These notes refer to the Criminal Justice Act 2003 (c.44)
which received Royal Assent on 20th November 2003

CRIMINAL JUSTICE ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 11 - Evidence

Chapter 1 : Evidence of Bad Character

Section 98: Bad Character and Section 99: Abolition of common law rules

353. *Section 98* defines the sort of evidence whose admissibility is to be determined under the new statutory scheme. The definition covers evidence of, or of a disposition towards, misconduct. The term "misconduct" is further defined in section 112 as the commission of an offence or other reprehensible behaviour. This is intended to be a broad definition and to cover evidence that shows that a person has committed an offence, or has acted in a reprehensible way (or is disposed to do so) as well as evidence from which this might be inferred.

354. The definition is therefore intended to include evidence such as previous convictions, as well as evidence on charges being tried concurrently, and evidence relating to offences for which a person has been charged, where the charge is not prosecuted, or for which the person was subsequently acquitted. This reflects the state of the current law. On the latter point, in the case of *Z* ([2000] 2 AC 483), the House of Lords held that there was no special rule that required the exclusion of evidence that a person had been involved in earlier offences, even if they had been acquitted of those crimes, provided that that evidence was otherwise admissible. Thus, if there were a series of attacks and the defendant were acquitted of involvement in them, evidence showing or tending to show that he had committed those earlier attacks could be given in a later case if it were admissible to establish that he had committed the latest attack. The Act preserves the effect of this decision.

355. Evidence not related to criminal proceedings might include, for example, evidence that a person has a sexual interest in children or is racist.

356. The scheme does not affect the admissibility of evidence of the facts of the offence. This is excluded from the definition, as is evidence of misconduct in connection with the investigation or prosecution of the offence. This evidence is therefore not governed by the new statutory rules.

357. Thus, if the defendant were charged with burglary, the prosecution's evidence on the facts of the offence – any witnesses to the crime, forensic evidence etc – would be admissible outside the terms of these provisions. So too would evidence of an assault that had been committed in the course of the burglary, as evidence to do with the facts of the offence. Evidence that the defendant had tried to intimidate prosecution witnesses would also be admissible outside this scheme as evidence of misconduct in connection with, as appropriate, the investigation or the prosecution of the offence, as would allegations by the defendant that evidence had been planted. However, evidence that the defendant had committed a burglary on another occasion or that a witness had previously lied on oath would not be evidence to do with the facts of the offence

or its investigation or prosecution and would therefore be caught by the definition in section 98 and its admissibility would fall to be dealt with under the Act's provisions.

358. The intention is that this Part of the Act will provide a new basis for the admissibility of previous convictions and other misconduct. Accordingly, *section 99* abolishes the common law rules governing the admissibility of such evidence. (Statutory repeals are dealt with in Part 5 of Schedule 37.) This abolition does not extend to the rule that allows a person's bad character to be proved by his reputation. This common law rule is preserved as a category of admissible hearsay in *section 118(1)*. However the admissibility of a person's bad character, in circumstances where it was being proved by reputation, would fall to be determined under this part of the Act.

Section 100 – Non-defendant's bad character

359. *Section 100* sets out the circumstances in which, outside the alleged facts of the offence and its investigation and prosecution, evidence can be given of the previous misconduct of a person other than a defendant in the proceedings. This might be a witness in the case or a victim but extends to any other person as well. Evidence of their bad character is not to be given without the permission of the court - *Section 100(4)* - and can only be given if it meets one of three conditions. These are:

- it is important explanatory evidence,
- it is of substantial probative value to a matter in issue and that issue is one of substantial importance in the case, or
- the prosecution and defence agree that the evidence should be admitted.

360. The term "explanatory evidence" is used to describe evidence which, whilst not going to the question of whether the defendant is guilty, is necessary for the jury to have a proper understanding of other evidence being given in the case by putting it in its proper context. An example might be a case involving the abuse by one person of another over a long period of time. For the jury to understand properly the victim's account of the offending and why they did not seek help from, for example, a parent or other guardian, it might be necessary for evidence to be given of a wider pattern of abuse involving that other person.

361. For evidence to be admissible as "important explanatory evidence", it must be such that, without it, the magistrates or jury would find it impossible or difficult to understand other evidence in the case – *Section 100(2)*. If, therefore, the facts or account to which the bad character evidence relates are largely understandable without this additional explanation, then the evidence should not be admitted. The explanation must also give the court some substantial assistance in understanding the case as a whole. In other words, it will not be enough for the evidence to assist the court to understand some trivial piece of evidence.

362. Evidence is of probative value to a matter in issue where it helps to prove that issue one way or the other. In respect of non-defendants, evidence of bad character is most likely to be probative where a question is raised about the credibility of a witness (as this is likely to affect the court's assessment of the issue on which the witness is giving evidence). The evidence might, however be probative in other ways. One example would be to support a suggestion by the defendant that another person was responsible for the offence.

363. Evidence which is of probative value is admissible if it meets an "enhanced relevance" test – *Section 100(1)(b)*. That is, it must be of substantial probative value and the matter in issue to which it relates must be of substantial importance in the context of the case. Thus evidence which has no real significance to an issue or is only marginally relevant would not be admissible, nor would evidence that goes only to a trivial or minor issue in the case.

364. *Section 100(3)* directs the court to take into account a number of factors when assessing the probative value of evidence of a non-defendant's bad character. These include the nature and number of the events to which it relates and when those events occurred. When considering evidence that is probative because of its similarity with evidence in the case (for example, to suggest that the alleged victim had acted in a particular way), the court is directed by *subsection (3)(c)* to consider the nature and extent of the similarities and dissimilarities. Similarly, where the evidence is being tendered to suggest a particular person was responsible, *subsection (3)(d)* requires the court to consider the extent to which the evidence shows or tends to show that the same person was responsible each time.

Sections 101 to 108: defendants

365. At present evidence of a defendant's bad character is generally inadmissible, subject to a number of restricted common law and statutory exceptions discussed in the 'Summary and Background' section (above). *Sections 101 to 108* set out the circumstances in which such evidence is to be admissible in future. In summary, these provide an inclusionary approach to a defendant's previous convictions and other misconduct or disposition, under which relevant evidence is admissible but can be excluded in certain circumstances if the court considers that the adverse affect that it would have on the fairness of the proceedings requires this. *Section 101* sets out the gateways through which this evidence can be admitted, whilst *Sections 102 to 106* provide additional definitional material. *Section 107* provides an important safeguard where this sort of evidence has been influenced by other witnesses or evidence in the case and is consequently false or misleading. *Section 108* deals with the admissibility of convictions for offences committed by a person under the age of fourteen in proceedings for offences committed by a person over the age of twenty-one.

Section 101: Defendant's bad character

366. *Section 101(1)* provides that evidence of a defendant's bad character is admissible in the following circumstances:

- all the parties agree to it being given;
- the defendant introduces the evidence himself or it is given in response to a question put by the defendant (or his counsel) that is intended to elicit it;
- it is important explanatory evidence;
- it is relevant to an important issue between the defendant and prosecution;
- it has substantial probative value in relation to an important issue between the defendant and a co-defendant;
- it corrects a false impression given by the defendant about himself;
- the defendant has attacked the character of another person.

367. This is subject to an application by the defendant to have the evidence excluded if admitting it would have such an adverse effect on the fairness of the trial that it ought to be excluded (*Section 101(3)*). The circumstances in which such an application can be made are where the evidence is relevant to an issue in the case between the defendant and prosecution or has become admissible because of the defendant's attack on another person.

368. The test to be applied is designed to reflect the existing position under the common law, as section 78 of the Police and Criminal Evidence Act 1984 does, under which the judge assesses the probative value of the evidence to an issue in the case and the prejudicial effect of admitting it, and excludes the evidence where it would be unfair to admit it. The intention is for the courts to apply the fairness test set out here in the

same way. In applying the test, the courts are directed specifically under *section 101(4)* to take account of the amount of time that has elapsed since the previous events and the current charge.

Section 102: "Important explanatory evidence"

369. *Section 102* defines what is meant by important explanatory evidence. The definition mirrors that used in the context of non-defendants (see "non-defendant's bad character": section 100).

Section 103: "Matter in issue between the defendant and the prosecution"

370. *Section 103* relates to evidence of a defendant's bad character that is admissible because it is relevant to an important matter at issue between the defendant and the prosecution (see *section 101(1)(d)*). Evidence might be relevant to one of a number of issues in a case. For example, it might help the prosecution to prove the defendant's guilt of the offence by establishing their involvement or state of mind or by rebutting the defendant's explanation of his conduct. Only prosecution evidence is admissible on this basis – section 103(6) – and the defendant may apply to have the evidence excluded under section 101(3).

371. *Section 103(1)(a)* makes it clear that evidence that shows that a defendant has a propensity to commit offences of the kind with which he is charged can be admitted under this head. For example, if the defendant is on trial for grievous bodily harm, a history of violent behaviour could be admissible to show the defendant's propensity to use violence. Evidence is not, however, admissible on this basis if the existence of such a propensity makes it no more likely that the defendant is guilty. This might be the case where there is no dispute about the facts of the case and the question is whether those facts constitute the offence (for example, in a homicide case, whether the defendant's actions caused death).

372. Where propensity is an issue, subsection (2) provides that this propensity may be established by evidence that the defendant has been convicted of an offence of the same description or category as the one with which he is charged. This is subject to subsection (3), which provides that the propensity may not be established in this way if the court is satisfied that due to the length of time since the previous conviction or for any other reason that would be unjust.

373. An offence of the same description is defined by reference to how the offence appears on an indictment or written charge. It therefore relates to the particular law that has been broken, rather than the circumstances in which it was committed. An offence will be of the same category as another if they both fall within a category drawn up by the Secretary of State in secondary legislation. An order establishing such categories will be subject to the affirmative procedure (see *section 330(5)*). The categories must contain offences that are of the same type (*section 103(4)*), for example, offences involving violence against the person or sexual offences.

374. *Section 103(1)(b)* makes it clear that evidence relating to whether the defendant has a propensity to be untruthful (in other words, is not to be regarded as a credible witness) can be admitted. This is intended to enable the admission of a limited range of evidence such as convictions for perjury or other offences involving deception (for example, obtaining property by deception), as opposed to the wider range of evidence that will be admissible where the defendant puts his character in issue by for example, attacking the character of another person. Evidence will not be admissible under this head where it is not suggested that the defendant's case is untruthful in any respect, for example, where the defendant and prosecution are agreed on the facts of the alleged offence and the question is whether all the elements of the offence have been made out.

Section 104: "Matter in issue between the defendant and a co-defendant"

375. *Section 104* relates to evidence that is relevant to issues between the defendant and a co-defendant (*section 101(1)(e)*). Evidence is only admissible on this basis by (or at the behest of) a co-defendant: see *Section 104(2)* – the prosecution therefore cannot avail themselves of this provision. A co-defendant may wish to adduce evidence of a defendant's bad character if his defence is, for example, that it was the defendant, rather than himself, who was responsible for the offence. Under *Section 101(1)(e)* evidence is admissible on issues between the defendant and a co-defendant if it has substantial probative value in relation to an important issue in the case. In other words, evidence that has only marginal or trivial value would not be admissible, nor would it be admissible if the issue it related to were marginal or trivial in the case as a whole. However, once this threshold is passed, there is no power for the courts to exclude the evidence. This ensures that defendants are able to put forward the widest range of evidence in their defence and reflects the current position. *Section 104* restricts the admissibility of evidence of a defendant's bad character that only shows that he has a propensity to be untruthful (that is, is not credible as a witness) to circumstances in which the defendant has undermined the co-defendant's defence. In these circumstances, his credibility may well have a bearing on resolving the issues in the case.

Section 105: "Evidence to correct a false impression"

376. *Section 105* relates to evidence that is admissible under *Section 101(1)(f)* to correct a false impression given by the defendant. For this provision to apply, the defendant must have been responsible for an assertion that gives a false or misleading impression about himself. This might be done expressly, for example, by claiming to be of good character when this is not the case, or implied, for example, by leading evidence of his conduct that carries an implication that he is of a better character than is actually the case. It may also be done non-verbally, through his conduct in court, such as his appearance or dress *(Section 105(4) and (5))*. For example, if a defendant were to give a false impression by suggesting he were a priest, he could not escape this provision simply by not making such an assertion verbally but choosing to wear a clerical collar.

377. *Section 105(2)* sets out the circumstances in which a defendant is to be treated as being responsible for an assertion. These include the defendant making the assertion himself, either in his evidence or in his representative's presentation of his case or, if used in evidence, when being questioned under caution or on being charged with the offence. It also includes assertions made by defence witnesses, those by any witness if responding to a question by the defendant that was intended (or likely to) elicit it and out of court assertions made by anybody if adduced by the defendant.

378. In correcting the impression, the prosecution (and only the prosecution – see *Section 105(7)*) may introduce evidence of the defendant's misconduct that has probative value in correcting it, in other words, is relevant to correcting the false impression. Exactly what evidence is admissible will turn on the facts of the case, in particular, the nature of the misleading impression he has given. Evidence is only admissible to the extent that it is necessary to correct that impression: *section 105(6)*. A defendant may withdraw or disassociate himself from a false or misleading impression. Evidence to correct the impression is not then admissible: *section 105(3)*. In light of this, *section 101(3)*, under which a defendant may apply to have evidence of his bad character excluded, does not apply to this evidence.

Section 106: "Attack on another person's character"

379. *Section 106* deals with evidence that becomes admissible as a result of the defendant attacking another person's character (see *section 101(1)(g)*). A defendant attacks another person's character if he gives evidence that they committed an offence (either the one charged or a different one) or have behaved in a reprehensible way

– *section 106(1)(a)* and *106(2)*. This is similar to the definition of evidence of bad character in s*ection 98* but it also includes evidence relating to the facts of the offence charged and its investigation and prosecution. Thus, a defendant would be attacking a prosecution witness if he claimed that they were lying in their version of events or adduced evidence of their previous misconduct to undermine their credibility. But a suggestion that a witness is mistaken is not intended to engage this provision.

380. A defendant also attacks another person's character if he or his representative ask questions that are intended (or are likely) to elicit evidence of this sort or if the defendant makes an allegation of this nature when questioned under caution or on being charged with the offence and this is heard in evidence – (s*ection 106(1)(b) and (c)).*

381. Where a defendant has attacked another person's character, evidence of his own bad character becomes admissible (but only by the prosecution – see *section 106(3)*). Evidence admissible on this basis may, however, be excluded under *section 101(3*).

382. Evidence admissible under section 101(1)(g) – as under section 101(1)(f) - will primarily go to the credit of the defendant. Currently a jury would be directed that evidence admitted in similar circumstances, under the 1898 Act, goes only to credibility and is not relevant to the issue of guilt. Such directions have been criticised and the new statutory scheme does not specify that this evidence is to be treated in such a way. However, it is expected that judges will explain the purpose for which the evidence is being put forward and direct the jury about the sort of weight that can be placed on it.

Section 107: Stopping the case where evidence contaminated

383. *Section 107* deals with circumstances in which bad character evidence has been admitted but it later emerges that the evidence is contaminated, that is, has been affected by an agreement with other witnesses or by hearing the views or evidence of other witnesses so that it is false or misleading (see *Section 107(5)).*

384. Ordinarily it is for the jury to decide whether or not to believe evidence and decide on the weight to be placed on it. In cases where a question of contamination has arisen, the current position is that the judge must draw that matter to the jury's attention and warn them that if they are not satisfied that the evidence can be relied on as free of collusion, then they cannot rely on it against the defendant. If it becomes apparent that the evidence is so contaminated that it could not reasonably be accepted as free from collusion, the judge should go further and direct the jury not to rely on the evidence for any purpose adverse to the defence. This will continue to be the case.

385. However, there may be cases where it is not possible to expect the jury to put this evidence completely out of their mind. There are existing common law powers for the judge to withdraw a case from the jury at any time following the close of the prosecution case. *Section 107* builds on these powers by conferring a duty on the judge to stop the case if the contamination is such that, considering the importance of the evidence to the case, a conviction would be unsafe. This is intended to be a high test and if the judge were to consider that a direction along the lines described above would be sufficient to deal with any potential difficulties, then the question of safety does not arise and the case should not be withdrawn.

386. Having stopped the case the judge may consider that there is still sufficient uncontaminated evidence against the defendant to merit his retrial or may consider that the prosecution case has been so weakened that the defendant should be acquitted. *Section 107(1)* provides for the judge to take either of these courses. If, however, an acquittal is ordered then the defendant is also to be acquitted of any other offence for which he could have been convicted, if the judge is also satisfied that the contamination would affect a conviction for that offence in the same way (*Section 107(2)). Section 107(3*) extends the duty to the situation where a jury is determining under the Criminal Procedure (Insanity) Act 1964 whether a person, who is deemed unfit to plead, did the

act or omission charged. *Section 107(4)* makes it clear that the section does not affect any existing court powers in relation to ordering an acquittal or discharging a jury.

Section 108 – Offences committed by defendant when a child

387. *Section 108* deals with the admissibility of certain juvenile convictions. Subsection *(1)* repeals section 16(2) and (3) of the Children and Young Persons Act 1963. That provision precludes the use in evidence of certain juvenile convictions (those relating to offences committed under the age of 14) in a trial for an offence committed over the age of 21.

388. The admissibility of this evidence will instead fall under the general scheme for admitting evidence of bad character set out in this Part, but will also have to satisfy the two further requirements of subsection (2). The additional requirements are:

- that the offence for which the defendant is being tried and the offence for which the defendant was convicted are triable only on indictment; and
- that the court is satisfied that the interests of justice require the evidence to be admissible.

Section 109: Assumption of truth in assessment of relevance or probative value

389. *Section 109* requires a court, when considering the relevance or probative value of bad character evidence, to assume that the evidence is true. This reflects the distinction between the roles of the judge and jury: it is for the jury to form a view on matters of fact, such as the reliability of the evidence, and for the judge to rule on issues of law. However, there may be occasions where evidence is so unreliable that no reasonable jury could believe that it was true. In these circumstances, intended very much to be exceptional cases, *Section 109(2)* makes it clear that the judge does not have to assume the evidence is true. In making this decision, the court should normally make its decision based on the papers before it; however there may be exceptional circumstances in which a separate hearing on the issue (a *voir dire*) might be necessary. This reflects the current common law position as established in *R v H* [1995] 2 AC 596 which considered the admissibility of similar fact evidence in cases of alleged collusion.

Section 110: Court's duty to give reason for rulings

390. Section 110 requires a court to give reasons for its rulings under these provisions. These must be given in open court and, in the magistrates' courts, entered into the register of proceedings, ensuring that a record is kept. This applies to rulings on whether an item to evidence is evidence of bad character, rulings on questions of admissibility and exclusion and any decision to withdraw a case from the jury.

Section 111: Rules of court

391. *Section 111* makes provision for rules of court to be drawn up to require the prosecution and a co-defendant to give notice of their intention to adduce evidence of a defendant's bad character (or elicit such evidence from a witness). In relation to prosecution evidence, such rules *must* be made. Such rules may also include provision for the defendant to waive any notice requirement. (*section 111(3)*). The court is empowered to take a failure to give the required notice into account in considering the exercise of its powers in respect of costs (*section 111 (4)).*

Section 112: Interpretation of Chapter 1

392. *Section 112* defines terms employed in this Part. *Subsection (2)* makes it clear that where the defendant is charged with two or more offences the provisions of this Part refer to each charge as separate proceedings. This means that bad character evidence that is admissible in relation to one charge in the proceedings is not automatically admissible in

relation to another charge in the same proceedings, but must instead meet the provisions of this Chapter to be admissible in respect of that charge. It also means that evidence relevant on one charge is not rendered inadmissible if not also relevant to other charges. However, where the court is looking at whether the evidence should be excluded under section 101(3) then the court is to look at the effect of the admission of the evidence on the fairness of the proceedings as a whole and not just the charges for which the evidence is admissible.

393. *Section 112(3)* makes it clear that nothing in this Chapter affects the exclusion of evidence on certain other grounds. These are:

- the rule in section 3 of the Criminal Procedure Act 1865 against a party impeaching the credit of his own witness by general evidence of bad character;
- section 41 of the Youth Justice and Criminal Evidence Act 1999 which places restrictions on evidence or questions about a complainant's sexual history;
- any other power to exclude the evidence, on grounds other than it is evidence of a person's bad character, for example under section 78 of the Police and Criminal Evidence Act 1984 which provides for the exclusion of unfair evidence, or under the provisions of Chapter 2 of this Part relating to hearsay.

Section 113: Armed forces

394. *Section 113* introduces *Schedule 6*. *Schedule 6* applies the provisions of Chapter 1 to the service courts, modifying them as necessary.

Chapter 2: Hearsay evidence

Section 114: Admissibility of hearsay evidence

395. *Subsections (1)-(3)* set out the circumstances in which a statement which is not made in oral evidence during criminal proceedings can be used as evidence of the facts stated within it. For example, if B was charged with robbery of a jewellers, the prosecution might want A to testify that B told her that he was "outside the jewellers at midday on Monday" in order to prove that B was outside the jewellers at the relevant time. As these subsections remove the common law rule against the admission of such hearsay evidence, this out-of court statement will be admissible in A's testimony, *provided* it comes under one of the following heads:

- It is admissible under a statutory provision;
- It is admissible under a common law rule preserved by this Chapter of Part 11 of the Act;
- The parties agree that it can go in; or
- The court gives leave to admit the statement.

396. Before the court can grant leave to admit such a statement (under the fourth head above and found in *subsection (1)(d)*), it must be satisfied that it is in the interests of justice to admit the evidence. The intention, therefore, is that the court should be able to admit an out-of-court statement which does not fall within any of the other categories of admissibility, where it is cogent and reliable.

397. *Subsection (2)* sets out some of the factors that the court must consider when deciding whether to grant leave under the discretion in *Subsection (1)(d)*. Some of these factors are:

- the degree of relevance of the statement in proving a matter in issue in the trial (assuming the statement to be true);

- the circumstances in which it was made (if indeed it was made at all);
- the extent to which it supplies evidence which would not otherwise be available;
- the creditworthiness of the maker of the statement;
- the reason why oral evidence cannot be given;
- the extent to which the other party can challenge the statement, and the risk of unfairness.

398. The list is intended to focus attention on whether the circumstances surrounding the making of the out of court statement indicate that it can be treated as reliable enough to admit it as evidence, despite the fact that it will not be subject to cross-examination.

399. *Subsection (3)* provides that out of court statements may still be excluded even if they fulfil the requirements in this Chapter. For example, confessions must meet the additional requirements of sections 76 and 78 of the Police and Criminal Evidence Act 1984 before admission.

Section 115: Statements and matters stated

400. This section defines the type of statements which will be covered by Chapter 2. Its purpose is to overturn the ruling in *Kearley* [1992] 2 AC 228 that "implied assertions" are covered by the hearsay rule and therefore prima facie inadmissible. Under *subsection (3)*, a statement is one to which this Chapter applies if it is the purpose of the person making the statement to:

- cause the hearer to believe that the matter stated is true or to act on the basis that it is true; or
- cause a machine to operate on the basis that the matter is as stated.

401. *Section 115* therefore changes the common law position and will *not* prevent the admission of such implied assertions on the basis of the hearsay rule. Equally, where the assertion relates to a failure to record an event, sometimes known as negative hearsay, it will not be covered by Chapter 2 if it was not the purpose of the person who failed to record the event to *cause* anyone to believe that the event did not occur.

402. *Subsection (2)* preserves the present position whereby statements which are not based on human input fall outside the ambit of the hearsay rule. Tapes, films or photographs which directly record the commission of an offence and documents produced by machines which automatically record a process or event or perform calculations will not therefore be covered by Chapter 2.

Section 116: Cases where a witness is unavailable

403. This section sets out a series of categories under which first-hand hearsay evidence, whether oral or documentary, will be admissible, provided that the witness is unavailable to testify for a specified reason. The new provisions will be available to the prosecution and the defence.

404. A statement will be admissible under this section (subject to the additional conditions explained below) if the person who made it is:

- Dead (*subsection (2)(a)*);
- Ill (*subsection (2)(b)*);
- Absent abroad (*subsection (2)(c)*);
- Disappeared (*subsection (2)(d)*); or

- In fear (*subsection (2)(e)*).

405. *Subsections (2)(e) and (4)* make specific provision for the admissibility, with leave of the court, of statements of witnesses who are too frightened to testify (or to continue testifying) provided the interests of justice do not dictate otherwise. In considering the interests of justice, the court should have regard to what was said in the statement; any risk of unfairness to other parties in the case; to the fact that special measures directions may be made in relation to a witness under Part II of the Youth Justice and Criminal Evidence Act 1999; and to any other relevant circumstances (*subsection (4)*). *Subsection (3*) provides that "fear" must be widely construed.

406. There are a number of other conditions which apply to the admissibility of evidence under *Section 116.* A statement can *only* be adduced as truth of any matter stated if*:*

- the witness's oral evidence would have been admissible itself (*subsection (1)(a)*); and
- the person who made the statement is identified to the court's satisfaction *(subsection (1)(b))*. This will enable the opposing party to challenge the absent witness's credibility under *section 124.*

407. Additionally, even if all the relevant conditions mentioned above are satisfied, the evidence will not be allowed if a party, or someone acting on his behalf, *causes* the unavailability of the declarant (*subsection (5)).* This is intended to focus attention on cases where a party acts with the *intention* of preventing a witness from giving evidence. It is up to the party opposing admission to prove this to the court.

Section 117: Business and other documents

408. This Section provides for the admissibility of statements in documentary records provided certain conditions are met. These conditions are (*subsection (2)*):

- the document was created or received by a person in the course of a trade, business, profession or as the holder of a paid or unpaid office; and
- the person who *supplied* the information in the statement had or may reasonably be supposed to have had personal knowledge of the matters dealt with in the statement; and
- each person through whom the information was supplied received the information in the course of a trade, business, profession or other occupation or as the holder of a paid or unpaid office.

409. *Subsection (2)* therefore reflects the current position relating to business and other documents in section 24 (1)(c)(ii) and section 24(2) of the Criminal Justice Act 1988, which is being repealed. However, in the case of documents prepared for the purpose of criminal investigations or proceedings, the statement will only be admissible if the *supplier* of the information is unavailable or cannot reasonably be expected to recall any of the matters dealt with in the statement.

410. Even if a statement in a documentary record meets the conditions as set out in this Section, the evidence will not be allowed if it is considered unreliable. *Subsections (6) and (7)* permit the court to direct that the statement shall not be admissible where there is reason to doubt its reliability on the basis of its contents, source of information, mode of supply and circumstances of creation or reception.

Section 118: Preservation of common law categories of admissibility

411. This section preserves a number of common law exceptions to the old rule against the admission of hearsay evidence. The preservation of these rules means that in the specified circumstances, an out of court statement will be admissible as evidence of any

matters stated in it. Many of these rules were also preserved under the corresponding civil evidence provisions in section 7 of the Civil Evidence Act 1995. The common law rules preserved in paragraphs (1) to (8) are as follows:

- 'Public information' will be admissible. This includes published works; public documents; records of certain courts, treaties, Crown grants, pardons and commissions; evidence relating to a person's age or date of birth;
- 'Reputation as to character' will be admissible as evidence of a person's good or bad character;
- 'Reputation or family tradition' will be admissible as evidence to prove or disprove pedigree or the existence of marriage; a public or general right; or the identity of a person or thing.
- 'Res gestae' will be admissible (this rule is explained below);
- 'Confessions' will be admissible as long as they fulfil the requirements of sections 76, 76A and 78 of the Police and Criminal Evidence Act 1984;
- 'Admissions by agents' will be admissible against the defendant as evidence of any fact stated.
- The rule of 'common enterprise' is preserved. This means that a statement made by a party to a common enterprise will be admissible against another party to the enterprise as evidence of any matter stated. For example, if it is independently proved that A and B are involved in a joint enterprise to rob a jewellers', any incriminating statements made by A will also be admissible against B.
- The rule of 'expert evidence' is preserved. This permits an expert to give evidence of any relevant matter which forms part of his professional expertise (although not acquired through personal experience) and to draw upon technical information widely used by members of the expert's profession.

412. Paragraph *(4)* preserves the common law rule known as "*res gestae*". One justification for this exception is that reported words which are very closely connected to a relevant event are reliable accounts and should therefore be admissible in certain circumstances. Such statement may be admitted if *one* of the following conditions is met:

- the statement is made by a person who was so emotionally overpowered by an event that the possibility that he was lying can be disregarded;
- the statement accompanied an act which can properly be evaluated as evidence only if considered together with the statement. For example, if the act doesn't make sense without the statement; or

the statement relates to a physical sensation or mental state, such as an intention or emotion.

Section 119: Inconsistent statements.

413. This section clarifies the relationship between hearsay evidence and previous inconsistent statements. It provides that if a witness admits that he has made a previous inconsistent statement or it has been proved that he made such an inconsistent statement, it is *not only* evidence which undermines his 'credibility' (as someone who makes inconsistent statements) but it is also evidence of the *truth* of its contents.

414. *Subsection (2)* envisages the following type of situation. A makes a statement to the police that she saw B 'outside the jewellers' at midday on Monday'. A does not testify at trial but her statement is admitted under *Section 116*. As explained below**,** *Section 124* provides that evidence can be admitted in this type of situation in relation to the credibility of A. *Subsection (2)(c)* of *Section 124* provides that evidence can be admitted to prove that A had made another statement inconsistent with this statement

(for example, A had said earlier that she did not see B on Monday at all). Section*119(2)* provides that if there is such an inconsistent statement, it not only goes to the credibility of A, but it is also admissible as to the truth of its contents (that A did not see B on Monday).

Section 120: Other previous statements by witnesses

415. This section makes *other* previous statements admissible as evidence of the truth of their contents (not merely to bolster the credibility of the witness's oral evidence) in the following circumstances:

- *Subsection (2)* applies to statements which are admitted to rebut a suggestion that the witness's oral evidence is untrue;
- *Subsection (3)* applies to the situation where a witness is "refreshing his memory" from a written document. If he is cross-examined on the document and it is received in evidence, the statement will be evidence of any matter contained within it;
- *Subsections (4) - (7)* provide that a previous statement will be admissible as evidence of the facts contained within it provided the witness states that he made the statement and believes it to be true *and* one of the following conditions is met:
    - The statement describes or identifies a person, place or thing (which includes objects such as a car registration number) ; or
    - The statement was made when the incident was fresh in the witness's memory and he cannot reasonably be expected to remember the matters stated. The intention is that where a witness has to rely on another person, or a document, or both to fill in details which he or she can no longer remember, this fact should go to the *weight* of the evidence, but should not make it inadmissible; or
    - The statement consists of a complaint by a victim of the alleged offence which was made as soon as could reasonably be expected after the conduct in question, and the witness gives oral evidence in relation to the matter. There is a further requirement for such a statement to be admissible which is that the complaint must not have been made as a result of a threat or a promise.

Section 121: Additional requirement for admissibility of multiple hearsay

416. This section sets out the approach which the courts should take to multiple hearsay. "Multiple hearsay" is where information passes through more than one person before it is recorded.

417. Under the section a hearsay statement is admissible to prove the fact that another statement was made in three circumstances. These are:

- Either of the statements is admissible under sections 117 (business documents) 119 (inconsistent statements) or 120 (other previous statement of a witnesses);
- All parties to the proceedings agree; or
- The court uses its discretion to admit the statement.

418. The test for the court in deciding whether to exercise its discretion is whether it is satisfied that the value of the evidence in question, taking into account how reliable the statement appears to be, is so high that the interests of justice require the later statement to be admissible for that purpose. This discretion is intended to cover exceptional circumstances where although multiple hearsay does not fall within one of the specified categories for admissibility (in section 121 (1)(a) or (b)) it nevertheless should be admitted in the interests of justice.

Section 122: Documents produced as exhibits

419. This section provides that if a statement previously made by a witness is admitted in evidence and produced as an exhibit under *Sections 119 or 120*, the jury should not take the exhibit with them when they retire to the jury room, unless the court considers it appropriate or all the parties agree that it should accompany them.

Section 123: Capability to make statement

420. This section provides that an out of court statement cannot be admitted under s*ections 116, 119 or 120* if the person who made the statement did not have the "required capability" for making a statement at the time the statement was made. A statement may not be admitted under *section 117* if any person who supplied or received the information or created or received the document did not have the "required capability" or, where that person cannot be identified, cannot reasonably be assumed to have had the required capability. Under *subsection (2)* a person is deemed to have the required capability for the purposes of this section if he can understand questions put to him and give answers which can be understood. This section reflects the test for witness competence to give evidence in criminal proceedings under section 53 of the Youth Justice and Criminal Evidence Act 1999.

Section 124: Credibility

421. This section makes provision for challenges to the credibility of the maker of a hearsay statement who does not give oral evidence in person in the proceedings. If such hearsay statement is admitted as evidence of a matter stated *section 124* provides certain rights for the person against whom hearsay evidence has been admitted to produce, in specified circumstances, evidence to discredit the maker of the statement or to show that he has contradicted himself. *Section 124* thus provides a replacement for the corresponding provisions in section 28(2) and paragraph 1 of Schedule 2 to the CJA 1988.

Section 125: Stopping the case where evidence is unconvincing

422. *Subsection (1)* imposes a duty on the court to stop a case and either direct the jury to acquit the defendant, or discharge the jury, if the case against him or her is based wholly or partly on an out of court statement which is so unconvincing that, considering its importance to the case, a conviction would be unsafe. This issue only arises in relation to jury trials (and by virtue of paragraph 4 of Schedule 7 to service courts) because in other cases, the finders of fact would be bound to dismiss a case in these circumstances, or order a retrial if appropriate.

423. Similarly, *subsection (2)* imposes a corresponding duty on the court to direct the jury to acquit of any other offence not charged, of which they could convict by way of an alternative to the offence charged, if the judge is satisfied that a conviction would be unsafe. *Subsection (3)* extends the duty to cases under the Criminal Procedure (Insanity) Act 1964 where a jury is required to determine whether a defendant, who is deemed unfit to plead, did the act (or made the omission) charged.

Section 126: Court's general discretion to exclude evidence

424. This section provides a further discretion to exclude superfluous out of court statements if the court is satisfied that the value of the evidence is substantially outweighed by the undue waste of time which its admission would cause. *Subsection (2)* preserves both the existing common law power for the court to exclude evidence where its prejudicial effect is out of proportion to its probative value and the discretion contained in section 78 of the Police and Criminal Evidence Act 1984 in relation to the admission of unfair evidence.

Section 127: Expert evidence: preparatory work

425. This section seeks to address the problem which arises where information relied upon by an expert witness is outside the personal experience of the expert (for example work undertaken by an assistant) and cannot be proved by other admissible evidence. The intention is that the rules about advance notice of expert evidence will be amended so as to require advance notice of the name of any person who has prepared information on which the expert has relied. It is envisaged that any other party to the proceedings will be able to apply for a direction that any such person must give evidence in person but a direction will only be given if the court is satisfied that it is in the interests of justice.

426. In cases where no such application is made in respect of any assistant listed, or an application is made but refused, *section 127* will enable the expert witness to base his evidence on any information supplied by that assistant on matters of which that assistant had personal knowledge. *Section 127* applies if:

- The statement was prepared for the purpose of criminal proceedings;
- The expert's assistant had or might reasonably be supposed to have had personal knowledge of the matters stated; and
- A notice has been given under the advance notice rules of the name of a person who has prepared a statement on which it is proposed that the expert witness should base any opinion or inference, and the nature of the matters stated.

427. Where *section 127(1)* applies, the expert may base an opinion or inference on the statement and any information so relied upon will be admissible as evidence of its truth.

428. *Subsections (4) and (5)* permit a party to the proceedings to apply for an order that the exception should not apply in the interests of justice. In deciding whether to make such an order, the court may take into account any of the matters mentioned in *subsection (5)*.

Section 128: Confessions

429. This section inserts section 76A of the Police and Criminal Evidence Act 1984. The position prior to the insertion of this new section 76A was that whilst the prosecution could not make use of a confession which was obtained in breach of sections 76 or 78 of the Police and Criminal Evidence Act 1984, a co-defendant *could* use it to undermine another co-defendant's account or to strengthen their own case. Instead, section 76A applies the same rules to confessions adduced by the co-defendant to those adduced by the prosecution under sections 76 and 78 of PACE. That is, the confession will not be allowed if obtained by oppression or is rendered unreliable. 'Oppression' is defined in identical terms to section 76(8) of PACE.

430. Unlike the requirements for the prosecution, under section 76A(2), the co-accused would only need to satisfy the court on the *balance of probabilities* that the confession was not obtained by oppression or in circumstances likely to render it unreliable.

431. *Subsection (4)* maintains the rule that the exclusion of a confession does not affect the admissibility of facts discovered as a result of that confession.

Section 129: Representations other than by a person

432. This section provides where a statement generated by a machine is based on information implanted into the machine by a human, the output of the device will only be admissible where it is proved that the information was accurate. *Subsection (2)* preserves the common law presumption that a mechanical device has been properly set or calibrated.

Section 130: Depositions

433. This repeals paragraph 5(4) of Schedule 3 of the Crime and Disorder Act 1998 which provided that a judge could overrule an objection to a deposition being read as evidence if he considered it to be in the interests of justice to do so.

Section 131: Evidence at retrial

434. *Section 131* provides that if a retrial is ordered by the Court of Appeal, evidence must be given orally if it was given that way at the original trial except in certain defined situations, in which case a transcript of the earlier evidence may be used. These exceptions are:

- All parties agree to the evidence being admitted;
- A witness is unavailable to give evidence in accordance with *section 116*; or
- A witness is unavailable to give evidence for a reason other than those listed in *section 116*and his evidence is admitted under the residual discretion in *section 114(1)(d)*.

Section 132: Rules of court

435. *Section 132* gives a power for making rules of court about the provisions in the Act. The intention is that rules of court will govern both the notice and leave procedures under Chapter 2. *Subsection (5)(b)* provides that the court or jury can, with leave, draw an adverse inference from the failure of a party to comply with the prescribed requirements.

Section 133: Proof of statements in documents

436. This section corresponds to the position under section 27 of the Criminal Justice Act 1988, whereby a statement in a document can be proved by producing either the original document or an authenticated copy. It is intended to cover all forms of copying including the use of imaging technology.

Sections 134-136 : Final provisions

437. *Section 135* introduces Schedule 7 which makes provision for Chapter 2 to apply to proceedings before courts-martial, Standing Civilian Courts and the Court-Martial Appeal Court, modifying them as necessary.

Section 136 repeals existing legislation which is spent or is superseded by this Act.

Chapter 3 : Miscellaneous and Supplemental

Section 137: Evidence by video recording

438. This section permits a video recording of an interview with a witness (other than the defendant), or a part of such a recording, to be admitted as evidence in chief of the witness in a wider range of circumstances than is presently the case. *Subsection (1)* provides that the court can authorise such a video recording to replace the evidence-in-chief of a witness *provided* that:

- the person claims to be an witness to the offence (or part of it) or to events closely connected to the offence;
- the video recording of the statement was made at a time when events were fresh in the witness's memory; and
- the alleged offence can only be tried in the Crown Court or is an either-way offence prescribed by Order of the Secretary of State.

439. If the recording satisfies these requirements, the court may admit the recording *provided* that:

- the witness's recollection of events is likely to be significantly better at the time he gave the recorded account than by the time of the trial; and
- it is in the interests of justice to admit the recording, having regard to whether the recording is an early and reliable account from the witness, whether the quality is adequate, and any views which the witness may have about using the recording for this purpose.

440. Under *subsection (2)* evidence given by a video recording shall be treated as if it was given orally in court in the usual way, providing the witness asserts the truth of it.

Section 138: Video evidence : further provisions

441. Where a video recording (or part of one) is admitted under section 137, *section 138 (1)* states that the recording should be the final statement of any matters dealt with adequately within the recording for the purpose of the witness's evidence-in-chief.

442. *Subsection (2)* allows video recordings to be edited if the interests of justice so require. In determining whether to allow only an edited recording to be used, the court will have to consider whether the parts sought to be excluded are so prejudicial as to outweigh the desirability of using the whole recording.

Section 139: Use of documents to refresh memory

443. This section creates a presumption that a witness in criminal proceedings may refresh his memory from a document whilst giving evidence providing that:

- he indicates that the document represents his recollection at the time he made it; and
- his recollection was likely to be significantly better at the time the document was made (or verified).

The fact that the witness has read the statement before coming into the witness box will not affect this presumption.

444. In view of the practical difficulties associated with memory refreshing in the witness box from an audio or video recording, *subsection (2)* makes provision for a witness to refresh his memory from a transcript of such a recording.