These notes refer to the Coroners and Justice Act 2009 (c.25) which received Royal Assent on 12 November 2009

CORONERS AND JUSTICE ACT 2009

EXPLANATORY NOTES

THE ACT

Commentary on Sections

Part 3 - Criminal evidence, investigations and procedure

Chapter 1: Anonymity in investigations

Section 74: Qualifying offences

412. *Subsection (1)* stipulates that an offence is a qualifying offence if it is listed in *subsection (2)* and the condition in *subsection (3)* is satisfied in relation to it. The offences listed in subsection (2) are murder and manslaughter, and the condition in subsection (3) is that the death was caused by being shot with a firearm, and/or by being injured with a knife. The purpose of defining qualifying offence in this way is to limit investigation anonymity orders so that they are available only in respect of investigations concerning suspected homicides (murder and manslaughter) where death was caused by a gun and/or a knife.

413. *Subsection (4)* gives power to the Secretary of State to amend subsections (2) and (3) by order so as to alter what is a qualifying offence. The order making power is subject to the affirmative resolution procedure (see section 176(4)(a) and (5)(c)).

Section 75: Qualifying criminal investigations

414. *Subsection (1)* defines a qualifying criminal investigation as one which is conducted by an investigating authority, wholly or in part with a view to ascertaining whether a person should be charged with a qualifying offence (as defined in section 74), or whether a person charged with a qualifying offence is guilty of it. Investigating authorities are listed in *subsection (2)*. They are:

- police forces in England and Wales;
- the British Transport Police Force;
- the Serious Organised Crime Agency; and
- the Police Service of Northern Ireland.

415. *Subsection (3)* gives power to the Secretary of State to amend *subsection (2)* by order so as to alter the list of investigating authorities. The power is linked to (although not contingent upon) the power to amend section 74. If that power is exercised so as to add a new offence to subsection (2) of that section, the power in section 75, may need to be exercised to add a person not already listed in subsection (2) as an investigating authority, if that person has power to investigate the newly added offence. This order making power is subject to the affirmative resolution procedure (see section 176(4)(a) and (5)(c)).

416. *Subsection (4)* provides that an order made under subsection (3) may modify any provision of this Chapter.

Section 76: Investigation anonymity orders

417. *Subsection (1)* defines an investigation anonymity order. An investigation anonymity order is an order made by a justice of the peace, in relation to a person specified in the order, prohibiting the disclosure of any information that (a) identifies the specified person as a person who is or was able or willing to assist a qualifying criminal investigation specified in the order, or (b) that might enable the specified person to be identified as such a person. The order applies to the officers and others involved in the investigation, and indeed to anybody else, including the specified person. The purpose of the order is to prevent disclosure of information relating to the identity of an individual who is or was able or willing to assist a qualifying criminal investigation, and thus to protect an informant from harm and to provide reassurance to a reluctant informant that his or her identity will be protected by a court order.

418. *Subsection (3)* provides that an investigation anonymity order is not contravened if a person discloses information identifying the specified person, or which might enable the specified person to be identified, as someone who is or was able or willing to assist a specified qualifying criminal investigation, if the person disclosing the information does not know and has no reason to suspect that an order is in force.

419. *Subsection (4)* provides that an investigation anonymity order is not contravened if a person discloses information which might enable the specified person to be identified as someone who is or was able or willing to assist a specified qualifying criminal investigation, if the person disclosing the information does not know, and has no reason to suspect, that the information might enable the specified person to be so identified.

420. *Subsections (5) and (6)* provide that an investigation anonymity order is not contravened if a person ("A") discloses the fact that an investigation anonymity order has been made to another person ("B"), where A knows that B is aware that the informant for whose benefit the order was made is or was able or willing to help with an investigation.

421. *Subsection (7)* provides that an investigation anonymity order is not contravened where disclosure of information is to a person who is involved in the specified qualifying criminal investigation or in the prosecution of an offence to which the investigation relates, and the disclosure is made for the purposes of the investigation or prosecution.

422. *Subsection (8)* provides that an investigation anonymity order is not contravened where disclosure is required by any enactment or rule of law, or where required by a court order. However, *subsection (9)* provides that a person may not rely on subsection (8) in a case where (a) it might have been determined that the person was required or permitted to withhold the information but (b) the person disclosed the information without there having been a determination as to whether the person was required or permitted to withhold the information. The effect of subsection (9) on subsection (8) is to limit the protection based on being obliged to disclose to cases where there is no exception to that obligation and cases where an exception that could have applied to protect the informant (such as public interest immunity) has been raised.

423. *Subsection (10)* provides that disclosing information in contravention of an investigation anonymity order is a criminal offence. A person who is guilty of this offence is liable to imprisonment and/or a fine. On summary conviction the maximum term of imprisonment is 12 months (or, in Northern Ireland, six months). Following conviction on indictment, the maximum term of imprisonment is five years. However, *subsections (3) to (8)* set out the circumstances in which an order will not be contravened.

424. *Subsection (13)* defines the term "specified" as meaning specified in the investigation anonymity order.

Section 77: Applications

425. *Subsection (1)* provides that an application must be made to a justice of the peace. A justice of the peace includes any person acting as such, whether a lay justice, or a judge who is a District Judge (Magistrates' Court) (see section 25 of the Courts Act 2003), or a Crown Court judge (see section 66 of the Courts Act 2003).

426. The subsection also restricts the availability of investigation anonymity orders to investigating authorities and certain prosecutors. Only certain persons in those organisations (and persons to whom they delegate the function under section 81) may apply for an order. Those persons are described in *subsection (1)(a) to (g)*:

(a) in a case where a police force in England and Wales is conducting the qualifying criminal investigation, the chief officer of police of the police force;

(b) in a case where the British Transport Police Force is conducting the qualifying criminal investigation, the Chief Constable of the British Transport Police Force;

(c) in a case where the Serious Organised Crime Agency is conducting the qualifying criminal investigation, the Director General of the Serious Organised Crime Agency;

(d) in a case where the Police Service of Northern Ireland is conducting the qualifying criminal investigation, the Chief Constable of the Police Service of Northern Ireland;

(e) the Director of Public Prosecutions;

(f) the Director of Revenue and Customs Prosecutions; and

(g) the Director of Public Prosecutions for Northern Ireland.

427. *Subsection (2)* makes it clear that the applicant is not obliged to give notice of the application to a suspect or someone who has been charged with an offence subject to a qualifying criminal investigation (or their legal representatives). Such notice could defeat the purpose of the order.

428. *Subsection (3)* requires the applicant to inform the justice of the peace of the identity of the person whose identity is to be protected by the investigation anonymity order. However, the justice of the peace can direct the identity of that person to be withheld.

429. *Subsection (4)* permits a justice of the peace to grant an application on the papers, without an oral hearing. The Government expects, however, that in the vast majority of cases there will be an oral hearing.

430. *Subsection (5)* provides that where a justice of the peace determines an application without a hearing the designated officer in relation to that justice of the peace must notify the applicant about the decision, and *subsection (6)* makes similar provision for Northern Ireland.

431. *Subsection (7)* provides the Secretary of State with a power to amend subsection (1) by order. This will allow the persons who may make an application to be altered. There may for example be amendments because of changes to investigating or prosecuting organisations. The order-making power will also allow for consequential changes for example to section 81 (see *subsection (8)*).

Section 78: Conditions for making order

432. This section sets out the conditions that have to be satisfied when an application for an investigation anonymity order is made.

433. Under *subsection (2)*, an investigation anonymity order may be made where the justice of the peace is satisfied that there are reasonable grounds for believing that the five

conditions specified in *subsections (3) to (8)* are satisfied. This is to avoid placing an unduly high burden of proof on the applicant, particularly at the early stages of an investigation when the information available may be limited but an investigation anonymity order in respect of a particular informant is highly desirable in order to progress the investigation.

434. The condition in *subsection (3)* is that a qualifying offence has been committed. (Qualifying offence is defined in section 74.)

435. The condition in *subsection (4)* is that the person likely to have committed the offence was at least 11 but under 30 years old at the time the offence was committed.

436. The condition set out in *subsections (5) and (6)*, is that the person likely to have committed the offence is a member of a group (1) which it is possible to identify from the criminal activities that its members appear to be engaged in and (2) it appears that the majority of the members of the group are at least 11 but under 30 years old. The reason for the conditions in subsections (4) to (6) is that the provisions are targeted at informants in qualifying criminal investigations who are afraid of reprisals from street gangs. The age range set out is the understood age range for membership of such gangs, and the activities are the understood activities of such gangs.

437. The condition in *subsection (7)* is that the informant in respect of whom the order would be made has reasonable grounds to fear intimidation or harm if he or she were identified as a person who is or was able or willing to assist in the investigation into the homicide at issue.

438. The condition in s*ubsection (8)* has two limbs, both of which must be satisfied. The first is that the person who would be specified in the order, is able to provide information that would assist the qualifying criminal investigation, and the second is that that person is more likely than not to provide the information if the order was made.

439. *Subsection (9)* provides that where more than one person is suspected of having caused the death under investigation, the five conditions need be satisfied only in relation to one of the suspects.

440. *Subsection (10)* gives power to the Secretary of State to modify or repeal subsections (4) to (6) and subsection (9) by order. The conditions set out in subsections (3), (7) and (8) cannot therefore be modified or repealed using this power. This order making power is subject to the affirmative resolution procedure (see section 176(4)(a) and (5)(c)).

441. *Subsection (11)* provides that an order made under subsection (10) may modify any provision of this Chapter.

Section 79: Appeal against refusal of order

442. *Subsection (1)* permits an applicant to appeal to a judge of the Crown Court if the justice of the peace refuses the application for an investigation anonymity order.

443. *Subsection (2)* requires that in order to appeal a refusal of an application, the applicant must indicate an intention to appeal a refusal either in the application for the order or before the justice of the peace at the hearing if there is one. Otherwise no appeal will be possible.

444. *Subsections (3) and (4)* provide that if the applicant has given an indication of intention to appeal, in the event of a refusal of the application the justice must nevertheless make the investigation anonymity order which has been applied for. The order will continue in force until the appeal is determined or disposed of. This is to err on the side of caution and to protect the informant's identity until such time as the appeal has been dealt with.

445. *Subsection (5)* provides that where an appeal is made the judge must consider afresh the application for an investigation anonymity order and section 77(3) to (5) applies accordingly to the determination of the application by the judge.

Section 80: Discharge of order

446. Situations may arise in which an investigation anonymity order should be discharged, for example, where the informant no longer has any fear of reprisals. *Subsection (1)* therefore permits a justice of the peace to discharge an investigation anonymity order if it appears to the justice to be appropriate to do so.

447. *Subsection (2)* provides that a justice of the peace may discharge an investigation anonymity order on an application by the person who applied for the original order or on an application by the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions, the Director of Public Prosecutions for Northern Ireland or the informant in respect of whom the order was made.

448. Under *subsections (3) and (8)* an application for the discharge of an investigation anonymity order may be made only if there has been a material change of circumstances since the order was originally made, or since the last application to discharge the order was made. It will be for the justice of the peace to determine what amounts to a material change in circumstances.

449. *Subsection (4)* provides that where a person applies for the discharge of an investigation anonymity order any other person who is eligible to apply for the discharge of the order is entitled to be party to the proceedings.

450. *Subsection (*5) provides that if an application to discharge an investigation anonymity order is made by a person other than the informant in respect of whom the order was made, the justice may not determine the application unless (a) the informant has had an opportunity to oppose the application, or (b) the justice is satisfied that it is not reasonably practicable to communicate with the informant.

451. *Subsection (6)* provides a party to the proceedings with a right to appeal the justice of the peace's decision to a judge of the Crown Court.

452. *Subsection (7)* provides that if a party to the proceedings indicates an intention to appeal against a determination to discharge the investigation anonymity order, a justice of the peace who makes such a determination must provide for the discharge of the order not to have effect until the appeal is disposed of.

Section 81: Delegation of functions

453. By virtue of section 77, the power to apply for an investigation anonymity order is vested in a number of individuals, such as the chief officer of police of a police force. Section 81 makes provision for those individuals to delegate their functions in relation to investigation anonymity orders to other persons. It would not be conducive to operational efficiency for chief officers to deal with every order personally.

Section 82: Public interest immunity

454. This section provides that this Chapter of the Act does not affect the common law rules on public interest immunity.

Section 83: Review

455. This section requires the Secretary of State to undertake a review of the operation of investigation anonymity orders and provide Parliament with a report of the review within two years of the commencement of section 77.

Section 84: Application to armed forces

456. By *subsection (1)*, the provisions of this Chapter of the Act do not apply to investigations concerning service offences as defined by the Armed Forces Act 2006. However, *subsections (2) and (3)* give power to the Secretary of State to make provision by order

equivalent to the provisions in this Chapter for that sort of investigation (subject to any modifications the Secretary of State considers appropriate). Provision may be made in such way as the Secretary of State considers appropriate, including applying any of the provisions of this Chapter, with or without modifications. This will allow the Secretary of State to provide for the use of investigation anonymity orders in investigations concerning service offences. An order made under this power is subject to the negative resolution procedure (section 176(4)).

Section 85: Interpretation of this Chapter

457. Section 85 defines terms which are used in this Chapter of the Act.

Chapter 2: Anonymity of witnesses

Section 86: Witness anonymity orders

458. *Subsection (1)* sets out what a witness anonymity order is. Breach of the order by the unauthorised disclosure of a witness's identity will fall to be dealt with as contempt of court. Subsection (1) defines the order in such a way as to grant the court a wide discretion as to how the court protects the anonymity of a witness in any particular case. For example, in some cases the court might consider that it is only necessary to screen the witness from the defendant and public; in others it might think it necessary to apply a whole range of measures.

459. *Subsection (2)* lists the kinds of measures the court may use to secure the witness's anonymity. The list is only illustrative; the court may employ other measures if it thinks fit. Technological developments and the practical arrangements in the court may affect such decisions.

460. Under *subsection (4)* the court may not make a witness anonymity order which prevents the judge, magistrates or jury either from seeing the witness or from hearing the witness's natural voice. The judge, magistrates and jury must always be able to see and hear the witness.

Section 87: Applications

461. *Subsection (1)* provides that applications for a witness anonymity order may be made by defendants as well as prosecutors. This reflects the position in the case of *Davis*, where the Court of Appeal allowed a defence witness as well as prosecution witnesses to give evidence anonymously. The Government expects that defence applications are most likely to be made in multi-handed cases (that is, where there is more than one defendant) where one defendant does not wish a witness's identity to be known by the other defendant or defendants. But this subsection does not exclude the possibility of a defence application in a single-handed case.

462. *Subsection (2)* provides that, where an application for a witness anonymity order is made by the prosecutor, the identity of witnesses may be withheld from the defence before and during the making of the application. This ensures that the operation of the legislation is not impeded by procedural challenges to the power of the prosecution to withhold this information pending the court's determination of the application for the witness anonymity order.

463. Subsection (2) therefore provides that prosecutors are under no obligation to disclose the witness's identity to the defence at the application stage but must inform the court of the identity of the witness. Similar provision is made for the defence in *subsection (3)*, except that the defence must always disclose the identity of the witness to the prosecutor and the court but do not have to disclose it to any other defendant.

464. In addition, *subsection (4)* provides that where the prosecution or the defendant proposes to make an application for a witness anonymity order, information that might

identify the witness can be taken out of any relevant material which is disclosed before the application has been determined. This does not, however, override the obligation to disclose the identity of the witness to the court (in the case of a prosecution application) or to the court and prosecutor (in the case of a defence application).

465. Subsection (2) also enables the court to direct that it should not be informed of the identity of the witness. This provides for the possibility that, whilst in the vast majority of cases the court will require to be informed of the witness's identity, there may be rare cases (particularly national security related cases) where even the court will neither need nor wish to know it.

466. *Subsections (6) and (7)* set out two basic principles. *Subsection (6)* states that on an application for a witness anonymity order every party to the proceedings must be given the opportunity to be heard. However, it may be necessary in the course of making the application to reveal some or all of the very information to which the application relates: for example, the name and address of the witness who is fearful of being identified. So *subsection (7)* provides that the court has the power to hear any party without a defendant or his or her legal representatives being present. This reflects the existing practice, by which prosecution applications are expected to be made in the absence of any other parties in the case, with the defence able to make representations later at a hearing with the prosecution (and possibly other defendants) present. It is expected that defence applications will be permitted without other defendants being present but will always be made in the presence of the prosecution.

467. *Subsection (8)* confirms that this section does not affect the power of the Criminal Procedure Rule Committee to set out further procedures relating to witness anonymity in the Criminal Procedure Rules.

Section 88: Conditions for making order

468. *Subsection (2)* requires three conditions to be met before a court can make a witness anonymity order. They are described as conditions A, B and C.

469. *Subsection (3)* sets out condition A, which is that the measures to be specified in the order are necessary for one of two reasons. The first is to protect the safety of the witness or another person or to prevent serious damage to property. There is no requirement for any actual threat to the witness or any other person. The second is to prevent real harm to the public interest. This will cover the public interest in national security and in the ability of police or other agencies to conduct undercover work.

470. *Subsection (4)* sets out condition B, which is that the effect of the order would be consistent with the defendant receiving a fair trial. Thus the grant of the order must be compliant with Article 6 of the ECHR.

471. *Subsection (5)* sets out condition C, which is that the witness's testimony is such that in the interests of justice the witness ought to testify and that either the witness would not testify if the order was not made or there would be real harm to the public interest if the witness were to testify without an order being made (such harm might, for example, arise as a result of the identity of a member of the security services being made public).

472. *Subsection (6)* specifies that in determining for the purposes of condition A whether the order is necessary to protect the safety of the witness, another person or to prevent damage to property, the court must have regard to the witness's reasonable fear of death or injury either to himself or herself or to another person ("we'll get your kids") or reasonable fear that there would be serious damage to property ("we'll fire-bomb your house").

Section 89: Relevant considerations

473. *Subsection (1)* requires the court to have regard to the considerations set out in *subsection (2)* when deciding whether to make an order. The court must also have regard to any other factors it considers relevant.

474. The considerations in subsection (2) are the defendant's general right to know the identity of a witness, the extent to which credibility of the witness is relevant in assessing the weight of the evidence he or she gives, whether the witness's evidence might be the sole or decisive evidence, whether the witness's evidence can be properly tested without knowing the witness's identity, whether the witness has a tendency or any motive to be dishonest and whether alternative means could be used to protect the witness.

Section 90: Warning to jury

475. This section requires the judge to warn the jury in a Crown Court trial, in such way as the judge considers appropriate, so as to ensure that the fact that the order was made does not prejudice the defendant. The provision is based on section 32 of the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act) which makes similar provision for jury warnings where a special measures direction has been made to assist a vulnerable or intimidated witness.

Section 91: Discharge or variation of order

476. The Act does not provide for a right of appeal against the making of, or refusal to make, a witness anonymity order. The Government considers that existing appeal procedures are sufficient. Thus in the case of the prosecutor, the appeal against a terminating ruling under Part 9 of the 2003 Act or Part IV of the Criminal Justice (Northern Ireland) Order 2004 is available. In the case of a defendant, the matter may be raised on appeal against conviction. Section 91 does however provide for the court that made an order to discharge or vary it in those proceedings, either on an application by a party to the proceedings or on its own initiative. This power may be used where, for example, a witness who previously gave evidence anonymously is content for the anonymity to be lifted.

477. Under *subsection (3)* the court must give every party to the proceedings an opportunity to be heard before determining an application for variation or discharge of an order or before varying or discharging an order on its own initiative.

Section 92: Discharge or variation after proceedings

478. This section provides the court that makes a witness anonymity order with the power to discharge or vary that order after the proceedings have finished. The court may vary or discharge the order either on an application by a party to the proceedings or on an application made by the witness. This may be appropriate for example, if a considerable period of time has elapsed since the trial and the circumstances of the witness have changed.

479. *Subsection (4)* requires that the court, prior to discharging or varying a witness anonymity order, provide all parties to the proceedings and the witness the opportunity to be heard unless it is not reasonably practicable to do so, for example, if it is not possible to trace the person concerned.

Section 93: Discharge or variation by appeal court

480. This section provides that an "appeal court" (defined in *subsection (6)* as the Court of Appeal, Court of Appeal in Northern Ireland or Court Martial Appeal Court) can discharge or vary a witness anonymity order made in the proceedings which gave rise to the appeal. Under this Chapter as under the CEWAA, an appeal court already has the

power to make a witness anonymity order itself. However, this power does not of itself give it the power to discharge or vary an order made by the lower court.

481. This section gives an appeal court the flexibility it requires. There is no provision for an application procedure: it is intended that the power will be exercised by the appeal court of its own motion, how and when it thinks fit. The provision also applies to witness anonymity orders made under the CEWAA (see paragraph 16 of Schedule 22).

482. *Subsection (1)* sets out that the power applies where a court has made a witness anonymity order in a criminal trial and the defendant has been convicted, found not guilty by reason of insanity or been found to be under a disability and to have done the act charged. The new power will therefore apply in any appeal against conviction or other finding.

483. *Subsection (2)* gives an appeal court the discretion to take into account a wide range of factors before discharging or varying an anonymity order.

484. *Subsection (3)* requires the appeal court to hear any representations made by the parties to the trial proceedings, unless it would be impracticable to communicate with them. This mirrors the duty of the lower court to hear representations from the parties before making, discharging or varying an order during the course of the trial.

485. Under *subsection (4)* the duty to hear representations does not fetter the appeal court's power to hear a party in the absence of one or more of the defendants and their legal representatives.

Section 94: Special provisions for service courts

486. This section provides for the application of the witness anonymity provisions in relation to criminal proceedings before the service courts. Matters of law arising in the service courts, with the exception of the Court Martial Appeal Court and its successor under the Armed Forces Act 2006, are dealt with by the judge advocate. There are no juries in the service courts but such courts do have lay members. *Subsection (3)* requires the lay members to be warned as to the effect of the making of an order in the same way as juries are warned.

Section 95: Public interest immunity

487. This section provides that this chapter of the Act does not affect the common law rules on public interest immunity.

Section 96: Power to make orders under the 2008 Act

488. This section repeals sections 1 to 9 and 14 of the CEWAA, which provide for making a witness anonymity order under that Act. Paragraphs 16 and 17 of Schedule 22 preserve the effect of a witness anonymity order made under the CEWAA before 1 January 2010 and set out how such orders are to operate.

Section 97: Interpretation of this Chapter

489. This section defines terms which are used in this Chapter of the Act. *Subsection (2)* ensures that where the court that makes a witness anonymity order is a magistrates' court, it will be open to any magistrates' court in the same local justice area (or the same petty sessions district in Northern Ireland) to discharge or vary the order, not only the court that originally made the order. There might otherwise be difficulties if, for example, a member of the court that made the order were to retire.

Chapter 3: Vulnerable and intimidated witnesses

Section 98: Eligibility for special measures: age of child witnesses

490. Chapter 1 of Part 2 of the 1999 Act enables a court in criminal proceedings to give a direction that one or more special measures should apply to a witness when giving evidence. A special measures direction can only be made in relation to a witness who is eligible for assistance. The criteria for eligibility are also set out in that Part.

491. Section 98 amends section 16(1)(a) of the 1999 Act so that all persons aged under 18 will automatically qualify as witnesses eligible for assistance under Part 2 of the 1999 Act. Currently, only witness aged under 17 are automatically eligible for assistance.

Section 99: Eligibility for special measures: offences involving weapons

492. Section 17(1) of the 1999 Act provides that a witness is eligible for assistance if the court is satisfied that the quality of the witness's evidence would be reduced on the grounds of fear or distress about testifying. Section 17(4) of the 1999 Act gives automatic eligibility for complainants in respect of sexual offences who are witnesses. Automatic eligibility means that the court does not need to be satisfied that the quality of the witness's evidence will be diminished for the purposes of establishing eligibility.

493. Section 99 extends section 17 and gives automatic eligibility for assistance to witnesses in proceedings related to "relevant offences". The court does not need to be satisfied that the quality of the witness's evidence will be diminished for the purposes of establishing eligibility. However under section 19 of the 1999 Act, the court still has to determine whether any of the available special measures will in fact improve the quality of the witness's evidence and consider whether any such measure or measures might inhibit the evidence being effectively tested. Relevant offences are specified gun and knife crimes which are listed in new Schedule 1A to the 1999 Act (inserted by Schedule 14 to the Act). A witness can inform the court that he or she does not wish to be eligible for assistance.

494. The list of relevant offences is inserted as a new Schedule 1A to the 1999 Act and the list can be amended by order made by the Secretary of State. The effect of *subsection (3)* is that the order-making power is subject to the affirmative resolution procedure.

Section 100: Special measures directions for child witnesses

495. Section 100 amends section 21 of the 1999 Act so as to modify the "primary rule" that applies to child witnesses. This rule (before amendment of this section) requires all child witnesses to give evidence in chief by a video recorded statement and any further evidence by live link, unless (except for child witnesses in need of "special protection" in certain sexual and other offence cases) the court is satisfied that to do so will not improve the quality of that child's evidence.

496. *Subsections (2) and (7)* remove the special category of child witnesses who are "in need of special protection". The effect is to place all child witnesses on the same footing, regardless of the offence to which the proceedings relate.

497. *Subsections (4) and (5)* modify the primary rule so as to allow a child witness to opt out of giving evidence by a combination of video recorded evidence in chief and live link provided the court is satisfied, after taking into account certain factors, that not giving evidence in that way will not diminish the quality of the child's evidence. If as a result of opting out of the primary rule, the child witness would fall to give his or her evidence in court (and not by way of a live link) a secondary requirement applies. This obliges the child witness to give evidence in court in accordance with the special measure in section 23 of the 1999 Act, that is, from behind a screen that shields the witness from viewing the defendant. The secondary requirement does not apply if the court considers

it would not maximise the quality of the child's evidence. The child may also opt out of this secondary requirement, subject to the agreement of the court.

498. *Subsection (6)* inserts new subsection (4C) into section 21 of the 1999 Act which sets out the factors the court must consider in deciding whether the child witness may opt out of the primary rule and also in deciding whether the child witness may opt out of the secondary requirement to give evidence from behind a screen. These are: the witness's age and maturity, the witness's ability to understand the consequences of giving evidence in court rather than via video-recorded statement, any relationship between the witness and accused, the witness's social, cultural and ethnic background, and the nature and circumstances of the offence being tried, as well as any other factors the court considers relevant.

499. *Subsection (8)* makes related amendments to section 22 of the 1999 Act, which relates to witnesses who attain the age of 18 after the video recorded statement is made.

Section 101: Special provisions relating to sexual offences

500. Section 101 inserts new section 22A into the 1999 Act. Section 22A makes special provision for complainants in respect of sexual offences tried in the Crown Court. New section 22A(7) and (9) require the admission of the complainant's video-recorded statement under section 27 of the 1999 Act, unless that requirement would not maximise the quality of the complainant's evidence.

501. New section 22A(1) and (3) establish that this new section will apply if the complainant of a sexual offence is a witness in proceedings relating to that sexual offence, but not if the witness is under 18 years old (the rules set out in section 21 apply to a witness under 18). Also the requirement to admit the video recorded evidence in chief only applies if a party to the proceedings makes an application requesting that it should be admitted.

502. New section 22A(2) excludes proceedings in magistrates' courts from these provisions. This does not mean that video recorded evidence in chief is not admissible in such proceedings, but only that the rule in section 22A in favour of admitting such evidence does not apply.

Section 102: Evidence by live link: presence of supporter

503. Section 24 of the 1999 Act enables the court to make a direction allowing a witness to give evidence by live link. Section 102 amends this section so that the court, when making such a direction can also direct that a person specified by the court can accompany the witness when the witness is giving evidence by live link. The court must take the witness's wishes into account when it determines who is to accompany the witness.

Section 103: Video recorded evidence in chief: supplementary testimony

504. Section 27 of the 1999 Act enables the court to give a special measures direction that allows a video recorded statement to be admitted as a witness's evidence in chief. Section 103 amends this section so as to relax the restrictions on a witness giving additional evidence in chief after the witness's video-recorded statement has been admitted.

505. *Subsection (2)* removes the prohibition on asking a witness questions about matters the court considers have been covered adequately in the recorded statement. The effect of this is that the witness may be asked additional questions regarding:

- matters that are not covered in the recorded statement (as is now the case under section 27 of the 1999 Act), and
- matters that are covered in the recorded statement (so long as the permission of the court is given).

506. *Subsections (3) and (4)* remove the requirement that where an application to ask additional questions is made by a party, the court can give permission to ask a witness supplementary questions only if there has been a material change in circumstances since the court gave the direction to admit the recording.

Section 104: Examination of accused through intermediary

507. The powers of the court under Chapter 1 of Part 2 of the 1999 Act to make directions allowing for special measures when giving evidence do not apply where the witness is the accused. Chapter 1A gives the court more limited powers regarding the evidence of accused persons. Section 104 increases these powers by adding sections 33BA and 33BB to Chapter 1A. These new sections provide for the use of an intermediary where certain vulnerable accused persons are giving evidence in court.

508. Subsections (1) and (2) of new section 33BA provide that the court may make a direction allowing an intermediary in any proceedings if the accused satisfies either the condition in subsection (5) or the conditions in subsection (6) and making the direction is necessary to ensure that the accused receives a fair trial.

509. Subsections (3) and (4) of new section 33BA set out the nature of a direction and the role of the intermediary when the accused gives evidence. The intermediary relays questions that are put to the accused and relays the answers to the questioner. In doing so the intermediary can explain to the accused what the questions mean and to the questioner what the answers mean. Subsection (3) requires the intermediary to be a person approved by the court.

510. Subsection (5) of new section 33BA sets out the condition that is to be satisfied before a court may allow an accused aged under 18 to use an intermediary. This is that the accused's ability to participate effectively in the trial in terms of giving oral evidence as a witness is compromised by his or her level of intellectual ability or social functioning.

511. Subsection (6) of new section 33BA sets out the condition applying to an accused who is 18 years or older. The condition is that the accused is prevented from participating effectively as a witness giving oral evidence because the accused has a mental disorder (as defined by the Mental Health Act 1983) or a significant impairment of intelligence and social function.

512. Subsections (7) and (8) of new section 33BA are about the manner in which an examination through an intermediary is to be conducted, whether or not other provision about the examination is made. The examination is to take place in circumstances which enable the judge or justices, the legal representatives, the jury and a co-accused to see and hear the examination and also enable the judge or justices and the legal representatives to communicate with the intermediary.

513. Subsections (9) and (10) of new section 33BA require intermediaries to declare that they will perform the role faithfully and extend the Perjury Act 1911 to persons in the role of an intermediary. This is the same obligation that applies to foreign language interpreters and also to intermediaries assisting witnesses under section 29 of the 1999 Act.

514. New section 33BB gives the court power to discharge a direction for the use of an intermediary where this is no longer necessary for the purposes of a fair trial. The court may also vary a direction. A court must state publicly its reasons for discharging or varying an intermediary direction. This accords with similar provisions in section 20 of the 1999 Act that apply to special measures directions made in respect of witnesses.

Section 105: Age of child complainant

515. Section 35 of the 1999 Act prevents the cross-examination of a "protected witness" by an accused in person. The definition of a "protected witness" includes a child. Section 105 amends the definition of "child" in section 35 of the 1999 Act to mean a person under the age of 18 (as opposed to 17).

Chapter 4: Live links

Section 106: Directions to attend through live link

516. *Subsection (2)* amends section 57B of the Crime and Disorder Act 1998, which makes provision for courts to give live link directions for preliminary hearings where the defendant is in custody. The effect of the provision is to enable a single justice of the peace to give or rescind such a direction, thus obviating the need to convene a full court for that purpose.

517. *Subsection (3)* amends section 57C of the Crime and Disorder Act 1998 by removing the requirement for the defendant's consent to the use of a live link for a preliminary hearing in a magistrates' court where the defendant is at the police station, whether detained there in connection with the offence or having returned to answer live link bail (subsection (3)(b)). It also adds a requirement for the court to be satisfied that a live link direction would not be contrary to the interests of justice (subsection (3)(a)) and removes the ability of a court to rescind a live link direction before the hearing (subsection (3)(c)).

518. *Subsection (4)* amends section 57D of the Crime and Disorder Act 1998 by removing the requirement for a defendant's consent to be sentenced by live link where he or she has pleaded guilty at a live link preliminary hearing. The subsection adds a requirement for the court to be satisfied that the defendant continuing to attend through the live link would not be contrary to the interests of justice. The separate requirement for the defendant's consent if he or she is to give oral evidence at this kind of live link sentencing hearing is also removed.

519. *Subsection (5)* amends section 57E of the Crime and Disorder Act 1998 by removing the need for the defendant's consent for a live link sentencing hearing where he or she has previously been convicted of the offence and is in custody. The separate requirement for the defendant's consent if he or she is to give oral evidence at this kind of live link sentencing hearing is also removed.

Section 107: Answering to live link bail

520. This section amends section 46ZA of the Police and Criminal Evidence Act 1984 (which sets out the circumstances in which a person answering live link bail may be treated as being in police detention), and section 46A(1ZA) of that Act, by making changes that are consequential on the removal of the consent requirement by section 106.

Section 108: Searches of persons answering to live link bail

521. *Subsection (1)* amends the Police and Criminal Evidence Act 1984 by inserting new sections 54B and 54C giving police the power to search defendants attending the police station for the purposes of answering live link bail. Such searches would at present depend on defendants giving their consent to be searched, as they are not treated as in police detention when they enter a police station in answer to live link bail and the existing powers of search in that Act therefore do not apply to them.

522. Subsections (2) and (3) of new section 54B provide that a constable may seize and retain anything found on the defendant if the constable reasonably believes it may jeopardise the maintenance of order in the station, endanger anyone in the police station, or be evidence relating to an offence. New section 54B(4) provides that a constable may record any or all of the items seized and retained.

523. Subsections (5) and (6) of new section 54B provide that the constable searching must be of the same sex as the defendant and that the constable may not carry out an intimate search.

524. New section 54C(1) provides that anything seized and retained under new section 54B(2) must be returned to the defendant when he or she leaves the police station. However, this is subject to subsections (2) and (3) of new section 54C which provide that items can continue to be retained by a constable:

- in order to establish the lawful owner of the item, where there are reasonable grounds for believing that it has been obtained in consequence of the commission of an offence, or
- if the item is evidence of or relating to an offence, for use as evidence at trial for an offence or for forensic examination or investigation in connection with an offence unless a photograph or copy of the item would be sufficient for that purpose (new section 54C(4)).

525. New section 54C(5) preserves the power of a court to make an order under section 1 of the Police (Property) Act 1897.

526. *Subsection (2)* of section 108 inserts new subsection (1ZB) into section 46A of the Police and Criminal Evidence Act 1984 which extends the power of arrest for failure to answer to police bail to include defendants who attend the police station to answer live link bail but refuse to be searched under the new section 54B.

527. *Subsection (3)* of the section inserts a new paragraph 27A into Part 3 of Schedule 4 to the Police Reform Act 2002, to ensure that designated detention officers, as well as constables, can use the powers in new sections 54B and 54C to search and seize. Where a detention officer exercises the power to seize things found pursuant to a search the officer must deliver the things seized to a constable as soon as practicable and in any case before the person from whom it was seized leaves the police station.

Section 109: Use of live link in certain enforcement hearings

528. *Subsection (1)* of this section adds a new section 57F to the Crime and Disorder Act 1998 to permit a live link direction to be given in respect of hearings held to enforce a confiscation order, in much the same way as for preliminary hearings under section 57B of that Act. This will enable enforcement proceedings in respect of confiscation orders made against persons who are in custody having been sentenced for the substantive matter to take place by live link between the prison and the magistrates' court.

529. Subsection (1) of the new section 57F sets out the conditions for making a live link direction in enforcement proceedings for confiscation orders. Subsection (4) of the new section provides that the direction may be given by the court of its own motion or on application by a party to the proceedings. The court may rescind a live link direction at any time before or during the hearing (new section 57F(5)); the court must allow the parties to the proceedings to make representations before giving or rescinding such a direction (new section 57F(6)), and if the person in respect of whom the order has been made is to give oral evidence at this type of hearing, the court must be satisfied that it is not contrary to the interests of justice for him or her to do so (new section 57F(8)). The powers to give and rescind a direction are exercisable by a single justice of the peace (new section 57F(10)).

530. *Subsection (2)* makes necessary consequential amendments and defines the types of confiscation order in respect of which a direction under the new section 57F may be given.

Section 110: Direction of registrar for appeal hearing by live link

531. This section permits the power to give a live link direction for hearings in the Court of Appeal to be exercised by the registrar.

Chapter 5: Miscellaneous

Section 111: Effect of admission of video recording

532. Section 111 repeals section 138(1) of the 2003 Act. The repealed subsection provides that where an eyewitness's video recorded evidence in chief has been admitted as evidence under section 137 of that Act, the eyewitness cannot give further evidence in chief about a matter which, in the opinion of the court, is adequately covered in the recording.

Section 112: Admissibility of evidence of previous complaints

533. Section 120 of the 2003 Act provides for the admission of certain previous statements of witnesses and is part of the code on hearsay evidence set out in that Act.

534. A previous statement will be admissible as evidence of the facts contained within it as if it were oral evidence provided the witness who made it is called to give evidence in the relevant proceedings, states that he or she made the previous statement and believes it to be true, and one of the following also applies:

- section 120(5) – the statement describes or identifies a person, place or thing:
- section 120(6) – the statement was made when matters were fresh in the witness's memory and he or she cannot reasonably be expected to remember the matters stated;
- section 120(7) – the statement consists of a complaint by the victim of the alleged offence which satisfies various requirements including the requirement that it was made as soon as could reasonably be expected after the alleged conduct.

535. Section 112 amends section 120(7) of the 2003 Act so as to remove the requirement that "the complaint was made as soon as could reasonably be expected after the alleged conduct". Provided the other criteria for admissibility set out in section 120(7) are met, such complaints will be admissible regardless of when they were made.

Section 113: Powers in respect of offenders who assist investigations and prosecutions

536. The 2005 Act creates a statutory framework to clarify and strengthen common law provisions that provide for immunity and sentence reductions for defendants who co-operate in the investigation and prosecution of others who may have committed criminal offences. Section 71 of that Act confers on a "specified prosecutor" (as defined in section 71(4)) power to grant a person immunity from prosecution. Section 72 of the 2005 Act confers on specified prosecutors power to give an undertaking that any information which a person provides will not be used against that person in any criminal proceedings, or proceedings under Part 5 of the Proceeds of Crime Act 2002 (POCA), which are brought in England and Wales or Northern Ireland. Section 73 of the 2005 Act gives specified prosecutors power to enter into a written agreement with a defendant, for the defendant to provide assistance in relation to an offence and provides for the court to take into account the assistance given or offered when determining the sentence to impose on the defendant. There is also a power in section 74 for specified prosecutors to refer a case back to the court where a defendant benefits from a sentence reduction but then reneges on the agreement to provide assistance.

537. *Subsections (2) and (5)* of section 113 amend section 71(1) and section 72(1) of the 2005 Act to provide that these provisions can only be used for the investigation or prosecution of serious criminal offences. While a person who assists the authorities under these powers can be offered immunity or a restricted use undertaking or sentence reduction agreement for *any* offence, the assistance must be in relation to the investigation or prosecution of an offence that is capable of being tried in the Crown Court (that is it is either an indictable offence or triable either way).

538. *Subsection (3)* amends section 71 of the 2005 Act by adding the FSA and the Secretary of State for BIS to the list of "specified prosecutors" who can use the powers set out in sections 71 to 74 of the 2005 Act.

539. *Subsection (4)* adds new subsections (6A) to (6C) to section 71 of the 2005 Act. New subsection (6C) provides that the power of the FSA and BIS to grant immunity from prosecution under section 71 in any case is subject to the consent of the Attorney General. This reflects the fact that the other "specified prosecutors" under the 2005 Act are superintended by the Attorney General and the Attorney General is consulted before any grant of immunity is made by a superintended prosecutor. The requirement that the FSA and BIS obtain the Attorney General's consent before granting immunity under section 71 is aimed at putting FSA and BIS in a comparable position to the other "specified prosecutors" when granting immunity under section 71 of the 2005 Act.

540. New subsection (6A) provides that the FSA and BIS may delegate the powers in sections 71 to 74 of the 2005 Act within their respective organisations only to one prosecutor (or a nominated deputy in that person's absence). New subsection (6B) disapplies the normal arrangements for discharging the functions of the FSA in order to ensure that these powers are delegated only in the circumstances set out in new subsection (6A).

541. *Subsection (7)* introduces a new section 75B which provides the Attorney General with the power to issue guidance to all the "specified prosecutors" on the use of the powers set out at sections 71 to 74 of the 2005 Act.

Section 114: Bail: assessment of risk of committing an offence causing injury

542. Section 114 amends Schedule 1 to the Bail Act 1976.

543. *Subsection (2)* provides that a defendant who is charged with murder may not be granted bail unless the court is of the opinion that there is no significant risk that, if released on bail, he or she would commit an offence that would be likely to cause physical or mental injury to another person.

544. *Subsection (3)(a)* provides that, in deciding whether it is of the opinion that there is no such significant risk, the court must have regard to any relevant considerations in paragraph 9 of Part 1 of Schedule 1 to the Bail Act 1976.

545. *Subsection (3)(b)* amends paragraph 9 in relation to bail decisions where the alleged offence is imprisonable and triable in the Crown Court. It provides that, in deciding whether to grant bail in a case where the court is satisfied that there are substantial grounds for believing the person would commit an offence while on bail, the court must have regard to the risk that such further offending would, or would be likely to, cause physical or mental injury to another person.

Section 115: Bail decisions in murder cases to be made by a Crown Court judge

546. Section 115 provides that a person who is charged with murder (including one charged with murder and other offences – *subsection (6)*) may not be granted bail except by a judge of the Crown Court. The power of magistrates to consider bail in murder cases, whether at the first hearing or after a breach of an existing bail condition, is thus removed.

547. *Subsection (3)* provides that where a person charged with murder appears, or is brought before, a magistrates' court, a bail decision must be made by a judge of the Crown Court as soon as reasonably practicable, and in any event within 48 hours (excluding public holidays – *subsection (7)*) beginning with the day after the person's appearance in the magistrates' court.

548. *Subsection (4)* provides that the person must if necessary be committed in custody to the Crown Court to enable a bail decision to be made, and *subsection (5)* that it is

immaterial whether he or she is at the same time sent for trial or remanded following adjournment of proceedings under section 52 of the Crime and Disorder Act 1998. That section generally requires a defendant charged with an offence only triable in the Crown Court to be sent by the magistrates' court to the Crown Court forthwith.

Section 116: Indictment of offenders

549. The need for section 116 arises from the decision of the House of Lords in *R v Clarke, R v McDaid* [2008] UKHL 8. Under section 2 of the Administration of Justice (Miscellaneous Provisions) Act 1933 (the 1933 Act), a bill of indictment becomes an indictment upon which a trial on indictment may proceed only once the bill has been signed by a proper officer of the court. Where a trial proceeds without a bill of indictment having been signed, the House of Lords confirmed in these cases that those proceedings and any subsequent conviction and sentence will be invalid as signature of the bill of indictment is a necessary prerequisite to the Crown Court obtaining jurisdiction to try the case.

550. Section 116 removes from section 2 of the 1933 Act the requirement that a bill of indictment be signed by the proper officer of the court with the result that the bill becomes an indictment on being preferred (*subsection (1)(a) and (b)*). Subsection (1)(c) inserts into section 2 of the 1933 Act three new subsections which provide that objections to an indictment based on an alleged failure to observe procedural rules may not be taken after the start of the trial proper, that is, when the jury has been sworn. (For this purpose a preparatory hearing does not mark the start of trial.)

551. Subsection (1)(d) and (2) make consequential amendments.

552. Paragraph 26 of Schedule 22 provides that, for the purposes of any proceedings before a court after the Act is passed, the amendments are deemed always to have had effect. They apply even if the proceedings (including appeals) have begun before the Act was passed.

Section 117: Detention of persons under section 41 of the Terrorism Act 2000

553. Section 117 provides powers for further scrutiny of the treatment of terrorist suspects detained under section 41 of the Terrorism Act 2000.

554. *Subsections (1) to (3)* amend section 36 of the Terrorism Act 2006 (review of terrorism legislation) to clarify that the independent reviewer of terrorism legislation may review and report on the treatment of persons detained under section 41 of the Terrorism Act 2000 for more than 48 hours.

555. *Subections (4) to (8)* amend section 51 of the Police Reform Act 2002 (independent custody visitors for places of detention).

556. Subsection (5) provides that all police authorities must, in the arrangements they make regarding visits to detainees by independent custody visitors, require independent custody visitors who visit a person detained under section 41 of the Terrorism Act 2000 ("a suspected terrorist detainee") to prepare and submit a report on that visit; and the arrangements must also ensure that a copy of that report is sent to the independent reviewer of terrorism legislation.

557. Subsection (6) gives independent custody visitors the authority to listen to or view any audio or video recordings made of police interviews with a suspected terrorist detainee. Subsection (7) provides the police with the power to refuse, in certain circumstances, an independent custody visitor access to such recordings, whether in part or whole.