CRIMINAL EVIDENCE BILL 2018

EXPLANATORY NOTES

These notes are circulated for the information of Members with the approval of the Member in charge of the Bill, HM Attorney General

INTRODUCTION

1. These explanatory notes relate to the Criminal Evidence Bill 2018. They have been prepared by the Attorney General's Chambers order to assist readers of the Bill. They do not form part of the Bill and have not been endorsed by the Legislative Council.

2. The notes need to be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill.

3. Part 1 comprises clauses 1 to 3 which provide respectively for the resulting Act's short title and commencement.

4. Part 2 contains a comprehensive restatement of the law relating to evidence in criminal proceedings.

5. Division 1 (evidence of bad character) comprises clauses 4 to 16.

    a. Clause 4 defines the sort of evidence whose admissibility is to be determined under the new statutory scheme. The definition covers evidence of, or of a disposition towards, misconduct. The term "misconduct" is further defined in clause 16 as the commission of an offence or other reprehensible behaviour. This is intended to be a broad definition and to cover evidence that shows that a person has committed an offence, or has acted in a reprehensible way (or is disposed to do so) as well as evidence from which this might be inferred.

6. The definition is therefore intended to include evidence such as previous convictions, as well as evidence on charges being tried concurrently, and evidence relating to offences for which a person has been charged, where the charge is not prosecuted, or for which the person was subsequently acquitted. This reflects the state of the current law. On the latter point, in the case of R. v. Z (prior acquittal) ([2000] 2 AC 483), the House of Lords held that there was no special rule that required the exclusion of evidence that a person had been involved in earlier offences, even if

they had been acquitted of those crimes, provided that that evidence was otherwise admissible. Thus, if there were a series of attacks and the defendant were acquitted of involvement in them, evidence showing or tending to show that he had committed those earlier attacks could be given in a later case if it were admissible to establish that he had committed the latest attack. The Act preserves the effect of this decision.

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

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

9. Thus, if the defendant were charged with burglary, the prosecution's evidence on the facts of the offence – any witnesses to the crime, forensic evidence etc – would be admissible outside the terms of these provisions. So too would evidence of an assault that had been committed in the course of the burglary, as evidence to do with the facts of the offence. Evidence that the defendant had tried to intimidate prosecution witnesses would also be admissible outside this scheme as evidence of misconduct in connection with, as appropriate, the investigation or the prosecution of the offence, as would allegations by the defendant that evidence had been planted. However, evidence that the defendant had committed a burglary on another occasion or that a witness had previously lied on oath would not be evidence to do with the facts of the offence or its investigation or prosecution and would therefore be caught by the definition in clause 4 and its admissibility would fall to be dealt with under the Act's provisions.

10. The intention is that this Part of the Act will provide a new basis for the admissibility of previous convictions and other misconduct. Accordingly, clause 5 abolishes the common law rules governing the admissibility of such evidence. This abolition does not extend to the rule that allows a person's bad character to be proved by his reputation. This common law rule is preserved as a category of admissible hearsay in clause 5(2). However the admissibility of a person's bad character, in circumstances where it was being proved by reputation, would fall to be determined under this part of the Act.

11. Clause 6 sets out the circumstances in which, outside the alleged facts of the offence and its investigation and prosecution, evidence can be given of the previous misconduct of a person other than a defendant in the proceedings. This might be a witness in the case or a victim, but it extends to any other person as well. Evidence of their bad character is not to be given without the permission of the court and can only be given if it meets one of three conditions. These are:

    a. it is important explanatory evidence,

    b. it is of substantial probative value to a matter in issue and that issue is one of substantial importance in the case, or

c. the prosecution and defence agree that the evidence should be admitted.

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

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

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

15. Evidence which is of probative value is admissible if it meets an “enhanced relevance” test contained in clause 6(1)(b). That is, it must be of substantial probative value and the matter in issue to which it relates must be of substantial importance in the context of the case. Thus evidence which has no real significance to an issue or is only marginally relevant would not be admissible, nor would evidence that goes only to a trivial or minor issue in the case.

16. Clause 6(3) directs the court to take into account a number of factors when assessing the probative value of evidence of a non-defendant’s bad character. These include the nature and number of the events to which it relates and when those events occurred. When considering evidence that is probative because of its similarity with evidence in the case (for example, to suggest that the alleged victim had acted in a particular way), the court is directed by sub-clause (3)(c) to consider the nature and extent of the similarities and dissimilarities. Similarly, where the evidence is being tendered to suggest a particular person was responsible, sub-clause (3)(d) requires the court to consider the extent to which the evidence shows or tends to show that the same person was responsible each time.

17. At present evidence of a defendant’s bad character is generally inadmissible, subject to a number of restricted common law and statutory exceptions. Clauses 7 to 13 set

out the circumstances in which such evidence is to be admissible in future. In summary, these provide an inclusionary approach to a defendant's previous convictions and other misconduct or disposition, under which relevant evidence is admissible but can be excluded in certain circumstances if the court considers that the adverse effect that it would have on the fairness of the proceedings requires this. Clause 7 sets out the gateways through which this evidence can be admitted, whilst clauses 8 to 12 provide additional definitional material. Clause 12 provides an important safeguard where this sort of evidence has been influenced by other witnesses or evidence in the case and is consequently false or misleading.

18. Clause 7(1) provides that evidence of a defendant's bad character is admissible in the following circumstances:

    a. all the parties agree to it being given;

    b. the defendant introduces the evidence himself or it is given in response to a question put by the defendant (or his counsel) that is intended to elicit it;

    c. it is important explanatory evidence;

    d. it is relevant to an important issue between the defendant and prosecution;

    e. it has substantial probative value in relation to an important issue between the defendant and a co-defendant;

    f. it corrects a false impression given by the defendant about himself or herself;

    g. the defendant has attacked the character of another person.

19. This is subject to an application by the defendant to have the evidence excluded if admitting it would have such an adverse effect on the fairness of the trial that it ought to be excluded (clause 7(3)). The circumstances in which such an application can be made are where the evidence is relevant to an issue in the case between the defendant and prosecution or has become admissible because of the defendant's attack on another person.

20. The test to be applied is designed to reflect the existing position under the common law, under which the Deemster assesses the probative value of the evidence to an issue in the case and the prejudicial effect of admitting it, and excludes the evidence where it would be unfair to admit it. The intention is for the courts to apply the fairness test set out here in the same way. In applying the test, the courts are directed specifically under clause 7(4) to take account of the amount of time that has elapsed since the previous events and the current charge.

21. Clause 8 defines what is meant by "important explanatory evidence". The definition mirrors that used in the context of non-defendants (see "non-defendant's bad character": clause 6).

22. Clause 9 deals with the meaning of a "matter in issue between the defendant and the prosecution" and relates to evidence of a defendant's bad character that is admissible

because it is relevant to an important matter at issue between the defendant and the prosecution (see clause 7(1)(d)). Evidence might be relevant to one of a number of issues in a case. For example, it might help the prosecution to prove the defendant's guilt of the offence by establishing their involvement or state of mind or by rebutting the defendant's explanation of his conduct. Only prosecution evidence is admissible on this basis – see clause 9(6) – and the defendant may apply to have the evidence excluded under clause 7(3).

23. Clause 9(1)(a) makes it clear that evidence that shows that a defendant has a propensity to commit offences of the kind with which he is charged can be admitted under this head. For example, if the defendant is on trial for grievous bodily harm, a history of violent behaviour could be admissible to show the defendant's propensity to use violence. Evidence is not, however, admissible on this basis if the existence of such a propensity makes it no more likely that the defendant is guilty. This might be the case where there is no dispute about the facts of the case and the question is whether those facts constitute the offence (for example, in a homicide case, whether the defendant's actions caused death).

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

25. An offence of the same description is defined by reference to how the offence appears in an information or a written charge. It therefore relates to the particular law that has been broken, rather than the circumstances in which it was committed. An offence will be of the same category as another if they both fall within a category drawn up by the Department of Home Affairs in an order. The categories must contain offences that are of the same type (clause 9(4)), for example, offences involving violence against the person or sexual offences.

26. Clause 9(1)(b) makes it clear that evidence relating to whether the defendant has a propensity to be untruthful (in other words, is not to be regarded as a credible witness) can be admitted. This is intended to enable the admission of a limited range of evidence such as convictions for perjury or other offences involving deception (for example, obtaining property by deception), as opposed to the wider range of evidence that will be admissible where the defendant puts his or her character in issue by for example, attacking the character of another person. Evidence will not be admissible under this head where it is not suggested that the defendant's case is untruthful in any respect, for example, where the defendant and prosecution are agreed on the facts of the alleged offence and the question is whether all the elements of the offence have been made out.

27. Clause 10 relates to evidence that is relevant to issues between the defendant and a co-defendant (as mentioned in clause 7(1)(e)). Evidence is only admissible on this basis by (or at the behest of) a co-defendant: see clause 10(2) – the prosecution

therefore cannot avail themselves of this provision. A co-defendant may wish to adduce evidence of a defendant's bad character if his defence is, for example, that it was the defendant, rather than himself, who was responsible for the offence. Under clause 7(1)(e) evidence is admissible on issues between the defendant and a co-defendant if it has substantial probative value in relation to an important issue in the case. In other words, evidence that has only marginal or trivial value would not be admissible, nor would it be admissible if the issue to which it related were itself marginal or trivial in the case as a whole. However, once this threshold is passed, there is no power for the court to exclude the evidence. This ensures that defendants are able to put forward the widest range of evidence in their defence and reflects the current position. Clause 10 restricts the admissibility of evidence of a defendant's bad character that only shows that he has a propensity to be untruthful (that is, the defendant is not credible as a witness) to circumstances in which the defendant has undermined the co-defendant's defence. In these circumstances, his credibility may well have a bearing on resolving the issues in the case.

28. Clause 11 relates to evidence that is admissible under clause 7(1)(f) to correct a false impression given by the defendant. For this provision to apply, the defendant must have been responsible for an assertion that gives a false or misleading impression about himself or herself. This might be done expressly, for example, by claiming to be of good character when this is not the case, or implied, for example, by leading evidence of his conduct that carries an implication that he is of a better character than is actually the case. It may also be done non-verbally, through his conduct in court, such as his appearance or dress (clause 7(4) and (5). For example, if a defendant were to give a false impression by suggesting he were a priest, he could not escape this provision simply by not making such an assertion verbally but choosing to wear a clerical collar.

29. Clause 11(2) sets out the circumstances in which a defendant is to be treated as being responsible for an assertion. These include the defendant making the assertion himself, either in his evidence or in his representative's presentation of his case or, if used in evidence, when being questioned under caution or on being charged with the offence. It also includes assertions made by defence witnesses, those by any witness if responding to a question by the defendant that was intended (or likely to) elicit it and out of court assertions made by anybody if adduced by the defendant.

30. In correcting the impression, the prosecution (and only the prosecution – see clause 11(7)) may introduce evidence of the defendant's misconduct that has probative value in correcting it, in other words, is relevant to correcting the false impression. Exactly what evidence is admissible will turn on the facts of the case, in particular, the nature of the misleading impression he has given. Evidence is only admissible to the extent that it is necessary to correct that impression: clause 11(6). A defendant may withdraw or disassociate himself from a false or misleading impression. Evidence to correct the impression is not then admissible: clause 11(3). In light of this, clause 6(3), under which a defendant may apply to have evidence of his bad character excluded, does not apply to this evidence.

31. Clause 12 deals with an “attack on another person’s character” and with evidence that becomes admissible as a result of the defendant attacking another person’s character (see clause 7(1)(g)). A defendant attacks another person’s character if he gives evidence that they committed an offence (either the one charged or a different one) or have behaved in a reprehensible way: clause 7(1)(a) and 7(2)). This is similar to the definition of evidence of bad character in clause 3, but it also includes evidence relating to the facts of the offence charged and its investigation and prosecution. Thus, a defendant would be attacking a prosecution witness if he claimed that they were lying in their version of events or adduced evidence of their previous misconduct to undermine their credibility. But a suggestion that a witness is mistaken is not intended to engage this provision.

32. A defendant also attacks another person’s character if he or his representative ask questions that are intended (or are likely) to elicit evidence of this sort or if the defendant makes an allegation of this nature when questioned under caution or on being charged with the offence and this is heard in evidence – (clause 12(1)(b) and (c)).

33. Where a defendant has attacked another person’s character, evidence of his own bad character becomes admissible (but only by the prosecution – see clause 12(3)). Evidence admissible on this basis may, however, be excluded under clause 7(3).

34. Evidence admissible under clause 7(1)(g) – as under clause 6(1)(f) - will primarily go to the credit of the defendant. Currently a jury would be directed that evidence admitted in similar circumstances, under the Criminal Evidence Act 1946, goes only to credibility and is not relevant to the issue of guilt. Such directions have been criticised and the new statutory scheme does not specify that this evidence is to be treated in such a way. However, it is expected that a Deemster conducting a jury trial will explain the purpose for which the evidence is being put forward and direct the jury about the sort of weight that can be placed on it.

35. Clause 13 deals with circumstances in which bad character evidence has been admitted but it later emerges that the evidence is contaminated, that is, has been affected by an agreement with other witnesses or by hearing the views or evidence of other witnesses so that it is false or misleading (see clause (5)).

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

37. However, there may be cases where it is not possible to expect the jury to put this evidence completely out of their mind. There are existing common law powers for the

Deemster to withdraw a case from the jury at any time following the close of the prosecution case. Clause 13 builds on these powers by conferring a duty on the Deemster to stop the case if the contamination is such that, considering the importance of the evidence to the case, a conviction would be unsafe. This is intended to be a high test and if the Deemster were to consider that a direction along the lines described above would be sufficient to deal with any potential difficulties, then the question of safety does not arise and the case should not be withdrawn.

38. Having stopped the case, the Deemster may consider that there is still sufficient uncontaminated evidence against the defendant to merit his or her retrial or may consider that the prosecution case has been so weakened that the defendant should be acquitted. Clause 13(1) provides for the Deemster to take either of these courses. If, however, an acquittal is ordered then the defendant is also to be acquitted of any other offence for which he could have been convicted, if the Deemster is also satisfied that the contamination would affect a conviction for that offence in the same way (clause 13(2)). Clause 13(3) extends the duty to the situation where a jury is determining under the Criminal Jurisdiction Act 1993 whether a person, who is deemed unfit to plead, did the act or omission charged. Clause 13(4) makes it clear that the clause does not affect any existing court powers in relation to ordering an acquittal or discharging a jury.

39. Clause 14 requires a court, when considering the relevance or probative value of bad character evidence, to assume that the evidence is true. This reflects the distinction between the roles of the Deemster and jury: it is for the jury to form a view on matters of fact, such as the reliability of the evidence, and for the Deemster to rule on issues of law. However, there may be occasions where evidence is so unreliable that no reasonable jury could believe that it was true. In these circumstances, intended very much to be exceptional cases, clause 14(2) makes it clear that the Deemster does not have to assume the evidence is true. In making this decision, the court should normally make its decision based on the papers before it; however there may be exceptional circumstances in which a separate hearing on the issue (a *voir dire*) might be necessary. This reflects the current common law position as established in *R v H [1995] 2 AC 596* which considered the admissibility of similar fact evidence in cases of alleged collusion.

40. Clause 15 imposes a duty on the court to give reasons in open court for rulings given under clause 6, 7 or 13.

41. Clause 16 provides definitions of key terms used within Division 1.

42. Division 2, which comprises clauses 17 to 35, deals with the admissibility of hearsay evidence in criminal proceedings.

43. Clause 17 reverses the former rule that hearsay evidence was, as a general rule, inadmissible in criminal proceedings. Under clause 17 such evidence becomes admissible if, but only if —

    a. it is made admissible by any other provision of the Division;

b. any rule of law retained under clause 5 makes it admissible;

c. the parties all agree that it should be admissible; or

d. the court is satisfied that it is in the interests of justice for it to be admitted.

44. Clause 18 defines the meaning of “statement” and “matter stated” for the purposes of Division 2.

45. Clause 19 deals with the admissibility of a witness’s statement where the witness is unavailable.

46. Clause 20 deals with the admissibility of documents produced in the course of a trade, business, profession or other occupation or as the holder of an office (whether paid or not).

47. Clause 21 preserves a number of common law rules which already provide an exception from hearsay rules.

48. Clause 22 clarifies the relationship between hearsay evidence and previous inconsistent statements. It provides that if a witness admits that he has made a previous inconsistent statement or it has been proved that he made such an inconsistent statement, it is not only evidence which undermines his ‘credibility’ (as someone who makes inconsistent statements) but it is also evidence of the truth of its contents.

49. Subsection (2) envisages the following type of situation. A makes a statement to the police that she saw B ‘outside the jewellers’ at midday on Monday’. A does not testify at trial but her statement is admitted under clause 19. As explained below, clause 27 provides that evidence can be admitted in this type of situation in relation to the credibility of A. Subsection (2)(c) of clause 27 provides that evidence can be admitted to prove that A had made another statement inconsistent with this statement (for example, A had said earlier that she did not see B on Monday at all).

50. Clause 22(2) provides that if there is such an inconsistent statement, it not only goes to the credibility of A, but it is also admissible as to the truth of its contents (e.g. that A did not see B on Monday).

51. Clause 23 makes other previous statements admissible as evidence of the truth of their contents (not merely to bolster the credibility of the witness’s oral evidence) in the following circumstances:

52. Subsection (2) applies to statements which are admitted to rebut a suggestion that the witness's oral evidence is untrue;

53. Subsection (3) applies to the situation where a witness is “refreshing his memory” from a written document. If he is cross-examined on the document and it is received in evidence, the statement will be evidence of any matter contained within it;

54. Subsections (4) - (7) provide that a previous statement will be admissible as evidence of the facts contained within it provided the witness states that he made the statement and believes it to be true and one of the following conditions is met:

a. the statement describes or identifies a person, place or thing (which includes objects such as a car registration number) ;

b. the statement was made when the incident was fresh in the witness's memory and he cannot reasonably be expected to remember the matters stated. The intention is that where a witness has to rely on another person, or a document, or both to fill in details which he or she can no longer remember, this fact should go to the weight of the evidence, but should not make it inadmissible; or

c. the statement consists of a complaint by a victim of the alleged offence which was made as soon as could reasonably be expected after the conduct in question, and the witness gives oral evidence in relation to the matter. There is a further requirement for such a statement to be admissible which is that the complaint must not have been made as a result of a threat or a promise

55. Clause 24 sets out the approach which the courts should take to multiple hearsay. "Multiple hearsay" is where information passes through more than one person before it is recorded.

56. Under clause 24 a hearsay statement is admissible to prove the fact that another statement was made in three circumstances. These are:

- either of the statements is admissible under clauses 20 (business documents), 22 (inconsistent statements) or 23 (other previous statement of a witnesses);
- all parties to the proceedings agree; or
- the court uses its discretion to admit the statement.

57. The test for the court in deciding whether to exercise its discretion is whether it is satisfied that the value of the evidence in question, taking into account how reliable the statement appears to be, is so high that the interests of justice require the later statement to be admissible for that purpose. This discretion is intended to cover exceptional circumstances where although multiple hearsay does not fall within one of the specified categories for admissibility (in clause 24(1)(a) or (b)) it nevertheless should be admitted in the interests of justice.

58. Clause 25 provides that if a statement previously made by a witness is admitted in evidence and produced as an exhibit under clauses 22 or 23, the jury should not take the exhibit with them when they retire to the jury room, unless the Deemster considers it appropriate or all the parties agree that it should accompany them.

59. Clause 26 provides that an out of court statement cannot be admitted under clauses 19, 22 or 23 if the person who made the statement did not have the "required capability" for making a statement at the time the statement was made. A statement may not be admitted under clause 20 if any person who supplied or received the

information or created or received the document did not have the "required capability" or, where that person cannot be identified, cannot reasonably be assumed to have had the required capability. Under sub-clause (2) a person is deemed to have the required capability for the purposes of this clause if he can understand questions put to him and give answers which can be understood.

60. Clause 27 makes provision for challenges to the credibility of the maker of a hearsay statement who does not give oral evidence in person in the proceedings. If such hearsay statement is admitted as evidence of a matter stated, this clause provides certain rights for the person against whom hearsay evidence has been admitted to produce, in specified circumstances, evidence to discredit the maker of the statement or to show that he has contradicted himself.

61. Clause 28(1) imposes a duty on the court to stop a case and either direct the jury to acquit the defendant, or discharge the jury, if the case against him or her is based wholly or partly on an out of court statement which is so unconvincing that, considering its importance to the case, a conviction would be unsafe. This issue only arises in relation to jury trials because in other cases, the finders of fact would be bound to dismiss a case in these circumstances, or order a retrial if appropriate.

62. Similarly, subsection (2) imposes a corresponding duty on the court to direct the jury to acquit of any other offence not charged, of which they could convict by way of an alternative to the offence charged, if the Deemster is satisfied that a conviction would be unsafe. Subsection (3) extends the duty to cases under the Criminal Jurisdiction Act 1993 where a jury is required to determine whether a defendant, who is deemed unfit to plead, did the act (or made the omission) charged.

63. Clause 29 provides a further discretion to exclude superfluous out of court statements if the court is satisfied that the value of the evidence is substantially outweighed by the undue waste of time which its admission would cause. Subsection (2) preserves any power for the court to exclude evidence at its discretion.

64. Clause 30 seeks to address the problem which arises where information relied upon by an expert witness is outside the personal experience of the expert (for example work undertaken by an assistant) and cannot be proved by other admissible evidence. The intention is that the rules about advance notice of expert evidence will be amended so as to require advance notice of the name of any person who has prepared information on which the expert has relied. It is envisaged that any other party to the proceedings will be able to apply for a direction that any such person must give evidence in person but a direction will only be given if the court is satisfied that it is in the interests of justice.

65. In cases where no such application is made in respect of any assistant listed, or an application is made but refused, clause 30 will enable the expert witness to base his evidence on any information supplied by that assistant on matters of which that assistant had personal knowledge.

66. Clause 30 applies if:

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

67. Where clause 30 applies, the expert may base an opinion or inference on the statement and any information so relied upon will be admissible as evidence of its truth.

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

69. Clause 31 deals with the admissibility of confessions and amends the Criminal Justice Act 1991.

70. Clause 32 provides where a statement generated by a machine is based on information implanted into the machine by a human, the output of the device will only be admissible where it is proved that the information was accurate. Subsection (2) preserves the common law presumption that a mechanical device has been properly set or calibrated.

71. Clause 33 amends the Criminal Jurisdiction Act 1993 so as to provide that, at a retrial, evidence must be given orally if it was given that way at the original trial except in certain defined situations, in which case a transcript of the earlier evidence may be used. These exceptions are:

- all parties agree to the evidence being admitted;
- a witness is unavailable to give evidence in accordance with clause 19; or
- a witness is unavailable to give evidence for a reason other than those listed in clause 19 and his evidence is admitted under the residual discretion in clause 17(1)(d).

72. Clause 34 deals with the production of a statement in evidence where the statement is contained within a larger document and permits either the document to be produced or an authenticated part containing the statement.

73. Clause 35 defines certain terms for the purposes of Division 2.

74. Clauses 36 and 37 deal with the admissibility of evidence given by means of a video recording.

75. Clause 36 permits a video recording of an interview with a witness (other than the defendant), or a part of such a recording, to be admitted as evidence in chief of the witness in a wider range of circumstances than is presently the case.

76. Subsection (1) provides that the court can authorise such a video recording to replace the evidence-in-chief of a witness provided that:

- the person claims to be an witness to the offence (or part of it) or to events closely connected to the offence;
- the video recording of the statement was made at a time when events were fresh in the witness's memory; and
- the alleged offence is triable on information.

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

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

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

79. Clause 38 enacts the existing practice that a witness in criminal proceedings may refresh his memory from a document whilst giving evidence providing that:

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

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

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

82. Clause 39 defines certain terms for the purposes of Division 3.

83. Clause 40 provides for the repeal of paragraphs (f) and (h) of the proviso to section 1 of the Criminal Evidence Act 1946 and the whole of the Criminal Evidence Act 1967.

84. The Bill is not expected to have any impact on public income or expenditure, and accordingly no impact assessment has been prepared.

85. In the opinion of HM Attorney General, the provisions of the Bill are compatible with the Convention rights within the meaning of the Human Rights Act 2001.