

YOUTH JUSTICE AND CRIMINAL EVIDENCE ACT 1999

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

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

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

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

Section 34: Complainants in proceedings for sexual offences

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

Section 35: Complainants and other witnesses who are children

134. This section replaces and extends the provision made by section 34A of the Criminal Justice Act 1988, which prohibited unrepresented defendants from personally cross-examining child witnesses in cases of sex and violence. Unrepresented defendants will not now be allowed to cross-examine in person a child who is either the complainant of, or a witness to the commission of, an offence of kidnapping, false imprisonment or abduction.
135. *Subsection (2)* extends the prohibition to witnesses whose age when they gave their evidence in chief (e.g. by means of video recording or earlier in the trial) meant that they then counted as children even if by the time of the cross-examination they have passed that age limit.
136. *Subsection (4)* sets out the age limits below which witnesses are regarded as children for the purposes of this section. Following the example of sections 32 and 34A of the Criminal Justice Act 1988, section 35 sets the age limit at 17 for sexual offences and 14 for the other offences covered by this section.

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

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

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

Section 38: Defence representation for purposes of cross-examination

139. This section makes provision for representatives to be appointed to conduct the cross-examination when an unrepresented defendant is banned from cross-examining under sections 34, 35 or 36. If a defendant is banned from personally cross-examining a particular witness, the court will ask him to appoint his own legal representative to carry out that cross-examination, and to let the court know that he has made an appointment by a set time. If he does not, the court will know before the start of the proceedings that no legal representative has been appointed.
140. If the defendant does not appoint a legal representative, the court will have to consider whether it is necessary, in the interests of justice, for the witness's evidence to be tested. If it decides that it is, it will appoint a legal representative with rights of audience in the court to cross-examine the witness in the interests of the defendant. However, a court-appointed representative will not have been instructed by the defendant and so cannot be responsible to him (*subsection (5)*).
141. Rules of court will cover, among other things, how a legal representative appointed by the court would be given evidence or other material relating to the proceedings so that he could test the witness's evidence (*subsections (6) and (7)*).

Section 39: Warning to jury

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

Section 40: Funding of defence representation

143. This section deals with the way that legal representatives appointed by defendants, and by the courts, will be paid. Where a defendant is banned from personally cross-examining, he will be able to apply for legal aid for his representative on the same means-tested basis as other defendants in criminal cases. Court-appointed legal representatives will be paid from central funds rather than from legal aid.
144. Following the implementation of the Access to Justice Act 1999, representatives appointed under this Chapter will be funded under the new arrangements for legal representation in criminal proceedings. In other words, defendants eligible for legal representation would be represented by a lawyer contracted by the Legal Services Commission or a salaried defender. When courts appoint lawyers themselves, they will be able to appoint either contracted lawyers or salaried defenders with rights of audience in the court.