

POLICE AND JUSTICE ACT 2006

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 5: Miscellaneous

Section 34: Sentences of imprisonment for bail offences

288. *Section 34* amends the Criminal Justice Act 2003 so that the sentencing arrangements for prison sentences of less than 12 months introduced by sections 181 and 182 of the Criminal Justice Act 2003 are not applied to offences of absconding while released on bail, committed under section 6 of the Bail Act 1976.
289. *Subsection (2)* amends the definition of “sentence of imprisonment” in section 195 of the Criminal Justice Act 2003, which applies in Chapter 3 of the 2003 Act, to exclude sentences of imprisonment following summary conviction for offences of absconding while released on bail.
290. *Subsection (3)* amends section 237 of the 2003 Act so that offenders serving sentences of imprisonment following summary conviction for offences of absconding while released on bail are excluded from the definition of “fixed term prisoner” in Chapter 6.
291. *Subsection (4)* amends section 257 of the 2003 Act so that offenders serving sentences of imprisonment for offences of absconding while released on bail may be awarded additional days for disciplinary offences.
292. *Subsection (5)* amends section 258 of the 2003 Act so that offenders serving sentences of imprisonment following summary conviction for offences of absconding while released on bail are subject to the same early release arrangements as fine defaulters and contemnors.
293. *Subsection (6)* amends the definition of “sentence of imprisonment” in section 305(1) of the 2003 Act, which applies to Part 12 of that Act, to clarify that a committal for contempt of court or any kindred offence is excluded from that definition.

Section 35: Unauthorised access to computer material

294. *Section 35* amends section 1 of the Computer Misuse Act 1990 (offence of unauthorised access to computer material). Section 1 of the 1990 Act deals with the unauthorised access to computer systems or data, commonly known as “hacking” or “cracking”. Under that section, it is an offence to cause a computer to perform any function with intent to secure unauthorised access to any program or data held in any computer. It is necessary to prove that the access secured is unauthorised and that the suspect knew that this was the case.
295. *Section 35(2)* extends the section 1 offence so that it would be committed where the person’s intention is to enable someone else to secure unauthorised access to a computer

or to enable the person himself to secure unauthorised access to a computer at some later time.

296. *Section 35(3)* replaces the penalty for this offence by substituting a new subsection (3) into section 1 of the 1990 Act. The offence is made indictable, and the maximum sentence is increased from six months imprisonment to two years.
297. The European Union Framework Decision on Attacks Against Information Systems, adopted by the European Union and Justice and Home Affairs Council of Ministers on 24 February 2005 (<http://register.consilium.eu.int/pdf/en/04/st15/st15010.en04.pdf>), requires the approximation of Member States' criminal law (offences, penalties and jurisdiction) on attacks against information systems; this amendment to the 1990 Act is designed to ensure compliance. The EU Framework Decision requires all Member States to give effect to its provisions in legislation by 24 February 2007. This is to ensure that there are adequate and more effective penalties available for the offence of unauthorised access to computer material, to reflect the seriousness of the criminal activities which can be involved in committing this offence.

Section 36: Unauthorised acts with intent to impair operation of computer, etc

298. The existing section 3 of the Computer Misuse Act 1990 makes unauthorised modification of computer material an offence, for which the penalty for conviction is imprisonment for a maximum of five years or a fine or both. Section 36 of the Act substitutes a new section 3.
299. The effect of the new section 3(1) to (4) is that a person commits an offence if he does any unauthorised act in relation to a computer, knowing it to be unauthorised, and if he intends by doing the act to do one of the things set out in subsection (2), or if he is reckless as to whether by doing the act he will do one of the things set out in subsection (2). Subsection (2) refers to impairing the operation of any computer, preventing or hindering access to programs or data, impairing the operation of programs or the reliability of data and to enabling any of these things to be done.
300. New section 3(6) increases the maximum penalty for an offence under section 3 to an unlimited fine and/or ten years imprisonment. (The maximum period of imprisonment that may be imposed for an offence under the existing section 3 is five years.)
301. This amendment is designed to ensure that adequate provision is made to criminalise all forms of denial of service attacks in which the attacker denies the victim(s) access to a particular resource, typically by preventing legitimate users of a service accessing that service, for example by overloading an Internet Service Provider of a website with actions, such as emails. Article 5 of the Council of Europe Cybercrime Convention 2001 (<http://conventions.coe.int/Treaty/EN/Treaties/Html/185.htm>) and Article 3 of the EU Framework Decision on Attacks Against Information Systems detail an offence of illegal system interference. This requires the criminalisation of the intentional serious hindering of a computer system by the inputting, transmitting, damaging, deleting, deteriorating, altering, suppressing, or rendering inaccessible of computer data. Such serious hindering is intended to cover programmes that generate denial of service attacks, or malicious code such as viruses.

Section 37: Making, supplying or obtaining articles for use in computer misuse offences

302. This section inserts a new section 3A into the Computer Misuse Act 1990. The new section creates three new offences, each punishable on conviction on indictment with two years' imprisonment or a fine or both. The offences are:
- making, adapting, supplying or offering to supply an article intending it to be used to commit, or to assist in the commission of, an offence under section 1 or section 3 (subsection (1) of the new section);

*These notes refer to the Police and Justice Act 2006
(c.48) which received Royal Assent on 8 November 2006*

- supplying or offering to supply an article believing that it is likely to be used in this way (subsection (2));
- obtaining an article with a view to its being supplied for use in this way (subsection (3)).

If a person were charged with a subsection (2) offence in relation to a quantity of articles, the prosecution would need to prove its case in relation to any particular one or more of those articles; it would not be enough to prove that the person believed that a certain proportion of the articles was likely to be used in connection with an offence under section 1 or 3.

303. The background to these new offences is the existence of a ready and growing market in electronic tools such as "hacker tools" which can be used for hacking into computer systems, and the increase in the use of such tools in connection with organised crime. Also, Article 6(1)(a) of the 2001 Council of Europe Cybercrime Convention requires the criminalisation of the distribution or making available of a computer password or similar data by which a computer system is capable of being accessed with the intent to commit an offence. The new offences are designed to implement this. (By virtue of subsection (4) of the new section 3A, "article" includes "any program or data held in electronic form" and would therefore include computer passwords as well as much else.)

Section 38: Transitional and saving provision

304. This section makes transitional arrangements for provisions of the Act that amend the Computer Misuse Act 1990 so as to provide that the amendments do not apply in relation to offences committed before the coming into force of the amendments or acts done before that time.

Section 39: Forfeiture of indecent photographs of children: England and Wales

305. This section provides a mechanism for the forfeiture of indecent photographs of children held by the police. As it stands the law allows for the forfeiture of such material only following seizure under a warrant under the Protection of Children Act 1978, and requires all material that it is proposed be forfeited to be brought before the court irrespective of whether its owner consents to its forfeiture. The effect of the amendments at section 39 is to permit forfeiture of material by the police irrespective of the power under which the material was seized, and to permit forfeiture of material along with any other material that it is not possible to separate from it. The effect of the amendments is also that forfeiture may take place without the involvement of a court unless the owner or some other person with an interest in the material objects.
306. *Subsection (1)* introduces the amendments to the Protection of Children Act 1978 to bring into effect the new procedures for the forfeiture of indecent images of children.
307. *Subsection (2)(a)* amends section 4 (entry, search and seizure) of the Protection of Children Act 1978 by omitting subsection (3) thereby removing the mandatory production in court of articles seized under that Act to be considered for forfeiture.
308. *Subsection (2)(b)* substitutes subsection (4) of section 4 of the 1978 Act to define "premises" in line with the definition in section 23 of PACE.
309. *Subsection (3)* and *subsection (4)* replace section 5 (forfeiture) of the 1978 Act and insert into that Act the Schedule set out in Schedule 11 to the Act (forfeiture of indecent photographs of children). The inserted Schedule provides the new mechanism for the forfeiture of indecent images of children and the devices that hold them regardless of the powers of seizure used.

310. *Subsection (5)* limits the amendments made by subsection (2)(b) to warrants issued under section 4 of the 1978 Act after the commencement of that subsection.
311. *Subsections (6) and (7)* ensure that the new forfeiture procedures apply to articles seized lawfully before or after these provisions come into effect provided that the property has not already been brought before the court under the 1978 Act.

Schedule 11: Schedule to be inserted into the Protection of Children Act 1978

312. *Schedule 11* inserts a new Schedule into the Protection of Children Act 1978. This Schedule creates a mechanism whereby the police can forfeit indecent images of children and the devices that hold them. For example, computer hard drives that contain indecent images where deletion of the indecent images only is not technically possible. The existing procedure applies only if such articles were seized under a warrant under the Protection of Children Act 1978 or following conviction for an offence in which the items were used. This new Schedule applies irrespective of the power the material is seized under, so will include indecent material inadvertently seized in investigations into other matters. For example, computers seized in a fraud investigation may on subsequent analysis be found to contain both the business records sought and child pornography.
313. The inserted Schedule gives the police the power to forfeit such articles and creates an avenue of appeal for owners and third parties. Paragraphs 1 to 4 of the inserted Schedule provide that once the police no longer have a legitimate reason for possessing the articles and if they believe they are suitable for forfeiture on the grounds they are indecent photographs of children, they are obliged under the Schedule to issue a notice of forfeiture to those persons that they believe to be owners of the articles, the occupier of the premises they were seized from, and the person from whom they were seized.
314. *Paragraph 4* requires the notice of forfeiture to describe the articles and explain how a notice of claim against forfeiture should be pursued. A notice of claim is made under paragraph 5 to a constable at a police station in the police area where the articles were seized. Paragraph 6 sets out what must be in a notice and that it must be made within one month from the date of the giving of the notice of forfeiture. Under paragraph 7 if no notice has been given the articles can be automatically forfeited by the police.
315. If a notice of claim is received, the constable who has custody of the property must decide under paragraphs 8 and 9 whether to return the property or take proceedings to ask the court to condemn the property.
316. *Paragraphs 10 to 12* set out the procedure for forfeiture proceedings, and permit the court, when considering an application for forfeiture from the police, to condemn or return the property or a separable part of the property. The court must return the property in question to the person claiming it, if it concludes that the property is neither an indecent image of a child, nor material which it is not reasonably possible to separate from such an image. The court must also return the property to the person claiming it if it is satisfied that although the property is an indecent image of a child, that person has a legitimate reason for possessing it. For example, under the Criminal Justice Act 1988 it is not an offence to possess an indecent photograph of one's spouse if he or she is over 16 (see paragraph 21).
317. Under paragraph 11 the court in considering a forfeiture claim is also able to order the copying of data by the police and has the power to order payment of costs for any steps that it orders to be taken. For example, a computer hard drive may have on it both indecent photographs and business records. If it is not possible to delete one but not the other, the court can order that the business records be copied before the hard drive is forfeited and then destroyed by the police.

Section 40: Forfeiture of indecent photographs of children: Northern Ireland

318. *Section 40* and *Schedule 12* make provision in relation to Northern Ireland corresponding to that made by section 39 and Schedule 11.

Section 41: Immigration and asylum enforcement functions: complaints and misconduct

319. This section enables the remit of the IPCC to be expanded to provide oversight of certain personnel in the Immigration and Nationality Directorate (IND) exercising specified enforcement functions. The IPCC was established under Part 2 of the Police Reform Act 2002.
320. *Subsection (1)* enables the Secretary of State to make regulations (subject to the negative resolution procedure) conferring functions on the IPCC in relation to the exercise of specified enforcement functions by immigration officers, and the exercise by officials of the Secretary of State of specified enforcement functions relating to immigration and asylum.
321. *Subsection (2)* provides that the reference to “enforcement functions” in subsection (1) includes reference to powers of entry, powers to search persons or property, powers to seize or detain property, powers of arrest and detention, powers of examination, and powers in connection with the removal of persons from the United Kingdom.
322. *Subsection (3)* provides that the regulations made under subsection (1) may not confer functions on the IPCC in relation to the exercise by any person of a function conferred on him by or under Part 8 of the Immigration and Asylum Act 1999, which relates to removal centres and detained persons.
323. *Subsection (4)(a)* provides for the IPCC to carry out for IND a similar role to that it performs in respect of police forces in England and Wales where it examines police complaint handling procedures and undertakes or supervises investigations of conduct and complaints. The subsection does not simply apply the relevant provisions of the Police Reform Act 2002 because the regulations will need to be tailored to the circumstances of IND. Under these regulations, the IPCC would be able to look at allegations of criminal conduct or gross misconduct within IND. Again reflecting the practice for the police, regulations could enable the IPCC to investigate directly, to supervise or manage an investigation, or to determine that there be an investigation by the appropriate authority (the IPCC may determine that there should be an internal investigation and that the IPCC may supervise or manage it), depending on the circumstances.
324. *Subsection (4)(b)* enables the Secretary of State to make provision under the regulations for payment by the Secretary of State to or in respect of the IPCC.
325. *Subsection (5)* provides that the IPCC and the Parliamentary Commissioner for Administration (“PCA”) may disclose information to each other for the purposes of exercising their functions under this section and the Parliamentary Commissioner Act 1967 respectively.
326. *Subsection (6)* provides that the IPCC and the PCA may jointly investigate a matter in relation to which the IPCC has functions under this section and the PCA has functions under the Parliamentary Commissioner Act 1967.
327. *Subsection (7)* provides that regulations made under this section may only confer functions on the IPCC in relation to the exercise of enforcement functions in or in relation to England and Wales.

Section 42 and Schedule 13: Amendments to the Extradition Act 2003 etc

328. *Section 42* introduces *Schedule 13* which makes amendments to the Extradition Act 2003 (the “2003 Act”).

Paragraphs 1 and 2: Requests for extradition of persons unlawfully at large

329. *Paragraphs 1 and 2* amend the wording in the 2003 Act relating to extradition requests for persons who are unlawfully at large in relation to the offence for which they have been requested. Case law has established that, as long as it is clear from the information contained in the warrant or request that the person is in fact alleged to be “unlawfully at large”, the warrant or request does not actually have to contain those words. And indeed many warrants and requests for the extradition from the United Kingdom of persons already convicted do not contain these words. This has given rise to difficulties, given the way in which a number of the provisions of the 2003 Act are worded.
330. These paragraphs amend various sections of the Act to refer instead to a person who “has been convicted.” The convicted person can only be sought if wanted for the purpose of sentencing or to carry out a sentence of imprisonment.

Paragraph 3: Restriction on extradition following transfer from International Criminal Court

331. *Paragraph 3* arises as a consequence of a new draft agreement between the UK and the International Criminal Court (ICC). The agreement will allow the UK to enforce sentences of imprisonment imposed by the ICC and will mean that ICC prisoners can be transferred to prisons in the UK to serve their sentences.
332. The agreement will also require the consent of the Presidency of the ICC if such a person’s extradition is then requested from the UK to another state. In Part 1 of the 2003 Act, section 11 is amended and a new section 19A is added; in Part 2, section 93 is amended and a new section 96A is added, such that extradition is barred without the consent of the Presidency of the ICC.

Paragraphs 4 to 6: Restriction on extradition in cases where trial in United Kingdom more appropriate

333. *Paragraphs 4 and 5* are amendments to Parts 1 and 2 of the Act respectively. They introduce a ground for refusal of extradition where an accused person is requested for conduct a significant part of which occurred in the UK, and it would not be in the interests of justice for the person to be tried in the requesting territory.
334. *Paragraph 6(1)* provides that an order bringing the amendments contained in paragraphs 4 and 5 into force may not be made within 12 months of the day on which the 2006 Act was passed.
335. In addition, the effect of *paragraph 6(2)* is that the Secretary of State is not obliged to make a commencement order bringing paragraph 4 or 5 into force unless both Houses of Parliament have passed a resolution requiring him to do so. In that case he would be under a duty to make such an order within a month of the resolutions being passed (*paragraph 6(3)*).

Paragraph 7: Remand of persons serving sentence in United Kingdom

336. *Paragraph 7* deals with the case where a person’s extradition has been requested, but the proceedings have been adjourned while he serves a sentence of imprisonment in England and Wales.
337. Section 131 of the Magistrates’ Courts Act 1980 makes provision for a person who is serving a domestic sentence, and who is simultaneously on remand awaiting trial for another domestic offence, to be remanded every 28 days in respect of the unconvicted

offence. Section 131 is also applied to persons serving a domestic sentence who are simultaneously the subject of an extradition request. Paragraph 7, via amendments to sections 23 and 89 of the Act, amends the references to 28 days in section 131 of the Magistrates' Courts Act 1980 to have effect as if they were a reference to 6 months.

Paragraph 8: Remands in connection with appeal proceedings

338. *Paragraph 8* makes explicit provision for remands in appeal proceedings. The paragraph amends various provisions in Part 1 and Part 2 of the 2003 Act which provide for appeal routes to the High Court and House of Lords.

Paragraph 9: Time for extradition

339. *Paragraph 9* extends the deadline by which the subject of an executed Part 1 warrant must be removed if the person decides not to appeal. Upon a decision of a judge to order extradition the person has seven days in which to lodge an appeal. If at the end of the seven day period the person decides not to appeal, the Act (unamended) provides the police with only three days in which to remove the person from the UK.
340. The amendments give the police the same period of time to remove the person from the UK in an unappealed case as in a case which has been appealed (10 days), the short timescales reflecting the requirements of the Framework Decision on the European Arrest Warrant which Part 1 of the 2003 Act implements. Sections 35, 37 and 38 in Part 1 of the Act are amended.

Paragraphs 10 to 14: Extradition of person serving sentence in United Kingdom

341. *Paragraphs 10 to 14* make provision for a person who is on licence in the UK following conviction for an offence to be extradited while on licence. While the Act makes provision for a serving prisoner to be temporarily surrendered to the requesting jurisdiction, it does not make equivalent provision for someone who has completed the custodial part of the sentence and is out on licence. The amendments also cover arrangements for both the surrender of the person to the requesting jurisdiction and for his return to the UK to complete his licence period after his trial in the other state.
342. The amendments do not apply where someone has been given a suspended sentence or conditional discharge.

Paragraphs 15 and 16: "The appropriate judge"

343. *Paragraphs 15 and 16* provide that a case may be heard by a different judge at different times.

Paragraph 17: Extradition to category 2 territories: requests and certificates

344. *Sub-paragraphs (1), (2)(a) and (3) of paragraph 17* amend section 70(1) and (2) of the Act to provide Ministers with a discretion whether to certify an extradition request for a person who:
- has been recorded by the Secretary of State as a refugee within the meaning of the Refugee Convention, or
 - who has been granted leave to enter or remain in the United Kingdom on the ground that it would be a breach of Article 2 or 3 of the Human Rights Convention to remove him to the territory to which extradition is requested.
345. *Sub-paragraph (2)(b) of paragraph 17* amends section 70(1) to provide for a Part 2 request to be certified whether or not the person is in the UK on the day of certification.
346. *Sub-paragraph (5) of paragraph 17* removes the reference at section 70(9) to the Order in Council which designated the requesting state. This is because the orders designating

states for extradition purposes are made by Order of the Secretary of State not by Order in Council. It also removes the requirement at section 70(9) for the relevant order to *accompany* each certified request when it is sent to the court. The amendment made by *sub-paragraph (4)* requires Ministers instead to *identify* the relevant order when sending the request to the court.

Paragraph 18: Time for representations and consideration of case under Part 2

347. *Sub-paragraph (2)* of *paragraph 18* reduces the time permitted for the requested person to make representations to 4 weeks. (This has the consequence of equalising the time for the making of representations with the time within which the Secretary of State is required to consider them).
348. *Sub-paragraph (3)* of *paragraph 18* provides that if the person has consented to his extradition Ministers are not required to wait until the end of the permitted period (i.e. 4 weeks) to order extradition.

Paragraph 19: Applications for discharge or for extension of time limit

349. *Paragraph 19* amends section 99 of the 2003 Act to provide for applications in England and Wales to be made to the Magistrates' Court instead of the High Court in the following cases: where the person is applying for discharge (because Ministers have not ordered extradition within the permitted period), and where Ministers are applying for an extension of time in which to consider the case (because it raises issues that are too complex to be dealt with in the permitted period).

Paragraph 20: Scotland: references to Secretary of State

350. *Paragraph 20* corrects a small drafting flaw in the 2003 Act which attributed to Scottish Ministers a function that should properly be attributed to the Secretary of State. Section 141 is thereby amended, with the effect that, in Scottish cases, references to section 70(2)(b) (as amended) and section 93(4)(c) are references to the Secretary of State and not to Scottish Ministers.

Paragraph 21: Issue of part 3 warrant: persons unlawfully at large who may be arrested without domestic warrant

351. *Paragraph 21* amends section 142 of the 2003 Act to provide for additional grounds upon which a Part 3 warrant (a UK European Arrest Warrant for transmission to another Category 1 territory) may be issued, where the wanted person is unlawfully at large.

Paragraph 22: Issue of part 3 warrant: domestic warrant issued at common law by judge in Northern Ireland

352. *Paragraph 22* amends section 142(8) of the 2003 Act by adding common law warrants issued by a Crown Court judge in Northern Ireland to the list of domestic warrants.

Paragraph 23: Dealing with person for pre-extradition offences following extradition to UK

353. *Paragraph 23* amends section 146(3)(c) to provide the basis upon which the UK authorities can issue a request for pre-extradition offences to be dealt with following a wanted person's return to the UK. The amendment makes provision for such a request to be issued by a judge, analogous to the issue of the original Part 3 warrant.

Paragraph 24: Extradition requests to territories not applying European framework decision to old cases

354. *Paragraph 24* makes provision (by inserting a new section 155A into the 2003 Act) for the issue of extradition requests (as opposed to Part 3 warrants) to certain category

1 territories for certain old offences. A small number of territories have availed themselves of the provisions of Article 32 of the Framework Decision on the European Arrest Warrant, which states that where a person is wanted for offences committed before 7 August 2002 an extradition request rather than a European Arrest Warrant may be issued for their extradition.

Paragraph 25: Extradition of serving prisoners

355. *Paragraph 25* adds a new section to make it clear that a serving prisoner may be removed from custody in the United Kingdom if he is extradited to another country.

Paragraph 26: Authentication of receivable documents

356. *Paragraph 26* corrects an oversight in the 2003 Act which removed the ability of an officer of the requesting state to certify documents so that they are receivable in an extradition hearing in the UK. The amendment to section 202(4) of the 2003 Act restores the receivability of documents in court which have been authenticated by an officer, in addition to documents authenticated by a judicial authority of the requesting state.

Paragraphs 27 to 30: Powers of High Court in relation to bail decisions by magistrates' courts etc

357. *Paragraphs 27 to 30* deal with bail proceedings in the extradition process.
358. *Paragraph 27* gives a requested person refused bail by a magistrates' court an avenue of appeal.
359. *Paragraph 28* changes the venue for appeals in bail proceedings from the Crown Court, which has no other involvement in extradition proceedings, to the High Court, which hears all other appeals in extradition proceedings.
360. *Paragraphs 29 and 30* provide a prosecution right of appeal against the grant of bail in extradition proceedings in Northern Ireland where bail has been granted either by a Magistrates' Court or by a County Court Judge.
361. Section 22 of the Criminal Justice Act 1967, section 1(1A) of the Bail (Amendment) Act 1993 and section 10 of the Justice (Northern Ireland) Act 2004 are thereby amended.

Paragraphs 31 to 33: Credit against sentence for periods of remand in custody of persons extradited to UK

362. *Paragraphs 31 to 33* amend section 243 of the Criminal Justice Act 2003, section 101 of the Powers of Criminal Courts (Sentencing) Act 2000 and section 47 of the Criminal Justice Act 1991 to provide that time served abroad while awaiting extradition to the UK can be considered for deduction from the person's eventual UK sentence, subject to judicial discretion in line with domestic sentencing legislation. Without the amendments, credit could not be given in cases where the person is convicted before he is extradited, but is not sentenced until after he is extradited. There were also no provisions to give credit to juveniles sentenced to a detention and training order. The amendments apply regardless of when the person is convicted or sentenced in the UK, and regardless of the person's age.

Paragraphs 34 and 35: Amendments consequential on amendments in Part 1

363. *Paragraph 34* provides for an amendment to the Bail Act 1976 which is consequential on the amendments in relation to the provisions amending "unlawfully at large".
364. *Paragraph 35* amends Schedule 9 to the Constitutional Reform Act 2005 in respect of amendments to have effect on the Extradition Act 2003, substituting "Supreme Court" for "House of Lords".

Section 43: Designation of the United States of America

365. *Section 43(1)* makes provision for an amendment to be made to the Extradition Act 2003 (Designation of Part 2 Territories) Order 2003, which would restore the requirement for the United States to provide *prima facie* evidence with its extradition requests to the UK.
366. *Section 43(2)* provides that an order bringing such an amendment into force may not be made within 12 months of the day on which the 2006 Act was passed (i.e. 8 November 2006), nor may such an order be made if the instruments of ratification of the 2003 Extradition Treaty between the United States and the United Kingdom have been exchanged.
367. In addition, the effect of *subsection (3)* is that the Secretary of State is not obliged to make a commencement order bringing section 43(1) into force unless both Houses of Parliament have passed a resolution requiring him to do so. In that case he would be under a duty to make such an order within a month of the resolutions being passed (*subsection (4)*).

Section 44: Repatriation of foreign national prisoners

368. *Section 44* amends the Repatriation of Prisoners Act 1984 to enable a prisoner to be transferred without his consent where the relevant international arrangement does not require a prisoner to consent to transfer.

Section 45: Attendance by accused at certain preliminary or sentencing hearings

369. *Section 45* substitutes for the existing section 57 of the Crime and Disorder Act 1998 a new Part 3A consisting of new sections 57A to 57E. The existing section 57 allows courts to direct that a defendant in custody should appear at preliminary hearings over a live link from prison. The new Part 3A extends the provision to allow live links also to be used, provided the defendant consents, in sentencing hearings and in preliminary hearings where the defendant is at a police station (whether in police detention or in answer to bail).
370. The new section 57A sets out provisions common to sections 57B to 57E. Subsection (2) of new section 57A provides that an accused is to be treated as present when he attends via a live link. Subsection (3) sets out relevant definitions. A “live link” means that that the accused must be able to see and hear, and be seen and heard by, the court. While “live link” will typically refer to giving evidence over a closed circuit television link, the definition is drafted sufficiently widely to apply to any technology with the same effect. “Custody” will typically refer to prison or secure psychiatric accommodation, but also includes secure juvenile accommodation. The section states that custody does not include police detention, which is defined as having the same meaning as in PACE (but new section 57C makes separate provision for the use of live links where a defendant is in police detention).
371. The new section 57B provides that the Crown Court or a magistrates’ court may direct an offender who is expected to be in custody during a preliminary hearing to attend that hearing by way of link: section 57B(1) and (2). The defendant need not be physically present at court for a live link direction to be given: the court may give a live link direction either on the papers or immediately before a hearing with the defendant present over live link. Subsection (5) provides that, before giving or rescinding a live link direction, the court must give the parties the opportunity to make representations.
372. If a magistrates’ court decides not to give a live link direction where it has power to do so, it must state its reasons in open court and record the reasons in the register of its proceedings (subsection (6)).
373. The new section 57C provides that a magistrates’ court may direct the accused to attend a preliminary hearing over a live link from a police station. This applies both to

defendants who are detained at the police station (subsection (3)), and to defendants who have been bailed to return to the police station for a live link appearance in connection with the offence (“live link bail”) (subsection (4)). Subsection (7) contains an express requirement for the defendant’s consent to be given before the court makes a live link direction. An accused answering to live link bail is to be treated as having surrendered to custody of the court from the time when it makes a live link direction in respect of him (subsection (10)).

374. New section 57D provides that where the accused attends a preliminary hearing over a live link and he is convicted in the course of it, and the court proposes to proceed immediately to sentence, the accused may continue to attend over the link provided that he agrees and the court is satisfied that it is not contrary to the interests of justice.
375. Subsection (3) provides that, where a preliminary hearing over a live link continues as a sentencing hearing under subsection (2), the offender can give oral evidence over the live link only if he has specifically agreed to give evidence in that way and the court is satisfied that it is not contrary to the interests of justice.
376. The new section 57E provides that, where it is likely that an offender who has been convicted by a court of an offence will be held in custody during a sentencing hearing or hearings, the court may, of its own motion or following an application from either party, direct that the offender attend over a live link, provided that he agrees and the court is satisfied that it is not contrary to the interests of justice (subsection (5)).
377. The court may, if it is in the interests of justice to do so, rescind a live link direction, either of its own motion or on the application of either party (subsection (6)).
378. Subsection (7) provides that the offender can only give oral evidence over the live link under this section if he has specifically agreed to do so and the court is satisfied that it is not contrary to the interests of justice.
379. If the court refuses an application for, or rescinds, a live link direction under section 57E, it must state its reasons in open court and, in the magistrates’ courts, record the reasons in the register of its proceedings (subsection (8)).

Section 46: Live Link bail

380. *Section 46* amends the Police and Criminal Evidence Act 1984 (‘PACE’) to create a special class of bail – “live link bail”. The amended subsection 47(3) of PACE allows the police to grant bail subject to a duty to appear at a police station for the purpose of a live link hearing (see the amendment made by *subsection (5)* of section 46).
381. Subsection (2) of new section 46ZA of PACE (inserted by *subsection (3)*) provides that persons answering live link bail are not treated as being in police detention. But this is qualified by new section 46ZA(3) and (4) which provide that the accused is to be treated as if he had been arrested for and charged with the offence for which he was given live link bail if -
 - the accused informs the police that he does not intend give his consent to a live link direction,
 - a live link is not available, or
 - the court determines not to give a live link direction (whether because the defendant does not give his consent or for any other reason).

In such cases (and in cases where an accused granted live link bail is arrested under section 46A) section 38 of PACE will operate again in relation to the accused. This means that the defendant may (depending on the circumstances) be detained and brought before a court or granted bail afresh subject to a duty to appear in court in the usual way or to attend again at the police station for the purposes of a live link hearing.

382. Section 46A(1) of PACE allows the police to arrest without warrant a person who fails to attend a police station to answer bail (including the new live link bail). Subsection (1ZA) of section 46A of PACE (inserted by *subsection (4)*) extends this power to cover the case where an accused person does attend a police station in answer to live link bail but leaves the police station before the court has begun to consider giving a live link direction, without informing a constable that he does not intend to give consent to the direction.

Section 47: Evidence of vulnerable accused

383. *Section 47* inserts into the Youth Justice and Criminal Evidence Act 1999 a new Chapter 1A consisting of new sections 33A to 33C.
384. New section 33A allows the court in criminal proceedings, on application by the accused, to direct that any evidence given by the accused should be given over a live video link. Before doing so the court must be satisfied that it would be in the interests of justice, and that the following conditions are met:
- if the accused is under the age of 18, that his ability to participate effectively as a witness is compromised by his level of intelligence or social functioning, and that his ability to participate effectively would be improved by giving evidence over a live link: new section 33A(4).
 - if the accused is aged 18 or over, that he is unable to participate in the proceedings effectively because he has a mental disorder or a significant impairment of intelligence or social function, and that his ability to participate effectively would be improved by giving evidence over a live link: new section 33A(5).
385. “Mental disorder” for the purposes of subsection 33A(5) is a disorder within the meaning of the Mental Health Act 1983.
386. New section 33A draws a distinction between juvenile and adult defendants. The starting assumption in relation to adult defendants is that almost everyone should and can give evidence in court. The criteria set out in subsection (5), which include the requirements in section 16(2)(a)(i) and (ii) of the Youth Justice and Criminal Evidence Act 1999, are intended to provide the court with a structured approach to the decision-making process and to ensure that the use of a live link is reserved for exceptional cases where the accused has a condition that prevents effective participation as a witness and so may prevent a fair trial from taking place. In the case of a juvenile accused the test of eligibility is less strict: there is no reference to a mental disorder or impairment, and it is sufficient that the ability to participate is compromised. The lower threshold recognises that it may be more common for juveniles to experience difficulties during the trial through limited intelligence and social development, than it would be for adults. But new section 33A(4) is aimed at juvenile defendants with a low level of intelligence or a particular problem in dealing with social situations, and is not intended to operate merely because an accused is a juvenile and is nervous, for example.
387. Where a direction for a live link has been given, the accused must give all his evidence through a live link (subsection (3)). The accused may not give oral evidence other than through a live link; for example, any cross-examination of the accused is also to take place through a live link (subsection (6)). The court can discharge a direction if it appears to be in the interests of justice to do so. This is a matter for the court to determine in the exercise of its discretion, and may cover a wide range of circumstances, for example, where an accused finds that giving evidence over a live link is very difficult and believes that giving evidence in open court would allow him to give a better quality of evidence (subsection (7)). A direction also ceases to have effect if the proceedings relating to the accused are determined or abandoned.
388. New section 33B is an interpretation provision. It defines in subsection (1) the arrangements that will amount to a “live link”. Whilst “live link” will typically involve

*These notes refer to the Police and Justice Act 2006
(c.48) which received Royal Assent on 8 November 2006*

evidence over a closed circuit television link, the definition is drafted sufficiently widely to encompass any technology with the same effect, which will enable the accused to see and hear a person in the courtroom, and to be seen and heard by the persons listed in subsection (2).

Section 48: Appeals under Part 1 of the Criminal Appeal Act 1968

389. *Section 48* amends section 22 of the Criminal Appeal Act 1968 to enable the Court of Appeal Criminal Division, after taking account of any representations from the parties, to direct that an appellant in custody who is entitled to attend his appeal (whether by virtue of section 22(1) or leave given under section 22(2)) is to do so by way of a live link. “Live link” has the same meaning as in the new section 57A (3) of the Crime and Disorder Act 1998. The Court may rescind a live link direction at any time. Section 23(5) of the 1968 Act is amended to provide that an appellant may only give oral evidence over a link only if the direction expressly provides.