e. any other offences

for which the offender is being dealt with at the same time (section 15(2)) must be referred by the court to a youth offender panel. Such offenders appear to be the group most likely to benefit from this type of sentence.

38. *Subsection (2)* sets out a further category of young offender for which the court may make a referral order. The court may use its discretion to order a referral where a young offender pleads guilty to one or more offences but not guilty to others (of which he is, however, convicted). As with those cases referred to in subsection (1), the conditions in section 1(1) apply, and for a referral order to be made it must be the first time that the young offender has been convicted.

39. The new provisions will be piloted in selected areas across England and Wales. It may be that, in the light of the experience of the pilots, or following full implementation across the country, it will appear that other categories of young offender could also benefit from this new sentence. *Subsection (3*) allows the Secretary of State to amend the categories of offenders eligible for the new sentence subject to the agreement of Parliament by *affirmative resolution procedure*. This means that Parliament must discuss and approve the Secretary of State's amendments. *Subsection (4)* gives examples of the kind of amendments that might be made.

40. *Subsection (5)* ensures that young offenders who have previously been given a conditional discharge are treated as if they have a previous conviction for the purposes of considering whether they qualify for a referral order. This is in line with the concept of limiting the arrangements, in the first instance, to those young offenders who are being dealt with by a court for the first time.

Section 3: Making a referral order

41. Section 3 sets out the practical and administrative arrangements for making an order. To ensure that the young offender fully understands the effect of referral, the contents of the order are prescribed in *subsection (1)* and a requirement is contained in *subsection (3)* to explain the order, and the consequences of not complying with it, in clear language.

42. The order must specify the length of the period for which any youth offender contract will have effect (*subsection (1)(c)*). This will be between 3 and 12 months. It will be set by the court on the basis of the seriousness of the offence to ensure that the sentence is proportionate to the offence. Where referral is being ordered for two or more offences, the court will make a referral order for each offence. However, each order will be supervised by the same youth offender panel *(subsection (5))* and there can only be one youth offender contract. Although the period specified in each order may be of a different length, the total time for which any youth offender contract has effect will not exceed 12 months (*subsection (6)*).

43. The order must also specify which youth offending team is responsible for ensuring that a youth offender panel is set up to deal with the offender (*subsection (1)(a)*). *Subsection (2)* requires that the youth offending team identified in the order should be the team responsible for the young offender's home area or the area where he or she is expected to reside in the future.

Section 4: Effect of referral order on availability of other sentences

44. When a referral to a youth offender panel is made it will constitute the entire sentence for the offence (and any associated offences) with which the court is dealing. The referral is not to be treated as an additional sentence to run alongside others (*subsections (2) and (3)*) although the referral may be accompanied by certain ancillary orders such as orders for costs, compensation, forfeiture of items used in committing an offence, exclusion from football matches, etc.*Subsection (5)* prevents bind overs being made in respect of either the young offender or his or her parents and also prevents the making of parenting orders. But, as set out in *subsection (3)(a),* the court may order an absolute discharge in respect of an associated offence.

45. Where a young offender is referred back to the court by the panel, because (for example) he is in breach of his contract, or he has committed a further offence while subject to a referral order, the court may decide to revoke the original order and re-sentence. At this point the sentencing restrictions imposed by subsections (2), (3) and (5) of this section will no longer apply and the court may deal with the offender in any way that, if section 1 of the Act had not applied, the court which originally sentenced the offender could have dealt with him (*subsection (6*).

Section 5: Making of referral orders: attendance of parents etc

46. Referral to a youth offender panel is intended to provide an opportunity for the young offender to consider, with his or her parents and the panel, how best to address the offending behaviour and prevent its re-occurrence. The supportive role of the young offender's parents will be a particularly important element of this process. Section 5 regulates when the court may, and when it must, order parental attendance at meetings.

47. For those under 16 years of age at least one parent or guardian will be required to attend all youth offender panel meetings. *Subsection (2)* allows the court to place similar requirements on parents and guardians of young offenders who are over 16 (where this is considered to be appropriate).*Subsections (5) and (6)* recognise that a local authority may have a role to play in cases where young offenders are in their care or otherwise "looked after" by the authority. Here "looked after" has the meaning given by section 22 of the Children Act 1989. The requirement to attend will always be notified in writing if the parent or guardian, or local authority representative, is not present in court when the order is made (*subsection (7)*).

48. In *subsection (3)* it is recognised that there will be limited circumstances in which it would be unreasonable to expect the parent or guardian's attendance (for example, in the case of serious ill health). However, those parents, guardians or representatives who fail to attend the meeting against the order of the court without good reason may be brought before the court for contempt, in accordance with section 63 of the Magistrates' Courts Act 1980.

Section 6: Youth offender panels

49. Section 6 sets out how the youth offender panel should be set up (*subsection (2)*), who should sit on it (*subsections (3) and (4)*), who is responsible for arranging its meetings (*subsection (1)*) and what happens if the offender moves to a different area part-way through his referral (*subsections (5) and (6)*).

50. Arrangements for the panel and its meetings will be the responsibility of the youth offending team. The panel will include a member of the youth offending team and at least two other members. It is intended that these other members will be directly recruited from the community by the youth offending team in accordance with qualification criteria to be set out in regulations to be issued by the Secretary of State under *negative resolution procedure* (which offers both Houses of Parliament an opportunity to object to the criteria chosen).

51. National standards will be devised, and issued in the form of guidance from the Secretary of State, to ensure that the first meeting between the offender and the panel charged with dealing with him takes place promptly following the making of the order.

Section 7: Attendance at panel meetings

52. Section 7 describes how the youth offending team will be responsible for requiring the offender and others to attend panel meetings (*subsection (1)*) and sets out the arrangements for dealing with non-attendance (*subsection (2)*). If the young offender fails to attend a meeting, it may be adjourned. Alternatively, the youth offender panel may consider that this merits referring the offender back to court (as to which see Schedule 1).

53. The action taken by the panel following an offender's non-appearance will depend on a number of factors, including whether or not a reasonable explanation for non-attendance has been put forward and the general attitude of the young offender up until that point. These issues will be addressed in the guidance to be issued by the Secretary of State.

54. Apart from the duty to attend the meetings which may be imposed on the young offender's parents or guardian, there are no requirements on other adults participating in the meetings. Although it may be helpful for some of those present to play a specific role in the identified programme of behaviour with which the young offender agrees to comply (the 'contract'), any such participation would be voluntary.

55. The section also describes who else may be invited to each meeting. It is intended that the youth offender panel should consult the victims of the young offender's offending as to whether they also wish to attend. This might include anyone affected by the offence or, where appropriate, a representative of the community at large. Where the panel thinks it is appropriate for a victim to attend, he or she may be accompanied by a supporter, chosen by the victim and agreed by the panel. Meetings may also be attended by an adult supporter invited by the offender with the panel's agreement. The panel may also invite anyone they consider to be capable of having a good influence on the offender to attend.

Section 8: First meeting: agreement of contract with offender

56. Section 8 governs the drawing up of a programme of behaviour with which the young offender agrees to comply (the 'contract'). *Subsection (1)* specifies the purpose of the first meeting as being the agreement of the contract and states that the principal aim of the programme for which the contract will provide is the prevention of re-offending. This reflects the principal aim of the youth justice system introduced by the Crime and Disorder Act 1998.

57. Guidance on the contents of programmes will be published. It is intended that the programme should always include an element of reparation to those affected by the offence, if those individuals consent. Depending on the nature of the offence and the views of the victim, this may involve a direct apology or financial or other reparation. Where there is no identifiable victim, reparation may be made to the community at large. Any additional elements of the programme will depend on the factors which appear to have led to the offending behaviour and may include a range of activities or requirements. *Subsection (2)*includes a suggested list of the provisions that might be included, but the list is not exhaustive.

58. A referral order is not a custodial sentence. Accordingly *subsection (3)*precludes the inclusion in the programme of electronic monitoring or any form of custody.

59. *Subsection (5)* requires that, once the contract has been devised and agreed, it should be set out in writing and explained in clear language. It should also be signed by both the offender and a member of the youth offender panel. The offender will be given a copy of the contract.

Section 9: Duration of contract

60. The contract runs from the date that it is agreed (*subsection (2)*) and lasts for the period specified by the court in its referral order (*subsection (3)*), except where the order is subsequently extended by the court following a further offence or is terminated by a court after the offender has been referred back to the court by the youth offender panel (*subsections (5) and (6)*).

61. Where the court has made two or more referral orders, the contract may not continue in force for more than 12 months after it is agreed (*subsection (4)*).

Section 10: First meeting: failure to agree contract

62. The intention is for the contract to be agreed at the first meeting of the youth offender panel. Where necessary the meeting may be reconvened in order to reach agreement, but section 10 provides that where there seems to be no prospect of reaching agreement, or where an agreement appears to have been reached but the young offender refuses to sign the contract, the youth offender panel must refer the young offender back to the court for re-sentencing (as to which see Schedule 1).

Section 11: Progress meetings

63. Section 11 enables the youth offender panel to hold progress meetings during the course of the contract, as considered appropriate to monitor the young offender's progress. The number of meetings is not prescribed since it will depend on the length of the referral and the level of support the young offender appears to need in order to comply with the contract and complete the programme successfully. Progress meetings will also be required if a young offender wishes to vary the terms of the contract in any way or if there appears to a breach of the contract.

64. In the event of an apparent breach, the purpose of the meeting will be to discuss with the young offender what has happened so that the youth offender panel can assess whether it will be appropriate to continue with the contract, perhaps varied to take account of any genuine difficulties that may be preventing compliance. If the breach is without good reason the panel may consider it to be sufficiently serious to refer the young offender back to court for re- -sentencing (as to which see Schedule 1).

65. Where there is a major change in the circumstances of the young offender (such as moving to live abroad) which would make it impossible to comply with the terms of the contract, the young offender may ask the youth offender panel to seek revocation of the order. In such cases the panel may terminate the meeting, where the request seems reasonable, and refer the case back to court for revocation to be considered (as to which see Schedule 1).

66. Where it is considered appropriate to vary the terms of the contract, s*ubsections (6) and (7)* provide that, as with the original contract, the revised version should be set out or explained in clear language, signed by both the offender and a member of the youth offender panel and then copied to the offender. S*ubsection (9)* provides that the same general rules governing content should apply to the varied contract as to the original.

Section 12: Final meeting

67. Section 12 provides for the youth offender panel to call a final meeting before the end of the period specified by the referral order in order to review the young offender's overall compliance with the agreed contract.

68. If the youth offender panel is satisfied that the contract is being successfully completed the order will be discharged as from the end of the period. If the panel is not so satisfied, the young offender will be referred back to court for re-sentencing (as to which see Schedule 1). The young offender must be provided with the panel's decision in writing.

69. If the young offender is unable to attend the final panel meeting but has otherwise satisfactorily complied with the terms of the contract, the youth offender panel may discharge the order in his absence.

Section 13 and Schedule 1: Referral back to court

70. The sanction for a young offender's non-compliance with a contract is for him or her to be sent back to court for re-sentencing. A referral back to court can be triggered by: failure to attend a meeting; failure to agree a contract; refusal to sign a contract; failure to meet the requirements of an agreed contract; or a request by the offender for referral

back to court. The mechanics of the referral back procedure are contained in Part I of Schedule 1.

71. Schedule 1 stipulates that the appropriate court to which the young offender is to be referred back (and which will carry out the re-sentencing) is the youth court or, where the young offender has reached the age of 18, the adult magistrates' court. The youth offender panel will send a report to the court by way of notification. The court will then require the young offender to attend court for a hearing by issuing a summons or warrant as appropriate.

72. At such a hearing the court must consider the circumstances of the young offender's referral back to the court. The court must then make a finding of fact in respect of the report submitted by the youth offender panel.

73. Where the court is satisfied that the referral back was justified, *paragraph 5* empowers the court to revoke the referral order and to sentence the young offender afresh, with the same sentencing options (other than referral) as were available to the court which originally sentenced the offender. In reaching a decision on a fresh sentence, the court should consider the report of the youth offender panel and take into account the extent of the young offender's compliance with the contract up to the point of the referral back. The offender will have a right of appeal to the Crown Court against any sentence imposed.

74. It is hoped that inappropriate referrals back to the court will be rare, but where (for example) the court finds that an alleged breach is unsubstantiated or that a breach has indeed occurred but that it was a minor issue given the particular circumstances of the case, it should not revoke the referral order. If the panel refers the offender back to court because no contract has been agreed, but the court does not revoke the referral order, youth offender panel should continue to try to negotiate a contract. Any contract agreed before the referral back to court will have continued in force during the resulting court proceedings with the panel continuing to monitor the young offender's progress and compliance.

75. Part II of Schedule 1 provides for cases where a young offender who, having been referred by a court to a youth offender panel, is part-way through the referral period when he finds himself back before a court charged with a further offence. Where that offence (and any other further offences for which he is being sentenced on that occasion) occurred before the referral order was made, the court may sentence the offender for the further offence (or offences) by way of an extension to the existing referral period. Since any extension to the order must not extend its overall length beyond the maximum period of 12 months, this sentencing option will not be available where the original referral was for a full 12 months. Similarly, since the power of referral relates to young offenders aged from 10 to 17, this sentencing option will not be available if the young offender has reached the age of 18.

76. The option to extend an existing referral order also applies where a court is dealing with a further offence committed after the order had been made, although this course of action is only likely to be appropriate in exceptional circumstances. *Paragraph 12* of Schedule 1 requires the court to take account of any exceptional circumstances and, where they lead the court to make an extension of the original referral order, to give reasons for doing so in open court. The court's decision must be in line with the youth justice system's principal aim of preventing offending by children and young people.

77. The Secretary of State may vary the cases in which extensions to referral orders may be imposed by way of sentence for further convictions. Any such amendment would be made by regulations subject to the *affirmative resolution procedure* (i.e. Parliament will be asked to discuss and approve it).

78. The requirements of a youth offending contract under a referral order are incompatible with a custodial sentence and may interfere with aspects of other orders. Where a court

decides to sentence in respect of further convictions otherwise than by extending an existing referral order, *paragraph 14(2)* of Schedule 1 automatically revokes the referral order and any extension order. This, in turn, will cause the contract drawn up with the youth offender panel to expire.

79 In these circumstances, the court may re-sentence the offender for the offence in respect of which the revoked referral or extension order was made. But in doing so the court must take into account how far the young offender may have already complied with any contract that has been agreed.

80. The only exception to the automatic revocation is where the court gives an absolute discharge for the further offence as then there will be no difficulty with the existing referral order continuing to stand.

Section 14: Functions of youth offending teams

81. Section 14 (along with paragraph 28 of Schedule 4) adds to the functions of youth offending teams, originally set by the Crime and Disorder Act 1998, to take account of their specific new responsibilities in respect of referral orders (which include the setting up of youth offender panels and the keeping of records of an offender's compliance with the terms of his contract).

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

Chapter I: Special Measures directions in case of vulnerable or intimidated witnesses

Sections 16 and 17: Eligible witnesses

82. Witnesses other than the defendant (who already has the benefit of a number of procedural safeguards) will be eligible for special measures to help them with giving evidence in criminal proceedings if:

- they are under 17;
- they suffer from a mental disorder, or have a mental impairment or learning disability (which could include autistic spectrum disorders) that the court considers significant enough to affect the quality of their evidence;
- they have a physical disorder or disability (which could include deafness) that the court considers likely to affect the quality of their evidence; or
- the court is satisfied that the witnesses are likely, because of their own circumstances and the circumstances relating to the case (section 17(2)), to suffer fear or distress in giving evidence to an extent that is expected to affect its quality.

It will be possible to make applications, and for courts to grant special measures, on more than one of these grounds.

83. A witness under the age of 17 will always be eligible for help (and section 21 provides for measures to continue when a witness turns 17 before the end of the trial). Otherwise, in deciding eligibility courts must consider witnesses' own views about their status. Complainants of sexual offences will be considered eligible unless they inform the court that they do not want to be eligible. "Complainant" is defined in section 63 of the Act as "a person against or in relation to whom the offence was (or is alleged to have been) committed" – in other words, the alleged victim.

84. It is intended that courts will authorise special measures (see section 19) if they take the view that a measure or combination of measures will be likely to improve the quality of a witness's evidence. Without the measures, the quality is likely to range:

- from being unintelligible (in that the witness would not meet the tests for competence and intelligibility given in section 53: "to understand questions put to him as a witness and give answers to them which can be understood")
- to being intelligible, but of a worse quality than it could be, because of the circumstances that make the witness eligible for help.

'Quality' means more than intelligibility (section 16(5)): it encompasses completeness, accuracy and being able to address the questions put and give answers which can be understood (both as separate answers and when taken together as a complete statement of the witness's evidence).

Section 18: Special measures available to eligible witnesses

85. *Subsection (1)* of this section makes the special measures set out in sections 23 to 30 available to all eligible witnesses. The only exceptions are the examination of a witness through an intermediary (section 29) and the use of a communication device (section 30), which are not available to witnesses who are eligible on the ground of fear or distress only. The Act does not affect courts' common law discretion to make measures available to disguise witnesses' identities in the wholly exceptional circumstances (such as where a public interest immunity certificate has been granted) where that identity needs to be kept secret in court.

86*Subsection (2)* provides that courts will not be able to award any of the special measures until they are notified by the Secretary of State that a particular measure or group of measures is available in their area: this will allow for phased implementation of the measures.

87. The Secretary of State will be able to make new special measures available, and amend or remove others, by orders subject to the *affirmative resolution procedure* (i.e. the orders will have to be discussed and approved by Parliament) (*subsection (5)*).

Section 19: Special measures direction relating to an eligible witness

88. This section describes what courts must consider when they decide, on application from either the prosecution or the defence, or of their own accord, whether special measures might be appropriate for a witness. They must consider:

- whether the witness is eligible for special measures under section 16 or 17; and
- if the witness is eligible, whether any of the special measures available would improve the witness's evidence (*subsection (2)*) in the circumstances of the case and, if so, which ones. The circumstances of the case include the witness's own views and the possibility that the measures might tend to inhibit the evidence being tested effectively.

89. Any direction must give detailed instruction about where, when and how the measures specified should be provided (*subsection (4)*).

90 The inherent discretion of the court to offer these or other measures to witnesses who do not qualify as eligible (such as defendants), or who need measures for reasons other than age, incapacity, fear or distress, is not affected (*subsection (6)*).

Section 20: Further provisions about directions: general

91. This section makes special measures directions binding until the end of the trial, although courts can alter or discharge a direction if it seems to be in the interests of justice to do so.

92. Either party can apply for the direction to be altered or discharged, but it must show that there has been a significant change of circumstances since the court made the direction or since an application for it to be altered was last made.

93. This provision is intended to create some certainty for witnesses, by encouraging the party calling the witness (ie, the prosecution or the defence) to make applications for special measures as early as possible and by preventing re-applications on grounds the court has already found unpersuasive.

94. Special measures directions can be made before the trial begins, at a Plea and Directions Hearing in the Crown Court, or another pre-trial hearing. Special measures directions might also be made if, witnesses were called at a *Newton* hearing (to settle the factual basis upon which sentence will be passed after a guilty plea), and new directions would be needed for a retrial or appeal.

95. *Subsection (5)* is intended to ensure that there is a record of the court's reasons for giving, altering or discharging a direction or refusing an application. This is intended to include, for example, the court's reasons for deciding that a witness is ineligible for help. The reasons should be recorded so that it is clear to everyone involved in the case what decision has been made and why it was made.

96. It is intended to use the rule-making powers in *subsection (6)*:

- to enable applications that are not contested by the other side to be decided by the court without a hearing;
- to prevent the renewal of an unsuccessful application under this section except where there has been a material change of circumstances;
- so that expert witnesses can give evidence about whether a witness will benefit from special measures (courts can hear evidence from non-expert witnesses on such subjects under their existing discretion);
- to govern the way that confidential and sensitive information connected with applications for special measures is dealt with.

Section 21: Special provisions relating to young witnesses

97. This section imposes special obligations on courts when they deal with witnesses under the age of 17.

98. It creates three groups of child witnesses:

- children giving evidence in a sexual offence case (as defined in section 35)
- children giving evidence in a case involving an offence of violence, abduction or neglect, and
- children giving evidence in all other cases.

99. The first two groups are described as being in need of "special protection", and each group will benefit from strong presumptions about how they will give evidence. Children in sexual offence cases will receive a particularly high level of protection. *Subsections (2) to (8)* set out how each category of witness will give their evidence.

100. Most child witnesses – those giving evidence in cases that do not involve offences of sex, violence, cruelty or abduction – will have a video recording admitted as their evidence-in-chief and will give any further evidence, or cross-examination, through a live link at trial. A presumption to this effect will apply unless giving evidence in this way would not improve the quality of the child's evidence.

101. For witnesses in need of special protection, courts will not have to consider whether special measures will improve the quality of their evidence. That requirement is, in effect, treated as being satisfied.

102. All witnesses in need of special protection will have a video recording of their evidence-in-chief admitted. (The only possible exception would be if the court exercised its power under clause 27(2) to exclude a recording if it would not be in the interests of justice to be admit it.) Witnesses who are giving evidence in sexual offence cases will go on to be cross-examined at a pre-trial hearing which will be recorded on video, unless they inform the court that they do not want this measure to apply to them. Those giving evidence in violent offence cases will give further evidence through live link at trial.

103. *Subsection (8)* provides that, if a court makes a special measures direction in respect of a child witness who was eligible for special measures on grounds of youth only, and the witness turns 17 before beginning to give evidence, the direction will no longer have effect. But if such a witness turns 17 after beginning to give evidence, the special measures provided for him will continue to apply. The intention is to reduce confusion for the witness and the court.

104. *Subsection (9)* provides that if a witness gave video-recorded evidence in chief or was cross-examined on video before the trial when he was under 17, but since turned 17, the video recording will still be admissible as evidence.

Section 22: Extension of provisions of section 21 to certain witnesses over 17

105. This section extends some of the provisions of section 21 to witnesses who are over 17 at the beginning of the trial, but who made a video recording to take the place of their evidence-in-chief when they were under 17. They will be eligible for special measures in the same way that they would be if they were under 17, and the same presumptions will apply to them as apply to children under 17. That includes being considered "in need of special protection" if they are giving evidence in a case involving sex, violence, neglect or abduction.

Section 23: Screening witness from accused

106. Screens may be authorised under this section to shield the witness from seeing the defendant. S*ubsection (2)* is intended to ensure that screens do not prevent the judge, magistrates or jury and at least one legal representative of each party to the case (i.e. the prosecution and each defendant) seeing the witness, and the witness seeing them.

Section 24: Evidence by live link

107. This section allows witnesses to give evidence by live link. This would usually mean a closed circuit television link, but the section is drafted sufficiently widely to apply to any technology with the same effect.

108. *Subsections (2) and (3)* are intended to create a presumption that a witness who gives evidence by live link for a part of the proceedings will continue to give evidence by this means throughout.

109. *Subsections (5) and (6)* describe how temporary facilities may be made available to magistrates' courts for the purposes of hearing evidence by live link.

Section 25: Evidence given in private

110. This section allows the courtroom to be cleared of people who do not need to be present while a witness gives evidence. The measure will only be available in a case involving a sexual offence or when the court is persuaded that someone has tried to intimidate, or is likely to try to intimidate, the witness. The direction will describe individuals or groups of people, rather than areas of the court, and will mostly affect those in the public gallery and the press gallery. The court will have to allow at least one member of the

press to remain if one has been nominated by the press. The freedom of any member of the press who is excluded from the courtroom under this section to report the case will be unaffected, unless a reporting restriction is imposed separately.

Section 26: Removal of wigs and gowns

111. This measure can apply to the judiciary as well as legal representatives.

Section 27: Video recorded evidence in chief

112. This section allows a video-recorded interview to take the place of a witness's evidence in chief, both at trial and for the purposes of committal proceedings (*subsection (10)*).

113. *Subsections (2) and (3)* allow video recordings to be excluded and edited if the interests of justice so require. In deciding whether to allow only an edited recording to be used in evidence, courts will have to consider whether the parts sought to be excluded are so prejudicial as to outweigh the desirability of using the whole recording.

114. *Subsection (4)* provides that, where a direction has been made for a recording to be shown to the court, the court can later exclude the recording if there is not enough information available about how and where the recording was made or if the witness who made the recording is not available for further questioning (whether by video, in court or by live link) and the parties to the case have not agreed that this is unnecessary. However, courts will retain the discretion to admit the recording in these circumstances.

115. The video recording (as edited, in a case where that is required) will form the whole of a witness's evidence in chief unless:

- the witness is asked to give evidence about matters not covered in the recorded interview; or
- the court gives permission for the witness to be asked further questions about matters not covered adequately in the recorded interview. *Subsections (5)(b) and (7)* allow courts to give such permission on their own initiative or on an application by one of the parties to the case if that party can show that there has been a material change of circumstances since the direction to admit the video recording was made.

116. If the witness is asked to give further evidence, *subsection (9)* allows courts to direct that the evidence should be given by live link and, as in other circumstances where a live link is provided, allows temporary facilities to be authorised for magistrates' courts.

117. Witnesses aged 14 or over who make a video recording that is intended to take the place of their evidence-in-chief will either swear an oath at the beginning of the interview, if someone is available to administer the oath and they are capable of being sworn, or give evidence unsworn.

Section 28: Video recorded cross-examination or re-examination

118. This section provides that, where the court has already allowed a video recording to be admitted as the witness's main evidence, the witness may be cross-examined before trial, and the cross-examination, and any re-examination, recorded on video for use at trial.

119. The cross-examination would not be recorded in the physical presence of the defendant, although he would have to be able to see and hear the cross-examination and be able to communicate with his legal representative. This could be achieved through a live link, for example.

120. The video-recorded cross-examination may, but need not, take place in the physical presence of the judge or magistrates and the defence and prosecution legal representatives. However, a judge or magistrate will have to be able to control the proceedings. It is intended that the judge or magistrate in charge of this procedure would

normally be the trial judge. All the people mentioned in this paragraph will have to be able to see and hear the witness being cross-examined and communicate with anyone who is in the room with the witness (such as an intermediary).

121. As with video-recorded evidence in chief, a video recording of cross-examination may afterwards be excluded if any rules of court governing the cross-examination have not been complied with (*subsection (4)*).

122. *Subsections (5) and (6)* provide that witnesses who have been cross-examined on video are not to be cross-examined again unless the court makes a direction permitting another video-recorded cross-examination. It will only do so if the subject of the proposed cross-examination is relevant to the trial and something which the party seeking to cross-examine did not know about at the time of the original cross-examination (and could not have reasonably found out about by then) or if it is otherwise in the interests of justice to do so. Information that has not yet been disclosed to the cross-examining party is intended to count as information that the party could not reasonably have found out about.

Section 29: Examination of witness through intermediary

123. This section allows witnesses to be questioned and to give evidence through an intermediary. An intermediary is someone whom the court approves to communicate to the witness the questions the court, the defence and the prosecution ask, and then communicate the answers the witness gives in reply. The intermediary will be allowed to explain questions and answers if that is necessary to enable the witness and the court to communicate.

124. The intermediary will normally be a specialist - through training or, perhaps, through unique knowledge of the witness – who can help a witness who has difficulty understanding questions or framing evidence coherently to communicate. An intermediary might, alternatively, have skills to overcome specific communication problems, such as those caused by deafness. Deaf witnesses will be able to choose to rely on existing administrative arrangements for the provision in court of interpreters for the deaf, or, if they prefer, to apply for an interpreter or communication aid under the Act's provisions.

125. The judge or magistrates and at least one legal representative for both the prosecution and the defence must be able to see and hear the witness giving evidence and be able to communicate with the intermediary. The jury will also be able to see and hear the witness unless the evidence is being video-recorded (in which case they will see the recording when it is shown to them later).

126. Where intermediaries are used at a very early stage of an investigation or proceedings, and subsequently an application is made for a video recording of an interview in which they were involved to be admitted as evidence, that direction can be given despite the judge, magistrates or legal representatives not having been present. But the intermediary who was involved must still gain the court's approval retrospectively before the recording can be admitted.

127. Intermediaries will have to declare that they will perform their function faithfully. They will have the same obligation as foreign language interpreters (whose services are not a measure for which this section provides) not to wilfully make false or misleading statements to the witness or the court. If they do make such statements they will commit an offence under the Perjury Act 1911.

Section 30: Aids to communication

128. The communication aids that are intended to be authorised under this section are aids to overcoming physical difficulties with understanding or answering questions, such as

sign boards and communication aids. The section is not designed to cover devices for disguising speech.

Section 31: Status of evidence given under Chapter I

129. This section provides that evidence given using any of the special measures in this Act - for example, by video recording, or through an intermediary - shall be treated as if it was given orally in court in the usual way. This means that it will have the same status as it would have if it were actually given orally in court.

130. This section also provides that, if an adult who would normally give sworn evidence gives unsworn evidence by means of a video recording, it will be admissible at trial. However, such witnesses would be able to swear an oath or make a solemn affirmation if someone authorised to administer the oath or affirmation were present at the time of the recording.

Section 32: Warning to jury

131. This section provides for the jury to be warned, if the judge thinks it necessary, that the fact that special measures have been made available to a witness should not prejudice the conclusions they might draw about the defendant. This will be particularly relevant where, for example, intimidated witnesses are screened from the defendant: this should not be taken as justifying a conclusion that the defendant is dangerous.

Chapter II: Protection of witness from cross-examination by accused in person

132. The sections in this Chapter prohibit unrepresented defendants from cross-examining adult complainants and child witnesses in trials of certain offences. They also give courts the power to prohibit cross-examination of witnesses by unrepresented defendants in other circumstances, according to the criteria set out in section 36.

Section 34: Complainants in proceedings for sexual offences

133. This section prevents defendants charged with rape or other sexual offences (as set out in section 62) who choose to conduct their own defence from personally cross-examining the complainant of the offence. It also extends the prohibition to any other offence with which the defendant is charged in the proceedings.

Section 35: Complainants and other witnesses who are children

134. This section replaces and extends the provision made by section 34A of the Criminal Justice Act 1988, which prohibited unrepresented defendants from personally cross-examining child witnesses in cases of sex and violence. Unrepresented defendants will not now be allowed to cross-examine in person a child who is either the complainant of, or a witness to the commission of, an offence of kidnapping, false imprisonment or abduction.

135. *Subsection (2)* extends the prohibition to witnesses whose age when they gave their evidence in chief (e.g. by means of video recording or earlier in the trial) meant that they then counted as children even if by the time of the cross-examination they have passed that age limit.

136. *Subsection (4)* sets out the age limits below which witnesses are regarded as children for the purposes of this section. Following the example of sections 32 and 34A of the Criminal Justice Act 1988, section 35 sets the age limit at 17 for sexual offences and 14 for the other offences covered by this section.

Sections 36 and 37: Direction prohibiting accused from cross-examining particular witness

137. Section 36 gives courts the power to prohibit unrepresented defendants from cross-examining witnesses in cases where a mandatory ban does not apply under sections 34 and 35, but where the court is satisfied that the circumstances of the witness and the case merit a prohibition, and that it would not be contrary to the interests of justice.

138. Section 37 makes all directions under section 36 binding unless and until the court considers that the direction should be discharged in the interests of justice. Courts will have to record their reasons for making, refusing or discharging directions.

Section 38: Defence representation for purposes of cross-examination

139. This section makes provision for representatives to be appointed to conduct the cross-examination when an unrepresented defendant is banned from cross-examining under sections 34, 35 or 36. If a defendant is banned from personally cross-examining a particular witness, the court will ask him to appoint his own legal representative to carry out that cross-examination, and to let the court know that he has made an appointment by a set time. If he does not, the court will know before the start of the proceedings that no legal representative has been appointed.

140. If the defendant does not appoint a legal representative, the court will have to consider whether it is necessary, in the interests of justice, for the witness's evidence to be tested. If it decides that it is, it will appoint a legal representative with rights of audience in the court to cross-examine the witness in the interests of the defendant. However, a court-appointed representative will not have been instructed by the defendant and so cannot be responsible to him (*subsection (5)*).

141. Rules of court will cover, among other things, how a legal representative appointed by the court would be given evidence or other material relating to the proceedings so that he could test the witness's evidence (*subsections (6) and (7)*).

Section 39: Warning to jury

142 If, under section 38, the court appoints a legal representative to act in the interests of the defendant, this section requires the judge to consider warning the jury that the witness's evidence may not have been tested as fully as it might have been if the defendant had instructed his own legal representative. The judge must also consider warning the jury about not drawing prejudicial inferences from the fact that the defendant has been prevented from cross-examining in person.

Section 40: Funding of defence representation

143. This section deals with the way that legal representatives appointed by defendants, and by the courts, will be paid. Where a defendant is banned from personally cross-examining, he will be able to apply for legal aid for his representative on the same means-tested basis as other defendants in criminal cases. Court-appointed legal representatives will be paid from central funds rather than from legal aid.

144. Following the implementation of the Access to Justice Act 1999, representatives appointed under this Chapter will be funded under the new arrangements for legal representation in criminal proceedings. In other words, defendants eligible for legal representation would be represented by a lawyer contracted by the Legal Services Commission or a salaried defender. When courts appoint lawyers themselves, they will be able to appoint either contracted lawyers or salaried defenders with rights of audience in the court.

Chapter III: Protection of complainants in proceedings for sexual offences

145. The sections in this Chapter restrict the circumstances in which evidence or questions about a complainant's sexual behaviour outside the circumstances of the alleged offence can be introduced in rape or certain sexual offence cases (as listed in section 62). This includes sexual behaviour or experience with the defendant (section 42(1)(c)). The sections do not limit the meaning of evidence in this context, and it is therefore to be understood as including secondary evidence of sexual behaviour such as abortions.

146. If the defence wishes to introduce evidence or ask questions about the complainant's sexual behaviour, it will have to make an application to the court. The prosecution will be warned of the general grounds of the application and will have an opportunity to oppose it. The court will then consider whether or not to grant leave (which may only be granted on the strictly controlled grounds set out in section 41).

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

147. *Subsections (2)-(6)* set out the circumstances in which courts may allow evidence to be admitted or questions to be asked about the complainant's sexual behaviour.

148. Courts may only grant leave if:

- The evidence or questioning relates to any issue that has to be proved in the case other than whether the complainant consented (*subsection (3)(a)*). The defendant's honest but mistaken belief in consent falls into the category of a relevant issue in the case other than consent.
- The issue that is being argued in the case is whether the complainant consented and the evidence or questioning relates to behaviour that took place as part of the alleged offence, or at or about the same time (*subsection (3)(b)*). It is expected that "at or about the same time" will generally be interpreted no more widely than 24 hours before or after the offence.
- The issue is whether the complainant consented and the evidence or questioning relates to behaviour that is so similar to the defence's version of the complainant's behaviour at the time of the alleged offence (whether as part of the alleged offence or at or about the same time) that it cannot reasonably be explained as a coincidence.
- The evidence or questioning that the defence wishes to introduce is intended to dispute or explain evidence that the prosecution have introduced about the complainant's sexual behaviour, whether it was alleged by the prosecution to have taken place as part of the alleged offence or at some earlier or later date (*subsection (5)*). Such evidence must go no further than to directly contradict or explain claims made by or on behalf of the complainant.

149. Before allowing any evidence of sexual behaviour to be introduced, the court must be satisfied not only that one of the above criteria is met but also that, if the evidence were not heard, the jury or magistrate in the case might make an unsafe decision on an issue that had to be proved in the case (ie, an element of the offence or defence). *Subsection (6)* requires any such evidence to relate to a specific instance, or instances, of sexual behaviour.

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

Section 42: Interpretation and application of section 41

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

Section 43: Procedure on applications under section 41

152. *Subsection (1)* requires applications to the court for permission to introduce sexual history evidence to be made in the absence of the public, the press, the jury (if any) and all witnesses (other than the defendant). Any other parties to the trial will be allowed to be present when an application is being made so that they can make representations to the court about whether the application should be allowed.

153. *Subsection (2)* requires courts to give reasons for allowing or refusing an application in open court, and specify the extent to which they are allowing evidence to be introduced into the trial or questions to be asked. This must take place in the absence of the jury (if there is one.) The intention behind this requirement is to ensure that it is clear to the defence, the prosecution and the witness exactly how far questioning can go, and in reference to which issues.

Chapter IV: Reporting restrictions

154. The sections in this Chapter clarify the legislation that currently restricts the media identification of juveniles involved in the legal process and extend the restrictions back to the point at which a criminal investigation into an offence begins. The Chapter also provides a new power to impose restrictions on reporting the identities of intimidated witnesses and on reporting the making of directions under Chapters I and II of this Part of the Act. The revised provisions ensure that restrictions imposed by courts in England and Wales or Northern Ireland will be enforceable throughout the United Kingdom, including in Scotland. For each restriction, there is a procedure for the restriction to be lifted on application.

155. Sections 44 and 45 are based on the restrictions imposed by sections 39 and 49 of the Children and Young Persons Act 1933 (as amended by subsequent legislation) on the reporting of information likely to identify young people involved in court proceedings. The sections impose similar restrictions on reporting, but extend to the identification of young people during the pre-charge stage of criminal investigations. The young people covered by the restrictions are those who are alleged to have committed, been the victim of, or witnessed the commission of the offence that is under investigation.

156. To reflect the wide range of incidents where the mandatory restrictions under section 44 will apply, those who breach the restrictions by identifying child victims and witnesses will have statutory defences in certain circumstances (provided in section 50) against being convicted of an offence of breaching the restrictions. In addition, the restrictions can only be implemented through the draft affirmative resolution procedure (see paragraph 162 below).

157. Schedule 2 makes section 49 of the 1933 Act enforceable in Northern Ireland (as well as in England and Wales and Scotland). The effect of this change, together with the inclusion of Northern Ireland in the extent of sections 44 and 45, is that, where restrictions have effect, it will now be an offence to publish details anywhere in the United Kingdom which might lead to the identification of young people involved in a case triable in England and Wales or Northern Ireland.

158. Schedule 2 also makes several changes to the reporting restrictions imposed by the Sexual Offences (Amendment) Act 1992 – which provides anonymity for complainants of certain sexual offences – to ensure that its provisions are similar to those in sections

44, 45 and 46 of the Act. One consequence of this is to remove any distinction between the type of material which can be published between allegation and charge, and charge and trial (sections 1(1) and 1(2) of the 1992 Act).

159. This change is not intended to disturb any understandings between the media and the police about how far the media can go in giving information about a sex offence case before a suspect has been charged. (Information is sometimes published deliberately, with the complainant's consent, in the hope of prompting witnesses to come forward.)

Section 44: Restrictions on reporting alleged offences involving persons under 18

160. Section 44 provides that whenever a criminal investigation begins into an alleged offence against the law of England and Wales or Northern Ireland (or into the alleged commission by a person subject to armed forces law of a corresponding offence anywhere else in the world), no information enabling the identification of any person suspected of committing the offence may be reported by the media if he is under 18. This means that young people who are suspected of committing an offence will enjoy the same protection from media identification as those charged with an offence and brought before the court.

161. The restriction lasts until the individual reaches the age of 18 or a court order dispenses with the restrictions in the interests of justice *(subsection (7))* or the offence becomes the subject of criminal proceedings. *Subsection (8)* requires the court to have regard to the welfare of that person when making a decision to dispense, with the restrictions , to any extent. *Subsection (11)* provides a right of appeal against the court's decision on such an application. Once the offence is the subject of criminal proceedings, the restrictions under section 45, or under section 49 of the Children and Young Persons Act 1933, should then apply.

162. Section 44 also gives the Secretary of State the power to impose mandatory restrictions in respect of publishing information leading to the identification of children and young people who are alleged to have been the victims of, or witnesses to, a criminal offence. In the same way as for alleged offenders, applications can be made to the courts to lift these restrictions in the interests of justice. But, in addition, a number of defences against prosecution for breach of these restrictions are provided in section 50 which are not available to publishers in respect of the identification of alleged offenders. The presence of these defences turns the restriction from a ban into a presumption against publishing such information.

163. Section 64(3) provides that the restrictions under this section which relate to young complainants and witnesses can only be commenced through the draft affirmative resolution procedure: in other words, both Houses of Parliament would have to agree, after a debate, that these restrictions should be brought into force.

164. Material which is particularly likely to identify a juvenile, such as the juvenile's name, address or image or the identity of the juvenile's school or place of work, is listed in the section. But all material likely to lead to identification is subject to the restriction (*subsections (2) and (6)*). Reporting of any material (even the listed items) is not restricted if it would not lead to such identification.

165. *Paragraph 6* of Schedule 7 applies the restrictions to previously unpublished information leading to the identification of young persons involved in alleged offences committed at any time in the past.

166. In Schedule 2, section 49 of the Children and Young Persons Act 1933 is amended to bring its terms into line with the changes made by section 44. The restrictions that will apply during court proceedings will be similar in form to the restrictions which come into play immediately following the start of a criminal investigation, although there are obvious differences. The definition of a witness under section 49 encompasses any

witness in the proceedings: section 44 only covers witnesses to the commission of the alleged offence.

167. *Subsection (8)* of section 49 is amended to allow a single justice to dispense with the restrictions following the conviction of a child or young person (*paragraph 3(6)* of Schedule 2). Previously, a single justice could only dispense with the restrictions if he thought they were against the interests of the young person or if the young person had escaped from, or was avoiding, lawful custody.

168. *Paragraph 3(9)* of Schedule 2 extends the territorial application of the restrictions in section 49 of the 1933 Act to England, Wales, Scotland and Northern Ireland. This means that publications anywhere in the UK will not be able to report any material likely to lead to the identification of a minor concerned in criminal proceedings in England and Wales or Northern Ireland. But reports of proceedings in courts in Scotland will not be subject to this restriction.

Section 45: Power to restrict reporting of criminal proceedings involving persons under 18

169. Section 45 gives courts the power to impose prohibitions on reporting information leading to the identification of witnesses, complainants or defendants under the age of 18 once proceedings have started, whether in a court in England and Wales or Northern Ireland or in a court martial. It does not apply to proceedings in youth courts or to any other proceedings where the automatic restrictions imposed by section 49 of the Children and Young Persons Act 1933 have effect. The imposition of restrictions under the section is at the discretion of the court. As under section 49 of the 1933 Act, the restrictions can apply to any witness, not just witnesses to the commission of the offence.

170. If the court so wishes, it can choose to impose no restrictions at all or direct that the reporting ban is to have effect with specified exceptions. The restrictions will apply until the person reaches the age of 18 unless, in the meantime, the court decides to lift or relax them.

171. In respect of criminal proceedings, the section replaces section 39 of the Children and Young Persons Act 1933 and will extend to criminal proceedings in Northern Ireland and courts-martial. Section 39 of the 1933 Act is, however, not repealed but is amended by *paragraph 2* of Schedule 2 so that it will now relate solely to non-criminal proceedings. But section 39 will continue to apply in criminal cases begun prior to the date on which the change comes into force.

Section 46: Power to restrict reports about certain adult witnesses in criminal proceedings

172. Section 46 allows courts to impose restrictions on reporting information leading to the identification of an adult witness involved in criminal proceedings, if the court considers that the measure is needed because the witness's fear of, or distress at, giving evidence or co-operating with the party calling him is strongly linked to the likelihood of publicity. Neither "fear" nor "distress" is seen as covering a disinclination to give evidence on account of simple embarrassment.

173. Witnesses qualifying for restrictions under this section will be suffering from the degree of fear or distress that might make them eligible for special measures under Chapter I, although not everyone eligible by virtue of fear or distress for special measures will necessarily also be considered eligible for the protection of a reporting direction.

174. Courts will be able to partially disapply the restrictions if they are satisfied that that is necessary in the interests of justice, or if the restrictions are substantial and unreasonable and it would be in the public interest to relax the restrictions. They will also be able to revoke a direction under this section.

175. Section 50(7) allows witnesses protected by a direction under section 46 to give a written waiver allowing reporting which would otherwise be restricted by the direction. This might be appropriate, for example, for witnesses whose circumstances change after they have given evidence.

Section 47: Restrictions on reporting directions under Chapter I or II

176. Section 47 prevents the reporting of cases from covering certain aspects of the case before the end of the proceedings (*subsection (6)*). The restrictions apply to special measures directions under Chapter I or directions under section 36 prohibiting the defendant from cross-examining in person any particular witness. Restrictions under this section do not extend to any evidence given by witnesses in the case, or to witnesses' identity. Courts may lift restrictions imposed under this section, but they must consider, in the event of any representations by the defendant against doing so, whether doing so would be in the interests of justice (*subsections (4) and (5)*).

177. Prosecutions for breach of the restrictions imposed by section 47 may only be brought by or with the consent of the Attorney General or, where instituted in Northern Ireland, by or with the consent of the Attorney General for Northern Ireland (see section 49(6)).

Sections 49, 50, 51 and 52: Offences where reporting restrictions not complied with and defences to the offences

178. Section 49 sets out the summary offences created by the new reporting restrictions and the penalties which may be imposed on conviction. Sections 49 and 51 specify who can commit the offences. Section 51 provides for the separate prosecution of individuals who are involved in the commission by a corporate body of an offence against section 49. The restrictions relating to offences or proceedings in England and Wales or Northern Ireland, or to armed forces offences or proceedings, will be enforceable throughout the United Kingdom.

179. Section 50 sets out the defences that can be relied on if a publisher or broadcaster is charged with one of the offences under section 49. First, it is a defence to all the offences under section 49 that the person charged did not know or suspect (or have reason to suspect) that the publication included something protected by a reporting restriction.

180. In the case of an offence under section 49 for a breach of section 44(2), it will be a defence to prove that the person charged was not aware, did not suspect or had no reason to suspect, that a criminal investigation had begun when the information was published/broadcast. There is another defence if the breach of section 44(2) involved reporting information about a suspected victim or witness of any offence other than a sexual offence: to satisfy the court that the public interest demanded publication of the information and, because of that, the reporting restriction was substantial and unreasonable. A list of factors to be taken into account in an assessment of where the public interest lies in such situations is provided in section 52.

181. Section 50 also provides that it will be a defence for a person charged with a breach of section 44(2) to show that written consent to the publication of the material in question was obtained. If the person protected by the restriction is aged 16 or 17, he can give consent himself. If he is under 16, someone with appropriate responsibility for his welfare will be able to give consent. The appropriate person can only give written consent after having been reminded, in writing, to consider the welfare of the child. Once given, the notice can be revoked before publication by anyone else with appropriate responsibility for the child or by the child himself.

182. A defence based on such a waiver is not available in respect of reporting information about complainants of or witnesses to sexual offences if they are under the age of 16. Waivers cannot be given by appropriate adults who are themselves accused of the alleged offence *(subsection (13)).*

183. The types of publication caught by these provisions are described in section 63(1) and include written reports (including those available on the internet), speeches, television broadcasts (whether analogue or digital) and any other type of communication addressed to the public.

Chapter V: Competence of witnesses and capacity to be sworn

184 The sections in this Chapter reform the law about who is to be considered competent to give evidence in criminal proceedings and about when evidence may be given unsworn.

Section 53 (and certain amendments made by Schedule 4): General rule of competence

185. The general rule, set out in this section, is that all people, whatever their age, are competent to act as witnesses unless they cannot understand questions asked of them in court, or cannot answer them in a way that can be understood (with, if necessary, the assistance of special measures under Chapter I).

186. *Subsection (4)* provides the only exception to the general rule: that a defendant is not competent to give evidence for the prosecution in his own trial, and nor is any co-defendant in the proceedings.

187. The new general rule renders obsolete the existing rules on the competence of husbands and wives to give evidence for or against each other. Those rules are contained in section 80 of the Police and Criminal Evidence Act 1984 which, accordingly, is amended by paragraph 13 of Schedule 4 (so as to become a provision solely about the compellability of husbands and wives who are competent to give evidence). Those amendments, taken together with section 52, will ensure that, in future, no-one who is a defendant in a trial will be a competent witness for the prosecution in respect of any offence in that trial until such time as he either pleads guilty, is convicted or the charges against him are dropped.

Section 54: Determining whether a witness is competent

188. This section sets out how a witness's competence is to be determined if it is questioned by the prosecution, the defence or the court itself.

189. When the court assesses the witness's competence, *subsection (3)* requires it to take into account any special measures it has granted, or is planning to grant, under Chapter I (including, for example, communication aids or the giving of evidence through an intermediary). This is to avoid a potential witness being judged not to be competent to be a witness if the use of special measures would make him competent.

190. If the witness's competence is challenged and he needs to be questioned, *subsection (6)* requires the questions to be asked by the court (and not by the party that is calling or cross-examining the witness). Any such questioning will be done in the presence of both the prosecution and the defence. Courts will be allowed to ask for expert advice about the witness's competence. It will be the responsibility of the party calling the witness to satisfy the court that the witness is competent.

Section 55: Determining whether witnesses are to be sworn

191. This section sets out how courts are to decide whether a witness should swear an oath to tell the truth before giving evidence. Here, as in other legislation, references to swearing an oath include making an affirmation. *Subsection (1)* provides that the question of whether a witness is eligible to swear an oath may be raised by either party to the proceedings - i.e. prosecution or defence - or by the court itself. The procedure used to determine this question will be the same as the procedure outlined above for determining competence.

192. *Subsection (2)(a)* provides that no witness under the age of 14 is to be sworn. A witness of 14 or over is only eligible to be sworn if he understands the solemnity of a criminal trial and that taking an oath places a particular responsibility on him to tell the truth. If no evidence is offered suggesting that the witness does not understand those two matters, *subsection (3)* sets up a presumption that the witness is to be sworn if he is 14 or over.

193. *Subsections (5) – (7)* provide that, as with considerations of competence, the question of whether a witness should be sworn is to be considered in the absence of any jury (but in the presence of both the prosecution and the defence) and that expert evidence can be received on this subject.

Sections 56 and 57: Unsworn evidence

194. Section 56 provides that anyone who is competent to be a witness but not allowed to give evidence on oath may give evidence unsworn. At present, a person aged 14 or over who cannot be sworn is not allowed to give evidence at all. Section 57 describes the penalties for giving false unsworn evidence.

195. *Subsection (5)* of section 56 provides that convicted offenders will not be successful if they appeal against their convictions solely on the ground that a witness gave evidence unsworn when it should have been sworn.

Chapter VI: Restrictions on use of evidence

Section 58: Inferences from silence not permissible where no prior access to legal advice

196. This section amends the inferences from silence provisions in the Criminal Justice and Public Order Act 1994, to prohibit the drawing of inferences from silence when a suspect is questioned at a police station (or other authorised place of detention) while denied access to legal advice.

197. The effect of these provisions will be to bring the law into compliance with the judgment of the European Court of Human Rights in the case of John Murray v United Kingdom, which held that there was a breach of Article 6 of the European Convention on Human Rights as a result of denying the applicant access to legal advice in circumstances where inferences could be drawn from his silence during police questioning.

198. The provision inserted by *subsection* (5) empowers the Secretary of State to designate by regulation places of detention other than a police station. This is to take account of detention by other investigators such as HM Customs and Excise.

Section 59 and Schedule 3: Restrictions on use of answers etc. obtained under compulsion

199. Section 59 introduces Schedule 3 which amends various statutory provisions in the light of the judgment of the European Court of Human Rights in Saunders v United Kingdom. The court ruled that the admission in a criminal trial of statements given under section 434 of the Companies Act 1985 was in breach of Article 6 of the Convention because the statement in question was given under compulsion (i.e. there could have been a penalty for not giving it).

200. The amendments therefore restrict the use that can be made in criminal trials of evidence that has been obtained under compulsory powers. Several statutes that regulate commercial or financial activities do not only contain powers to compel answers: they also allow the answers to be used in evidence against the person giving them. The amendments qualify those provisions by restricting the use that the prosecution can make of the answers at trial to the following circumstances:

- where the defendant himself introduces them in evidence, or

- where the defendant is being prosecuted for his failure or refusal to answer a question, or his failure to disclose a material fact, or his having given an untruthful answer.

Section 60: Removal of restriction on use of evidence from computer records

201. This section repeals section 69 of the Police and Criminal Evidence Act 1984. For a document produced by a computer to be used as evidence in a criminal trial, section 69 required it to be accompanied by proof that the computer was operating properly and was not used improperly.

202. Following the repeal, the ordinary law on evidence will apply to computer evidence. In the absence of any evidence to the contrary, the courts will presume that the computer system was working properly. If there is evidence that it may not have been, the party seeking to introduce the evidence will need to prove that it was working.

Chapter VII: General provisions

Section 61: Application of Part II to service courts

203. This section makes provision for Part II to apply to proceedings before courts-martial, Standing Civilian Courts and the Courts-Martial Appeal Court. *Subsection (1)* gives the Secretary of State power to make an order so that Chapters I, II, III and V apply to such proceedings (with any modifications he specifies). *Subsection (2)* means that Chapter IV will apply to such proceedings, subject to any modifications which the Secretary of State may specify. For example, where a provision of Part II only applies if a certain offence is involved, the modifications could include specifying the corresponding offences under armed forces law. *Subsection (3)* ensures that it will be possible for the existing power under section 39 of the Criminal Justice and Public Order Act 1994 to apply the rules about inferences from silence, as amended by section 58, to service court proceedings.

Sections 62 and 63: Interpretation of Part II

204. Section 62(2) defines references to any offence in Part II to include not only aiding, abetting, counselling, inciting or procuring the commission of the offence, or conspiring to commit it, but also (for example) aiding or abetting an attempt to commit the offence.

205. The definition of "court" in section 63(1) means that in Chapters IV and V references to a court include, where appropriate, a Divisional Court of the High Court or the House of Lords. The definition does not apply to 63(2), where "court" should be interpreted more broadly.

206. The definition of "publication" in section 63(1) is drawn from the Contempt of Court Act 1981 and the related definition of "relevant programme" covers most radio and television programmes transmitted from or to the United Kingdom.

Part III: Final provisions

207. Section 64 requires the Secretary of State to make the orders and regulations provided for throughout the Act by statutory instrument. Statutory instruments are subordinate legislation. They may be subject to *affirmative resolution procedure*, by which each House of Parliament in turn is asked to debate and approve their content, or *negative resolution procedure*, by which both Houses are offered the opportunity to ask for a debate and vote. Some statutory instruments, such as orders specifying the date upon which provisions of the Act are to come into force, may be subject to neither procedure.

208. Section 65 gives a power for making rules of court about the provisions in the Act. Rules of court contain detailed rules of procedure, have the force of legislation and will enable the courts properly to implement the Act.

209. Section 66 provides alternative procedures for extending the provisions in Parts II and III to Northern Ireland, depending on whether Parts II and III of the Northern Ireland Act 1998 have been implemented when the provisions come to be extended. If the 1998 Act has been implemented, the provisions will be extended through Orders in Council under the 1998 Act, which will be subject to the *negative resolution procedure* (i.e. each House of Parliament will be given the opportunity to veto the Order) instead of the procedure to which they would otherwise be subject under section 85 of the 1998 Act. If the 1998 Act has not been implemented, an Order in Council will be made under paragraph 1(1)(b) of Schedule 1 to the Northern Ireland Act 1974, which will also be subject to the negative resolution procedure.

210. Section 67 and Schedules 4, 6 and 7 make minor and consequential amendments (Schedule 4), repeals of existing legislation which is superseded by the Act or spent (Schedule 6) and transitional arrangements in respect of investigations or proceedings part-way through at the time the Act will commence (Schedule 7).

211. It may be helpful to note the following. Paragraphs 1, 10, 12 to 14 and 17 of Schedule 4 relate to Chapter V of Part II of the Act. Paragraph 2 of Schedule 4 relates to section 25. Paragraphs 3, 4(3) and 24 of Schedule 4 relate to Chapter IV of Part II. Paragraphs 4(2), 5 to 9, 11, 20, 23 and 25 to 30 of Schedule 4 relate to Part I of the Act. Paragraph 16 of Schedule 4 relates to the repeals that give effect to section 60. Paragraphs 18 and 19 of Schedule 4 relate to paragraphs 22 and 23 of Schedule 3 to the Act.

212. Paragraph 22 of Schedule 4 clarifies section 51 of the Criminal Justice and Public Order Act 1994, so that it is clear that a threat to harm a witness relayed through a third party constitutes an offence under that section. It also makes it clear that when, within a year after the trial, someone threatens to harm a witness or juror, the prosecution do not need to prove a connection between the threat and the trial for an offence to be committed under that section.

213. Section 67 also introduces Schedule 5, which contains pre-consolidation amendments relating to youth justice. There are three main areas that the Schedule amends. They are provisions about supervision orders contained in the Children and Young Persons Act 1969, provisions about detention and training orders contained in the Crime and Disorder Act 1998 and provisions in that Act about reparation and action plan orders. The amendments do not alter any of the original policy intentions set out in the debates which surrounded the passage of these Acts. They simply clarify the legislation and ensure consistency across the range of court disposals.

214. *Subsection (2)* of section 68 provides that this Act will be deemed a pre-commencement Act for the purposes of the Scotland Act 1998, so that Ministerial functions conferred by this Act will transfer automatically to Scottish Ministers so far as they are exercisable "within devolved competence" (as defined in section 54 of the Scotland Act 1998).

215. *Subsection (3)* enables the Secretary of State to fix various dates for bringing this Act into force. It is intended that the introduction of the measures in the Act will be staggered, to allow time for adequate arrangements to be put in place across England and Wales and for new practices to be developed and tested. Courts will only be able to make the measures in Chapter I of Part II available when the Secretary of State has notified them that they may do so under section 18.

216. Section 68 also provides that the provisions about reporting restrictions will be enforceable in all parts of the United Kingdom, even though an individual restriction will relate to an offence or court proceedings in a particular part of the United Kingdom (*subsection (5) and (6)*).*Subsection (9)* ensures that (with the exceptions specified) any amendment or repeal to other legislation provided for in the Act becomes part of the law of the same territories as have the original legislation as part of their law. *Subsection (10)* provides for Chapter IV of Part II and section 61 to apply to courts-martial and other service courts wherever in the world they may be held.