



ANGUILLA

**ADMINISTRATION OF JUSTICE (SPECIAL PROVISIONS)
ACT, 2024**

Published by Authority

ADMINISTRATION OF JUSTICE (SPECIAL PROVISIONS) ACT, 2024

TABLE OF CONTENTS

SECTION

PART 1

PRELIMINARY

1. General interpretation

PART 2

**SPECIAL MEASURES DIRECTIONS IN CASE OF
VULNERABLE AND INTIMIDATED WITNESSES**

2. Witness eligible for assistance on grounds of age or vulnerability
3. Witnesses eligible for assistance on grounds of fear or distress about testifying
4. Special measures available to eligible witnesses
5. Special measures direction relating to eligible witness
6. Further provisions about directions: general
7. Special provisions relating to child witnesses
8. Extension of provisions of section 7 to certain witnesses over 18 years
9. Special provisions relating to sexual offences where the complainant is over 18 years
10. Screening witness from accused
11. Evidence by live link
12. Evidence given in private
13. Removal of gowns
14. Video recorded evidence-in-chief
15. Video recorded cross-examination or re-examination
16. Examination of witness through intermediary
17. Aids to communication
18. Status of evidence given under Part 2
19. Warning to jury

PART 3

USE OF LIVE LINK FOR EVIDENCE OF CERTAIN ACCUSED PERSONS

20. Live link direction
21. Warning to jury
22. Savings

PART 4

**PROTECTION OF WITNESSES FROM CROSS-EXAMINATION BY
ACCUSED IN PERSON**

23. Complainants in proceedings for sexual offences
24. Child complainants and other child witnesses
25. Direction prohibiting accused from cross-examining particular witness
26. Further provisions about directions under section 25

- 27. Defence representation for purposes of cross-examination
- 28. Warning to jury

PART 5

PROTECTION OF COMPLAINANTS IN PROCEEDINGS FOR SEXUAL OFFENCES

- 29. Restriction of evidence on sexual history or behaviour of the complainant
- 30. Conditions for admissibility
- 31. Procedure on applications under section 29
- 32. Warning to jury

PART 6

WITNESS ANONYMITY ORDERS

- 33. Witness anonymity orders
- 34. Applications
- 35. Conditions for making order
- 36. Relevant considerations
- 37. Warning to jury
- 38. Discharge or variation of order
- 39. Discharge or variation after proceedings
- 40. Discharge or variation by the Court of Appeal
- 41. Public interest immunity
- 42. Interpretation of this Part

PART 7

JUDGE ONLY TRIALS

- 43. Application of this Part
- 44. Application for trial to be conducted without a jury
- 45. Procedure for applications under section 53
- 46. Determination of application
- 47. Judge to have power of jury in trials without a jury
- 48. Judge to give reasons for conviction or acquittal

PART 8

APPEALS BY THE ACCUSED

- 49. Appeals against a decision of the judge sitting alone
- 50. Appeals against a conviction by the jury

PART 9

PROSECUTION APPEALS GENERALLY

- 51. Right of appeal
- 52. Right of appeal in respect of terminating rulings
- 53. Expedited and non-expedited appeals
- 54. Continuation of proceedings for offences not affected by ruling
- 55. Determination of appeal by Court of Appeal

- 56. Reversal of rulings
- 57. Interpretation

PART 10

CASE MANAGEMENT CONFERENCE

- 58. Duty of Trial Judge to hold a Case Management Conference

PART 11

USE OF LIVE LINK FOR EVIDENCE OF WITNESSES IN CIVIL PROCEEDINGS

- 59. Interpretation
- 60. Evidence of Witnesses via live link
- 61. Requirements for use of live link

PART 12

MISCELLANEOUS PROVISIONS

- 62. Depositions not in dispute and admissions to be read into evidence at trial
- 63. Use of statements as evidence in preliminary inquiries into sexual offences
- 64. Issue of Practice Directions
- 65. Power to make Regulations and Rules
- 66. Application of this Act
- 67. Conflict
- 68. Apparent age
- 69. Consequential Amendment
- 70. Citation and commencement

SCHEDULE 1: Relevant Offences under section 3(7)

I Assent


Julia Crouch, OBE
Governor
13th June 2024
Date

ANGUILLA

No. 13/2024

ADMINISTRATION OF JUSTICE (SPECIAL PROVISIONS) ACT, 2024

[Gazette Dated: 14th June, 2024] [Commencement: Section 70]

An Act to provide for the imposition of special provisions for the giving of evidence by vulnerable and intimidated witnesses; judge alone trials in criminal proceedings; special procedures for the admissibility of evidence in criminal proceedings; anonymity orders; special rights and procedures of appeal for both prosecution and accused and connected justice matters.

ENACTED by the Legislature of Anguilla

PART 1
PRELIMINARY

General interpretation

1. (1) In Parts (except where the context otherwise requires)—

“accused”, in relation to any criminal proceedings, means any person charged with an offence to which the proceedings relate (whether or not he has been convicted);

“the appointed day” means the day appointed by the Governor under section 70(2);

“the complainant”, in relation to any offence (or alleged offence), means a person against or in relation to whom the offence was or is alleged to have been committed;

“court” means a Magistrates’ court, the High Court or the Court of Appeal;

“Chief Justice” means the Chief Justice of the Eastern Caribbean Supreme Court;

“eligible witness” means a witness who by virtue of section 2 or 3 is eligible for assistance under this Act;

“indictable offences” includes either-way offences for which a determination has been made that the matter will be tried on indictment;

“legal representative” means a legal practitioner as defined in the Legal Professions Act, 2016;

“live link” in criminal proceedings means an arrangement by which the accused, while absent from the place where the proceedings are being held, is able to see and hear a person there, and to be seen and heard by—

- (a) the judge or justices (or both) and the jury (if there is one);
- (b) each of the other accused, where there are two or more accused in the proceedings;
- (c) the legal representatives acting in the proceedings; and
- (d) any interpreter or other person appointed by the court to assist the accused as an intermediary;

and for the purpose of this definition any impairment of eyesight or hearing is to be disregarded.

“mental disorder” means a substantial disorder of thought, mood, perception, orientation or memory that grossly impairs—

- (a) judgement;
- (b) behaviour;
- (c) capacity to recognise reality; or
- (d) ability to meet the ordinary demands of life;

“oral evidence” includes evidence which, by reason of any disability, disorder or other impairment, a person called as a witness gives in writing or by sign language or by way of any device;

“quality”, in relation to the evidence of a witness, shall be construed in accordance with section 2(5);

“special measure” means a special measure referred to in sections 10 to 17;

“special measures direction” means a direction given under section 5;

“video recording” means any recording, on any medium, from which a moving image may by any means be produced, and includes the accompanying sound-track;

“witness”, in relation to any proceedings, means any person called, or proposed to be called, to give evidence in the proceedings.

(2) In this Act references to a person being able to see or hear, or be seen or heard by another person are to be read as not applying to the extent that either of them is unable to see or hear by reason of any impairment of eyesight or hearing.

(3) In the case of any proceedings in which there is more than one accused any reference to the accused in sections 10 to 15 may be taken by a court, in connection with the giving of a special measures direction, as a reference to all or any of the accused, as the court may determine.

(4) For the purposes of Part 2 of this Act as it applies in relation to a witness who is the complainant, where the age of the witness is uncertain and there are reasons to believe that the witness is under the age of 18, that witness is presumed to be under the age of 18.

(5) Nothing in this Act shall affect any power of a court to exclude evidence at its discretion, whether by preventing questions being put or otherwise, which is exercisable apart from this Act.

(6) In this Act any reference (including a reference having effect by virtue of this subsection) to an offence of any description (“the substantive offence”) is to be taken to include a reference to an offence which consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, the substantive offence.

PART 2

SPECIAL MEASURES DIRECTIONS IN CASE OF VULNERABLE AND INTIMIDATED WITNESSES

Witness eligible for assistance on grounds of age or vulnerability

2. (1) A witness in criminal proceedings other than the accused is an eligible witness by virtue of this section if—

- (a) such witness is under the age of 18 at the time of the hearing; or
- (b) the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances specified in subsection (2).

(2) The circumstances referred to in subsection (1)(b) are—

- (a) that the witness—
 - (i) suffers from a mental disorder, or
 - (ii) otherwise has a significant impairment of intelligence and social functioning;
or
- (b) that the witness has a physical disability or is suffering from a physical disorder.

(3) In subsection (1)(a) “the time of the hearing”, in relation to a witness, means the time when it falls to the court to make a determination for the purposes of section 5(2) in relation to the witness.

(4) In determining whether a witness falls within subsection (1)(b) the court shall consider any views expressed by the witness.

(5) In this Act references to the quality of a witness' evidence are to circumstances and objective conditions which impact the witness's ability to give evidence and its quality in terms of completeness, coherence and accuracy; and for this purpose "coherence" refers to a witness' ability in giving evidence to give answers which address the questions put to the witness and can be understood both individually and collectively.

Witnesses eligible for assistance on grounds of fear or distress about testifying

3. (1) A witness in criminal proceedings other than the accused is an eligible witness by virtue of this section if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.

(2) In determining whether a witness is an eligible witness by virtue of subsection (1) the court shall consider the following—

- (a) the nature and alleged circumstances of the offence to which the proceedings relate;
- (b) the age of the witness;
- (c) such of the following matters as appear to the court to be relevant, namely—
 - (i) the social and cultural background and ethnic origins of the witness,
 - (ii) the domestic and employment circumstances of the witness, and
 - (iii) any religious beliefs or political opinions of the witness;
- (d) any behaviour towards the witness on the part of—
 - (i) the accused,
 - (ii) members of the family or associates of the accused, or
 - (iii) any other person who is likely to be an accused or a witness in the proceedings.

(3) In determining whether a witness is an eligible witness under subsection (1) the court shall also consider any views expressed by the witness.

(4) Where the complainant in respect of an offence listed in subsection (5), is a witness in proceedings relating to—

- (a) that offence; or
- (b) any other offences with which the accused is also charged in the proceedings;

the witness is deemed to be an eligible witness and such witness is eligible for assistance in relation to those proceedings by virtue of this section unless the witness has informed the court of his wish to not avail himself of such assistance.

(5) The offences are—

- (a) a sexual offence;
- (b) any other offence where it is alleged that the behaviour of the accused amounted to domestic violence within the meaning of the Domestic Violence Act, 2015.

(6) A witness in proceedings relating to a relevant offence (or to a relevant offence and any other offences) is eligible for assistance in relation to those proceedings by virtue of this subsection unless the witness has informed the court of the witness' wish not to be so eligible by virtue of this subsection.

(7) For the purposes of subsection (6) an offence is a relevant offence if it is an offence described in Schedule 1.

(8) The Governor in Council may by Regulations amend Schedule 1.

Special measures available to eligible witnesses

4. (1) Where a witness is eligible for assistance by virtue of—

- (a) section 2, the special measures directions specified in sections 10 to 17 may be given in relation to such witness; and
- (b) section 3, the special measures directions specified in sections 10 to 15 may be given in relation to such witness.

(2) The Chief Justice may by regulation, make such amendments to this Act as he considers appropriate for altering the special measures which, in accordance with subsection (1)(a) or (b), are available to a witness eligible for assistance by virtue of section 2 or section 3.

(3) A regulation referred to in subsection (2) may amend this Act by—

- (a) the addition of any new measure; or
- (b) by the removal of any measure.

Special measures direction relating to eligible witness

5. (1) This section applies where in any criminal proceedings—

- (a) a party to the proceedings, makes an application for the court to give a direction under this section in relation to a witness, other than the accused, in the proceedings; or
- (b) the court of its own motion raises the issue whether such a direction should be given.

(2) Where the court determines that the witness is eligible for assistance by virtue of section 2 or 3, the court shall then—

- (a) determine whether any of the special measures available in relation to the witness or any combination of such measures would, in its opinion, be likely to improve the quality of evidence given by the witness; and
- (b) if so—
 - (i) determine which of those measures or combination of such would, in its opinion, be likely to maximise so far as practicable the quality of such evidence, and
 - (ii) give a direction under this section providing for the measure or measures so determined to apply to evidence given by the witness.

(3) In making a determination under subsection (2)(a) or (b)(i) the court shall consider all the circumstances of the case, including in particular—

- (a) any views expressed by the witness; and
- (b) whether the measure or measures might inhibit such evidence being effectively tested by a party to the proceedings.

(4) A special measures direction shall specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness' evidence.

(5) Nothing in this Part is to be regarded as affecting any power of a court to make an order or to give leave of any description in the exercise of its inherent jurisdiction or otherwise in relation to—

- (a) a witness who is not an eligible witness; or
- (b) an eligible witness where (as, for example, in a case where a foreign language interpreter is to be provided) the order is made or the leave is given otherwise than by reason of the fact that the witness is an eligible witness.

Further provisions about directions: general

6. (1) A special measures direction given by the court has binding effect until the proceedings in relation to which such direction is given are either—

- (a) determined whether by acquittal, conviction or otherwise; or
- (b) abandoned;

in relation to the accused or, if there is more than one in relation to each of the accused.

(2) Notwithstanding subsection (1) the court may discharge or vary a special measures direction if it appears to the court to be in the interests of justice to do so, and may do so either—

- (a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time; or

(b) of its own motion.

(3) In subsection (2) “the relevant time” means—

(a) the time when the direction was given; or

(b) if a previous application has been made under subsection (2), the time when the application or the last application was made.

(4) Nothing in section 11(4) and (5), 14(2) to (7) or 15(4) to (6) is to be regarded as affecting the power of the court to vary or discharge a special measures direction under subsection (2).

(5) The court shall state in open court its reasons for—

(a) giving or varying;

(b) refusing an application for; or

(c) refusing an application for the variation or discharge of; or

(d) discharging;

a special measures direction and, if it is a court of summary jurisdiction, the magistrate shall cause the reasons to be entered in the register of its proceedings.

(6) The Chief Justice and two other judges of the Supreme Court may make rules for—

(a) uncontested applications to be determined by the court without a hearing;

(b) preventing the renewal of an unsuccessful application for a special measures direction except where there has been a material change of circumstances;

(c) expert evidence to be given in connection with an application for a direction or for varying or discharging such a direction;

(d) the manner in which confidential or sensitive information is to be treated in connection with an application for a direction.

Special provisions relating to child witnesses

7. (1) For the purposes of this section—

(a) a witness in criminal proceedings is a “child witness” if he is an eligible witness by reason of section 2(1)(a); and

(b) a “relevant recording”, in relation to a child witness, is a video recording of an interview of the witness made with a view to its admission as evidence-in-chief of such witness.

(2) Where in relation to a child witness, the court is making a determination under section 5(2), the court shall—

(a) first have regard to subsections (3) to (7) below; and

(b) then have regard to section 5(2);

and for the purposes of section 5(2), as it then applies to the child witness, any special measures required to be applied in relation to him by virtue of this section shall be treated as if they were measures determined by the court, pursuant to section 5(2)(a) and (b)(i), to be ones that (whether on their own or with any other special measures) would be likely to maximise, so far as practicable, the quality of his evidence.

(3) The primary rule in the case of a child witness is that the court must give a special measures direction in relation to the witness which complies with the following requirements—

- (a) it must provide for any relevant recording to be admitted under section 14 (video recorded evidence-in-chief); and
- (b) it must provide for any evidence given by the witness in the proceedings which is not given by means of a video recording (whether in chief or otherwise) to be given by means of a live link in accordance with section 11.

(4) Notwithstanding subsection (3), when giving a special measures direction, the court shall consider the following—

- (a) the requirement contained in subsection (3)(a) shall have effect subject to section 14(2);
- (b) where a child witness does not wish to give evidence by video recording or live link the primary rule in subsection (3) shall not apply, if the court is satisfied the quality of the witness' evidence would not be diminished if the evidence is not given by video recording or live link; and
- (c) where the court is satisfied that compliance with the special measure directions specified in subsection (3) is not likely to maximise, so far as practicable, the quality of the witness' evidence, either—
 - (i) because the application of another special measure is more likely to maximise the quality of the witness' evidence, or
 - (ii) due to any other reason;

the court shall not apply special measure direction specified in subsection (3).

(5) Where—

- (a) one or both of the special measure directions are not applied pursuant to subsection 4(b); and
- (b) as a result, the witness' evidence or any part of such evidence is to be given as testimony in court;

the court shall give a special measures direction specified in section 10, providing for the screening of the child witness from the accused, in relation to the witness' evidence.

(6) The requirement in subsection (5) is subject to the following limitations—

- (a) if a child witness does not wish for a screen to be used in accordance with section 11, the requirement shall not apply, where the court is satisfied that the quality of the witness' evidence would not be diminished if the screen is not used; and
- (b) the requirement does not apply if the court is satisfied that special measure direction given under section 11 is not likely to maximise, so far as practicable, the quality of the witness' evidence, either—
 - (i) because the application of another special measure available to the child witness will similarly or better maximise the quality of the witness' evidence, or
 - (ii) due to any other reason.

(7) In making a decision under subsection (4)(c) or (6)(a), the court shall take into account the following—

- (a) the age and maturity of the child witness;
- (b) the ability of the child witness to understand the consequences of giving evidence otherwise than in accordance with the requirements in subsections (3) or (5);
- (c) the relationship, if any between the child witness and the accused;
- (d) the child witness' social and cultural background and ethnic origins;
- (e) the nature and alleged circumstances of the offence to which the proceedings relate;
- (f) any other factors the court considers relevant.

(8) Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of section 2(1)(a) the direction shall cease to have effect at the time when the witness attains the age of 18 unless—

- (a) subsection (9) applies; or
- (b) the witness has already begun to give evidence in the proceedings.

(9) Where—

- (a) a special measures direction is given under section 14 and 15 in relation to a child witness who is an eligible witness by reason only of section 2(1)(a); and
- (b) at the time when the video recording was made for the purpose of sections 15 the witness was under the age of 18;

the direction shall continue to have effect in accordance with section 7(1) even though at the time when such video recording is being admitted into evidence, the witness has attained the age of 18.

Extension of provisions of section 7 to certain witnesses over 18

8. (1) For the purposes of this section—

- (a) a witness in criminal proceedings other than the accused is a “qualifying witness” if he—
 - (i) is not an eligible witness at the time of the hearing as defined by section 2(3), but
 - (ii) was under the age of 18 when a relevant recording was made; and
- (b) a “relevant recording”, in relation to a witness, is a video recording of an interview of the witness made with a view to its admission as evidence-in-chief of the witness.

(2) Subsections (2) to (4) and (7) of section 7, so far as relating to the giving of a direction complying with the requirement contained in section 7(3)(a), apply to a qualifying witness in respect of the relevant recording as they apply to a child witness within the meaning of that section.

Special provisions relating to sexual offences where the complainant is over 18 years

9. (1) This section applies where in criminal proceedings relating to a sexual offence, the complainant in respect of that offence is a witness in the proceedings.

(2) This section does not apply if the complainant is under 18 years and is an eligible witness by reason of section 2(1)(a), whether or not the complainant is an eligible witness by reason of any other provision of section 2 or 3.

(3) Where a party to the proceedings makes an application under section 5(1)(a) for a special measures direction in relation to the complainant, the party may request that the direction provide for any relevant recording to be admitted as evidence-in-chief pursuant to section 14 (video recorded evidence-in-chief).

(4) Subsection (5) applies if—

- (a) a party to the proceedings makes a request under subsection (3) with respect to the complainant; and
- (b) the court determines for the purposes of section 5(2) that the complainant is eligible for assistance by virtue of section 2(1)(b) or 3.

(5) The court shall—

- (a) first have regard to subsections (6) to (8); and
- (b) then have regard to section 5(2);

and for the purposes of section 5(2), as it then applies to the complainant, any special measure required to be applied in relation to the complainant by virtue of this section is to be treated as if it were a measure determined by the court, pursuant to section 5(2)(a) and (b)(i), to be one that (whether on its own or with any other special measures) would be likely to maximise, so far as practicable, the quality of the complainant’s evidence.

(6) The court shall give a special measures direction in relation to the complainant that provides for any relevant recording to be admitted as evidence-in-chief pursuant to section 14.

(7) The requirement in subsection (6) has effect subject to section 14(2).

(8) The requirement to give a special measures direction under subsection (6) does not apply where the court is satisfied that compliance with it would not be likely to maximise the quality of the complainant's evidence so far as practicable either—

(a) because the application of one or more other special measures available to the complainant would similarly or better maximise the quality of the complainant's evidence; or

(b) for any other reason.

(9) In this section “relevant recording”, in relation to a complainant, is a video recording of an interview of the complainant made with a view to its admission as the evidence-in-chief of the complainant.

Screening witness from accused

10. (1) A special measures direction may provide for the witness, while giving testimony or being sworn in court, to be prevented by means of a screen or other arrangement from seeing the accused.

(2) The screen or other arrangement shall not prevent the witness from being able to see, and to be seen by—

(a) the magistrate or judge or both and the jury, if there is one;

(b) legal representatives acting in the proceedings; and

(c) any interpreter or other person appointed in pursuance of the direction or otherwise to assist the witness.

(3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(b) is to be regarded as satisfied in relation to those representatives if the witness is able at all material times to see and be seen by at least one of them.

Evidence by live link

11. (1) A special measures direction may provide for the witness to give evidence by means of a live link.

(2) Such a direction may also provide for a specified person to accompany the witness while the witness is giving evidence by live link.

(3) In determining who may accompany the witness, the court shall have regard to the wishes of the witness.

(4) Where a direction provides for the witness to give evidence by means of a live link, the witness may not give evidence in any other way without the permission of the court.

(5) The court may give permission for the purposes of subsection (4) if it appears to the court to be in the interests of justice to do so, and may do so either—

- (a) on an application by a party to the proceedings, if there has been a material change of circumstances since the relevant time; or
- (b) of its own motion.

(6) In subsection (5) “the relevant time” means—

- (a) the time when the direction was given; or
- (b) if a previous application has been made under that subsection, the time when the application (or last application) was made.

Evidence given in private

12. (1) A special measures direction may provide for the exclusion from the court, during the giving of the witness’ evidence, of persons of any description specified in the direction.

(2) The persons who may be so excluded do not include—

- (a) the accused;
- (b) jury;
- (c) legal representatives acting in the proceedings; or
- (d) any interpreter or other person appointed (in pursuance of the direction or otherwise) to assist the witness.

(3) A special measures direction providing for representatives of news gathering or reporting organisations to be excluded under subsection (1) shall not apply to the person who—

- (a) is named to be representative of a news gathering or reporting organisation; and
- (b) has been nominated for the purpose by one or more such organisations, unless it appears to the court that no such nomination has been made.

(4) A special measures direction may only provide for the exclusion of persons under this section where—

- (a) the proceedings relate to a sexual offence and domestic violence offences; or
- (b) it appears to the court that there are reasonable grounds for believing that any person other than the accused has sought, or will seek, to intimidate the witness in connection with testifying in the proceedings.

(5) Any proceedings from which persons are excluded under this section (whether or not those persons include representatives of news gathering or reporting organisations) shall nevertheless be taken to be held in public for the purposes of—

- (a) any privilege; or
- (b) exemption from liability;

available in respect of fair, accurate and contemporaneous reports of legal proceedings held in public.

Removal of gowns

13. A special measures direction may provide for the wearing of gowns to be dispensed with during the giving of the witness' evidence.

Video recorded evidence-in-chief

14. (1) A special measures direction may provide for a video recording of an interview of the witness to be admitted as evidence-in-chief of the witness.

(2) A special measures direction may, however, not provide for a video recording, or a part of such a recording, to be admitted as evidence-in-chief under this section if the court is of the opinion, having regard to all the circumstances of the case, that in the interests of justice the recording, or that part of it, should not be so admitted.

(3) In considering for the purposes of subsection (2) whether any part of a recording should not be admitted as evidence-in-chief under this section, the court shall consider whether any prejudice to the accused which might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview.

(4) Where a special measures direction provides for a recording to be admitted as evidence-in-chief under this section, the court may nevertheless subsequently direct that it is not to be so admitted if—

- (a) it appears to the court that—
 - (i) the witness will not be available for cross-examination whether conducted with or without a special measures directions being given, and
 - (ii) the parties to the proceedings have not agreed that there is no need for the witness to be so available; or
- (b) any rules of court requiring disclosure of the circumstances in which the recording was made have not been complied with to the satisfaction of the court.

(5) Where a recording is admitted as evidence-in-chief under this section—

- (a) the witness shall be called by the party tendering it in evidence, unless—
 - (i) a special measures direction provides for the witness' evidence on cross-examination to be given in a video recording admissible under section 15, or

(ii) the parties to the proceedings have not agreed that there is no need for the witness to be available for cross-examination; and

(b) the witness may not without the permission of the court give evidence-in-chief otherwise than by means of the recording as to any matter which, in the opinion of the court, is dealt with in the witness' recorded testimony.

(6) Where in accordance with subsection (2) a special measures direction provides that only part of a recording is to be admitted under this section, references in subsections (4) and (5) to the recording or to the witness' recorded testimony are references to the part of the recording or testimony which is to be so admitted.

(7) The court may give permission for the purposes of subsection (5)(b) if it appears to the court to be in the interests of justice to do so, and may do so either—

(a) on an application by a party to the proceedings; or

(b) of its own motion.

(8) The court may, in giving permission for the purposes of subsection (5)(b), direct that the evidence in question is to be given by the witness by means of a live link.

(9) If the court directs under subsection (8) that evidence is to be given by live link, it may also provide for a specified person to accompany the witness while the witness is giving evidence by live link.

(10) A magistrates' court inquiring into an offence under Part 3 of the Magistrate's Code of Procedure Act may consider as evidence any video recording in relation to which it is proposed to apply for a special measures direction in accordance with this section.

(11) Nothing in this section affects the admissibility of any video recording which would be admissible apart from this section.

Video recorded cross-examination or re-examination

15. (1) Where a special measures direction provides for a video recording to be admitted under section 14 as evidence-in-chief of the witness, the direction may also provide for—

(a) any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording; and

(b) such a recording to be admitted, so far as it relates to any such cross-examination or re-examination, as evidence of the witness under cross-examination or on re-examination, as the case may be.

(2) A video recording referred to subsection (1) shall be made in—

(a) the presence of such persons as rules of court or the special measures direction may provide;

(b) the absence of the accused; but

(c) circumstances in which—

- (i) the magistrate or judge or both and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the persons in whose presence the recording is being made, and
- (ii) the accused is able to see and hear any such examination and to communicate with any legal representative acting for him.

(3) Where two or more legal representatives are acting for a party to the proceedings, subsection (2)(c) is to be regarded as satisfied in relation to those representatives if at all material times they are satisfied in relation to at least one of them.

(4) Where a special measures direction provides for a recording to be admitted under this section, the court may nevertheless subsequently direct that it is not to be so admitted if any requirement of subsection (2) or rules of court or the direction have not been complied with to the satisfaction of the court.

(5) Where in pursuance of subsection (1) a video recording has been made of any cross-examination or re-examination of the witness, the witness may not be subsequently cross-examined or re-examined in respect of any evidence given by the witness in the proceedings whether such evidence was given—

- (a) in any recording admissible as evidence-in-chief under section 14; or
- (b) in any recording of a cross-examination or re-examination, admissible under this section; or
- (c) otherwise than in such a recording;

unless the court gives a further special measures direction making such provision as is mentioned in subsection (1)(a) and (b) in relation to any subsequent cross-examination, and re-examination, of the witness.

(6) The court may only give a further direction specified in subsection (5) if it appears to the court that—

- (a) the proposed cross-examination is sought by a party to the proceedings as a result of that party having become aware, since the time when the original recording was made in pursuance of subsection (1); or
- (b) where new and relevant matters have arisen from re-examination; or
- (c) for any other reason it is in the interests of justice to give the further direction.

(7) Nothing in this section shall be read as applying in relation to any cross-examination of the witness by the accused in person in a case where the accused is to be able to conduct any such cross-examination.

Examination of witness through intermediary

16. (1) A special measures direction may provide for any examination of the witness however and wherever conducted to be conducted through an intermediary who shall include—

- (a) an interpreter; or
- (b) other person approved by the court.

(2) The function of an intermediary is to—

- (a) communicate to the witness, questions put to the witness; and
- (b) communicate to any person asking such questions, the answers given by the witness in reply to them;
- (c) explain such questions or answers so far as necessary to enable them to be understood by the witness or person asking the questions.

(3) Any examination of the witness pursuant to subsection (1) shall take place in—

- (a) the presence of such persons as rules of court or the special measures direction may provide; and
- (b) circumstances in which—
 - (i) the magistrate or judge (or both) and legal representatives acting in the proceedings are able to see and hear the examination of the witness and to communicate with the intermediary, and
 - (ii) except in the case of a video recorded examination, the jury (if there is one) is able to see and hear the examination of the witness.

(4) Where two or more legal representatives are acting for a party to the proceedings, subsection (3)(b)(i) is to be regarded as satisfied in relation to those representatives if at all material times it is satisfied in relation to at least one of them.

(5) A person shall only act as an intermediary in a particular case where he makes a declaration, in such form as may be prescribed by rules of court, that he will faithfully perform his function as intermediary.

(6) Subsection (1) does not apply to an interview of the witness which is recorded by means of a video recording with a view to its admission as evidence-in-chief of the witness; but a special measures direction may provide for such a recording to be admitted under section 14 if the interview was conducted through an intermediary and the—

- (a) intermediary made a declaration in compliance with subsection (5) before the interview began; and
- (b) court's approval for the purposes of this section is given before the direction is given.

(7) Section 116 of the Criminal Code shall apply in relation to a person acting as an intermediary as it applies in relation to a person lawfully sworn as an interpreter in a judicial proceeding; and for this purpose, where a person acts as an intermediary in any proceeding which is not a judicial proceeding for the purposes of that section, that proceeding shall be taken to be part of the judicial proceeding in which the witness' evidence is given.

Aids to communication

17. A special measures direction may provide for the witness, while giving evidence whether by testimony in court or otherwise, to be provided with such device as the court considers appropriate to enable questions or answers to be communicated to or by the witness where such witness has or suffers from a disability, disorder or other impairment.

Status of evidence given under Part 2

18. (1) Subsections (2) to (4) apply to a statement made by a witness in criminal proceedings which, in accordance with a special measures direction, is not made by the witness in direct oral testimony in court but forms part of the witness' evidence in those proceedings.

(2) The statement shall be treated as if made by the witness in direct oral testimony in court; and accordingly it is—

- (a) admissible evidence of any fact of which such testimony from the witness would be admissible;
- (b) not capable of corroborating any other evidence given by the witness.

(3) Subsection (2) applies to a statement admitted under section 14 or 15 which is not made by the witness on oath even though it would have been required to be made on oath if made by the witness in direct oral testimony in court.

(4) In estimating the weight if any to be attached to the statement, the court shall have regard to all the circumstances from which an inference can reasonably be drawn as to the accuracy of the statement or otherwise.

(5) Nothing in this Part, apart from subsection (3) of this section affects the operation of any rule of law relating to evidence in criminal proceedings.

(6) Where any statement made by a person on oath in any proceeding which is not a judicial proceeding for the purposes of section 116 of the Criminal Code, (offence of perjury) is received in evidence in pursuance of a special measures direction, that proceeding shall be taken for the purposes of that section to be part of the judicial proceeding in which the statement is so received in evidence.

(7) Where in any proceeding which is not a judicial proceeding for the purposes of section 116 of the Criminal Code—

- (a) a person wilfully makes a false statement otherwise than on oath which is subsequently received in evidence in pursuance of a special measures direction; and
- (b) the statement is made in such circumstances that had it been given on oath in any such judicial proceeding that person would have been guilty of perjury;

he shall be guilty of an offence and liable to any punishment which might be imposed on conviction of an offence of perjury under 116 of the Criminal Code.

(8) In this section “statement” includes any representation of fact, whether made in words or otherwise.

Warning to jury

19. Where on a trial on indictment with a jury, evidence has been given in accordance with a special measures direction, the judge shall give the jury such warning if any as the judge considers necessary to ensure that the fact that the direction was given in relation to the witness does not prejudice the accused.

PART 3

USE OF LIVE LINK FOR EVIDENCE OF CERTAIN ACCUSED PERSONS

Live link directions

20. (1) This section applies to any proceedings whether in a magistrates’ court or before the High Court in relation to a person accused of an offence.

(2) The court may, on the application of the accused, give a live link direction if it is satisfied that—

- (a) the conditions in subsection (4) or, as the case may be, subsection (5) are met in relation to the accused; and
- (b) it is in the interests of justice for the accused to give evidence through a live link.

(3) A live link direction is a direction that any oral evidence to be given before the court by the accused is to be given through a live link.

(4) Where the accused is aged under 18 when the application is made, the conditions are that—

- (a) his ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning; and
- (b) use of a live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise).

(5) Where the accused has attained the age of 18 at the time when the application is made, the conditions are that—

- (a) he suffers from a mental disorder or otherwise has a significant impairment of intelligence and social function;

- (b) he is for the reason specified in paragraph (a) unable to participate effectively in the proceedings as a witness giving oral evidence in court; and
- (c) use of a live link would enable him to participate more effectively in the proceedings as a witness whether by improving the quality of his evidence or otherwise.

(6) While a live link direction has effect, the accused may not give oral evidence before the court in the proceedings otherwise than through a live link.

(7) The court may rescind a live link direction at any time before or during any hearing to which it applies if it appears to the court to be in the interests of justice to do so but this does not affect the power to give a further live link direction in relation to the accused.

(8) The court may exercise this power under subsection (7) of its own motion or on an application by a party.

(9) The court shall state in open court its reasons for—

- (a) giving or rescinding a live link direction; or
- (b) refusing an application for a live link direction; or
- (c) refusing an application for the rescission of a live link direction;

and, if it is a magistrates' court, it shall cause those reasons to be entered in the register of its proceedings.

Warning to jury

21. (1) This section applies where, as a result of a direction under section 20, evidence has been given through a live link in proceedings before the High Court.

(2) The judge may give the jury (if there is one) such direction as he thinks necessary to ensure that the jury gives the same weight to the evidence as if it had been given by the accused in the courtroom or other place where the proceedings are held.

Savings

22. Nothing in this Part affects—

- (a) any power of a court to make an order, give directions or give leave of any description in relation to any witness (including an accused); or
- (b) the operation of any rule of law relating to evidence in criminal proceedings.

PART 4

PROTECTION OF WITNESSES FROM CROSS-EXAMINATION BY
ACCUSED IN PERSON

Complainants in proceedings for sexual offences

23. No person charged with a sexual offence may in any criminal proceedings cross-examine in person a witness who is the complainant, either in connection with—

- (a) the sexual offence; or
- (b) any other offence (of whatever nature) with which that person is charged in the same proceedings.

Child complainants and other child witnesses

24. (1) No person charged with an offence to which this section applies may in any criminal proceedings cross-examine in person a protected witness, either in connection with—

- (a) that offence; or
- (b) any other offence (of whatever nature) with which that person is charged in the same proceedings.

(2) For the purposes of subsection (1) a “protected witness” is a witness who—

- (a) either is the complainant or is alleged to have been a witness to the commission of the offence to which this section applies; and
- (b) either is a child within the meaning of subsection (4) at the time when he is being cross-examined; or
- (c) was a child at the time when—
 - (i) a video recording was made for the purpose of section 14; or
 - (ii) evidence-in-chief was otherwise given;

but is no longer a child at the time when he falls to be cross-examined.

(3) The offences to which this section applies are—

- (a) any sexual offence under Part 14 of the Criminal Code;
- (b) any offence under Part 16 of the Criminal Code which involves an assault on, or injury or a threat of injury to, any person;
- (c) any offence under Part 17 of the Criminal Code relating to cruelty to a child; or
- (d) an offence under Part 18 of the Criminal Code relating to abduction, kidnapping or similar offences.

(4) In this section “child” means a person who is under the age of 18 years.

(5) For the purposes of this section “witness” includes a witness who is charged with an offence in the proceedings.

Direction prohibiting accused from cross-examining particular witnesses

25. (1) This section applies where, in a case where neither section 23 nor 24 operates to prevent an accused in any criminal proceedings from cross-examining a witness in person—

- (a) the prosecutor makes an application for the court to give a direction under this section in relation to the witness; or
- (b) the court of its own motion raises the issue whether such a direction should be given.

(2) If it appears to the court—

- (a) that the quality of evidence given by the witness on cross-examination—
 - (i) is likely to be diminished if the cross-examination (or further cross-examination) is conducted by the accused in person, and
 - (ii) would likely be improved if a direction were given under this section; and
- (b) that it would not be contrary to the interests of justice to give such a direction;

the court may give a direction prohibiting the accused from cross-examining (or further cross-examining) the witness in person.

(3) In determining whether subsection (2)(a) applies in the case of a witness the court shall have regard, in particular, to—

- (a) any views expressed by the witness as to whether or not the witness is content to be cross-examined by the accused in person;
- (b) the nature of the questions likely to be asked, having regard to the issues in the proceedings and the defence case advanced so far (if any);
- (c) any behaviour on the part of the accused at any stage of the proceedings, both generally and in relation to the witness;
- (d) any relationship (of whatever nature) between the witness and the accused;
- (e) whether any person (other than the accused) is or has at any time been charged in the proceedings with a sexual offence or an offence to which section 24 applies, and (if so) whether section 23 or 24 operates or would have operated to prevent that person from cross-examining the witness in person;
- (e) any direction under section 5 which the court has given, or proposes to give, in relation to the witness.

(4) For the purposes of this section—

- (a) “witness”, in relation to an accused, does not include any other person who is charged with an offence in the proceedings; and
- (b) any reference to the quality of a witness’ evidence shall be construed in accordance with section 2(5).

Further provisions about directions under section 25

26. (1) Subject to subsection (2), a direction given under section 25 has binding effect from the time it is made until the witness to whom it applies is discharged.

(2) The court may rescind a direction if it appears to the court to be in the interests of justice to do so, and may do so either—

- (a) on an application made by a party to the proceedings, if there has been a material change of circumstances since the relevant time; or
- (b) of its own motion.

(3) In subsection (2) “the relevant time” means—

- (a) the time when the direction was given; or
- (b) if a previous application has been made under that subsection, the time when the application (or last application) was made.

(4) The court shall state in open court its reasons for—

- (a) giving; or
- (b) refusing an application for; or
- (c) refusing an application for the discharge of; or
- (d) discharging;

a direction and, if it is a magistrates’ court, shall cause them to be entered in the register of its proceedings.

(5) The Chief Justice and two judges of the Supreme Court may make regulations for—

- (a) uncontested applications to be determined by the court without a hearing;
- (b) preventing the renewal of an unsuccessful application for a direction except where there has been a material change of circumstances;
- (c) expert evidence to be given in connection with an application for, or for discharging, a direction;

- (d) the manner in which confidential or sensitive information is to be treated in connection with such an application and in particular as to its being disclosed to, or withheld from, a party to the proceedings.

(6) In this section “direction” means a direction under section 25.

Defence representation for purposes of cross-examination

27. (1) This section applies where an accused is prevented from cross-examining a witness in person by virtue of section 23, 24 or 25.

(2) Where it appears to the court that this section applies, it shall—

- (a) invite the accused to arrange for a legal representative to act for him for the purpose of cross-examining the witness; and
- (b) require the accused to notify the court, by the end of such period as it may specify, whether a legal representative is to act for him for that purpose.

(3) If by the end of the period mentioned in subsection (2)(b) either—

- (a) the accused has notified the court that no legal representative is to act for him for the purpose of cross-examining the witness; or
- (b) no notification has been received by the court and it appears to the court that no legal representative is to so act;

the court shall consider whether it is necessary in the interests of justice for the witness to be cross-examined by a legal representative appointed to represent the interests of the accused.

(4) If the court decides that it is necessary in the interests of justice for the witness to be so cross-examined, the court shall appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the accused.

(5) A person so appointed shall not be responsible to the accused.

(6) The Chief Justice and two judges of the Supreme Court may make regulations—

- (a) as to the time when, and the manner in which, subsection (2) is to be complied with;
- (b) in connection with the appointment of a legal representative under subsection (4), and in particular for securing that a person so appointed is provided with evidence or other material relating to the proceedings.

(7) For the purposes of this section any reference to cross-examination includes (in a case where a direction is given under section 28 after the accused has begun cross-examining the witness) a reference to further cross-examination

Warning to jury

28. (1) Where on a trial on indictment with a jury, an accused is prevented from cross-examining a witness in person by virtue of section 23, 24 or 25, the judge shall give the jury such

warning (if any) as the judge considers necessary to ensure that the accused is not prejudiced by any inferences that might be drawn from the fact that the—

- (a) accused has been prevented from cross-examining the witness in person; and
- (b) cross-examination was carried out by such a legal representative and not by a person acting as the accused's own legal representative, in cases where the witness has been cross-examined by a legal representative appointed under section 27(4).

(2) For the purposes of this section any reference to cross-examination includes (in a case where a direction is given under section 25 after the accused has begun cross-examining the witness) a reference to further cross-examination.

PART 5

PROTECTION OF COMPLAINANTS IN PROCEEDINGS FOR SEXUAL OFFENCES

Restriction of evidence on sexual history or behaviour of the complainant

29. (1) On a trial for a sexual offence, the adducing of evidence and the asking of questions about any sexual conduct of the complainant shall not be permitted except in accordance with this Part.

(2) Where the accused wishes to adduce evidence or ask questions about any sexual conduct of the complainant, he shall make an application to the court for leave to adduce such evidence or ask such questions.

(3) Evidence that the complainant has engaged in consensual sexual conduct on other occasions (including past sexual conduct with the accused) is not admissible where the purpose for adducing such evidence or asking questions in relation to the complainant's conduct, is to support the inference that the complainant is by reason of such conduct—

- (a) more likely to have consented to the sexual conduct at issue in the trial;
- (b) less worthy of belief as a witness.

Conditions for admissibility

30. (1) Where an application is made by the accused under section 29(2), the court may permit evidence to be adduced or questions to be asked about the complainant's sexual conduct, where the court is satisfied that the—

- (a) accused is not seeking to adduce evidence for purposes prohibited under section 29(3);
- (b) evidence is relevant to an issue at trial;
- (c) evidence is of specific instances of sexual activity; and
- (d) evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(2) In determining whether evidence is admissible under subsection (1), the judge shall take into account—

- (a) the interests of justice, including the right of the accused to make a full answer and defence;
- (b) society's interest in encouraging the reporting of sexual assault offences;
- (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
- (d) the need to remove from the fact-finding process any discriminatory belief or bias;
- (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
- (f) the potential prejudice to the complainant's personal dignity and right of privacy;
- (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
- (h) any other factor that the judge, considers relevant.

(3) For the purposes of subsection (1), the following are examples of admissible evidence—

- (a) of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution;
- (b) of sexual conduct tending to prove bias or motive to fabricate on the part of the complainant;
- (c) of prior sexual conduct, known to the accused at the time of the act charged, tending to prove that the accused believed that the complainant was consenting to the act charged;
- (d) of sexual conduct of the complainant on a previous occasion or occasions, that is so similar to the sexual conduct of the complainant which took place as part of the event which is the subject matter of the charge, that the similarity cannot reasonably be explained as a coincidence;
- (e) to rebut proof introduced by the prosecution regarding the complainant's sexual conduct.

(4) Where the accused is seeking to admit evidence that falls within subsection (3)(c), the accused must demonstrate some proximity in time between the conduct that is—

- (a) alleged to have given rise to a belief by the accused, that that complainant was consenting; and
- (b) the subject matter of the charge.

(5) Where this section applies in relation to a trial by virtue of the fact that one or more of a number of persons charged in the proceedings is or are charged with a sexual offence it shall—

- (a) cease to apply in relation to the trial if the prosecutor decides not to proceed with the case against that person or those persons in respect of that charge; but
- (b) not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

Procedure on applications under section 29

31. (1) An application for leave shall be heard in camera and in the absence of the complainant.

(2) Where such an application has been determined, the court shall state in open court (but in the absence of the jury, where trial by jury)—

- (a) its reasons for giving, or refusing, leave; and
- (b) if it gives leave, the extent to which evidence may be adduced or questions asked in pursuance of the leave;

and, if it is a magistrates' court, shall cause those matters to be entered in the register of its proceedings.

(3) The Chief Justice and two other judges of the Supreme Court may make regulations—

- (a) enabling the court to request a party to the proceedings to provide the court with information which it considers would assist it in determining an application for leave;
- (b) for the manner in which confidential or sensitive information is to be treated in connection with such an application, and in particular as to its being disclosed to, or withheld from, parties to the proceedings.

Warning to the jury

32. Where evidence that the complainant has engaged in consensual sexual conduct on other occasions is admitted under this Part, the judge shall warn the jury against inferring from the evidence of the conduct itself either that the complainant—

- (a) might have consented to the act alleged; or
- (b) is less worthy of belief as a witness.

PART 6

WITNESS ANONYMITY ORDERS

Witness anonymity orders

33. (1) In this Part a “witness anonymity order” is an order made by a court that requires such specified measures to be taken in relation to a witness in criminal proceedings as the court considers

appropriate to ensure that the identity of the witness is not disclosed in or in connection with the proceedings.

(2) The kinds of measures that may be required to be taken in relation to a witness include measures for securing one or more of the following—

- (a) that the witness' name and other identifying details may be withheld, and removed from materials disclosed to any party to the proceedings;
- (b) that the witness may use a pseudonym;
- (c) that the witness is not asked questions of any specified description that might lead to the identification of the witness;
- (d) that the witness is screened to any specified extent;
- (e) that the witness' voice is subjected to modulation to any specified extent.

(3) Subsection (2) does not affect the generality of subsection (1).

(4) Nothing in this section authorises the court to require—

- (a) the witness to be screened to such an extent that the witness cannot be seen by—
 - (i) the judge or other members of the court (if any), or
 - (ii) the jury (if there is one);
- (b) the witness' voice to be modulated to such an extent that the witness' natural voice cannot be heard by any persons specified in paragraph (a).

(5) In this section “specified” means specified in the witness anonymity order concerned.

Applications

34. (1) An application for a witness anonymity order may be made to the court by the prosecutor or the accused.

(2) Where an application is made by the prosecutor, the prosecutor—

- (a) shall unless the court directs otherwise inform the court of the identity of the witness; but
- (b) is not required to disclose in connection with the application—
 - (i) the identity of the witness, or
 - (ii) any information that might enable the witness to be identified;

to any other party to the proceedings or the legal representatives of any other party to the proceedings.

(3) Where an application is made by the accused, the accused—

- (a) shall inform the court of the identity of the witness; and
- (b) shall, where the court directs, inform the prosecution of the identity of the witness; but
- (c) is not required to disclose in connection with the application—
 - (i) the identity of the witness, or
 - (ii) any information that might enable the witness to be identified;to any other party to the proceedings or the legal representatives of any other party to the proceedings.

(4) Accordingly, where the prosecutor or the accused proposes to make an application for witness anonymity order, any relevant material which is disclosed by the party making the application, before the determination of the application may be disclosed in such a way as to prevent—

- (a) the identity of the witness; or
- (b) any information that might enable the witness to be identified;

from being disclosed except as required by subsection (2)(a) or (3)(a).

(5) “Relevant material” means any document or other material which falls to be disclosed, or is sought to be relied on, by or on behalf of the party making the application in connection with the proceedings or preliminary proceedings.

(6) The court must give every party to the proceedings the opportunity to be heard on an application under this section.

(7) Nothing in this section is to be taken as restricting any power to make rules of court.

Conditions for making order

35. (1) Where an application is made for a witness anonymity order the court may grant such order only if it is satisfied that Conditions A to C are met.

(2) Condition A is that the proposed order is necessary—

- (a) to protect the safety of the witness or another person or to prevent any serious damage to property; or
- (b) to prevent real harm to the public interest, whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise.

(3) Condition B is that, having regard to all the circumstances, the effect of the proposed order would not prevent the accused from receiving a fair trial.

(4) Condition C is that the importance of the witness' testimony is such that in the interests of justice the witness ought to testify and—

- (a) the witness would not testify if the proposed order were not made; or
- (b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

(5) In determining whether the proposed order is necessary for the purpose mentioned in subsection (2)(a), the court must have regard (in particular) to any reasonable fear on the part of the witness—

- (a) that the witness or another person would suffer death or injury; or
- (b) that there would be serious damage to property;

if the witness were to be identified.

Relevant considerations

36. (1) When deciding whether Conditions A to C in section 35 are met in the case of an application for a witness anonymity order, the court must have regard to—

- (a) the considerations set out in subsection (2); and
- (b) such other matters as the court considers relevant.

(2) The considerations are—

- (a) the general right of an accused in criminal proceedings to know the identity of a witness in the proceedings;
- (b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his evidence comes to be assessed;
- (c) whether evidence given by the witness might be the sole or decisive evidence implicating the accused;
- (d) whether the witness' evidence could be properly tested (whether on grounds of credibility or otherwise) without his identity being disclosed;
- (e) whether there is any reason to believe that the witness has—
 - (i) a tendency to be dishonest, or
 - (ii) any motive to be dishonest in the circumstances of the case;

having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the accused or any associates of the accused;

- (f) whether it would be reasonably practicable by implementing other measures available to the court, to protect the witness without making a witness anonymity order.

Warning to jury

37. (1) Subsection (2) applies where, on a trial on indictment with a jury, any evidence has been given by a witness at a time when a witness anonymity order applied to the witness.

(2) The judge must give the jury such warning as the judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the accused.

Discharge or variation of order

38. (1) A court that has made a witness anonymity order in relation to any criminal proceedings may in those proceedings subsequently discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of the provisions of sections 35 and 36 that apply to the making of an order.

(2) The court may do so—

(a) on an application made by a party to the proceedings if there has been a material change of circumstances since the relevant time; or

(b) of its own motion.

(3) The court must give every party to the proceedings the opportunity to be heard before—

(a) determining an application made to it under subsection (2)(a); or

(b) discharging or varying the order on its own initiative.

(4) Notwithstanding subsection (3) the court may hear one or more of the parties to the proceedings in the absence of an accused in the proceedings and the accused's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(5) "The relevant time" means—

(a) the time when the order was made; or

(b) if a previous application has been made under subsection (2), the time when the application or the last application was made.

Discharge or variation after proceedings

39. (1) This section applies if—

(a) a court has made a witness anonymity order in relation to a witness in criminal proceedings (the old proceedings); and

(b) the proceedings have come to an end.

(2) The court that made the witness anonymity order may discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of—

(a) the provisions of sections 35 and 36 that apply to the making of a witness anonymity order; and

(b) such other matters as the court considers relevant.

(3) The court may discharge or vary (or further vary) the witness anonymity order on an application made by—

(a) a party to the old proceedings if there has been a material change of circumstances since the relevant time; or

(b) the witness if there has been a material change of circumstances since the relevant time.

(4) The court may not determine an application made to it under subsection (3) unless in the case of each of the parties to the old proceedings and the witness—

(a) it has given the person the opportunity to be heard; or

(b) it is satisfied that it is not reasonably practicable to communicate with the person.

(5) Subsection (4) does not prevent the court hearing one or more of the persons mentioned in that subsection in the absence of a person who was an accused in the old proceedings and that person's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(6) "The relevant time" means—

(a) the time when the old proceedings came to an end; or

(b) if a previous application has been made under subsection (3), the time when the application (or the last application) was made.

Discharge or variation by the Court of Appeal

40. (1) This section applies if—

(a) a court has made a witness anonymity order in relation to a witness in criminal proceedings ("the trial proceedings"); and

(b) an accused in the trial proceedings has in those proceedings been—

(i) convicted, or

(ii) found not guilty by reason of insanity, and

(iii) found to be under a disability and to have done the act charged in respect of an offence.

(2) The Court of Appeal may in proceedings on or in connection with an appeal by the accused from the trial proceedings discharge or vary (or further vary) the order if it appears to the court to be appropriate to do so in view of—

(a) the provisions of sections 38 and 39 that apply to the making of a witness anonymity order; and

(b) such other matters as the court considers relevant.

(3) The Court of Appeal may not discharge or vary the order unless in the case of each party to the trial proceedings—

(a) it has given the person the opportunity to be heard; or

(b) it is satisfied that it is not reasonably practicable to communicate with the person.

(4) Notwithstanding subsection (3) the Court of Appeal may hear one or more of the parties to the trial proceedings in the absence of a person who was an accused in the trial proceedings and that person's legal representatives, if it appears to the court to be appropriate to do so in the circumstances of the case.

(5) In this section a reference to the doing of an act includes a reference to a failure to act.

Public interest immunity

41. Nothing in this Part affects the common law rules as to the withholding of information on the grounds of public interest immunity.

Interpretation of this Part

42. In this Part—

“criminal proceedings” means criminal proceedings consisting of a trial or other hearing at which evidence falls to be given;

“witness anonymity order” has the meaning given by section 33.

PART 7

JUDGE ONLY TRIALS

Application of this Part

43. (1) This Part applies where a person is committed for trial or indicted for an offence including a sexual offence under Part 14 of the Criminal Code.

Application for trial to be conducted without a jury

44. (1) Notwithstanding anything to the contrary in any other law, a judge may order that a trial be conducted without a jury if he is satisfied that the interests of justice so require.

(2) An order under subsection (1) may be made on the application of any party to the trial (prosecution or defence) or by the judge of his own volition.

(3) In making a determination as to whether the interests of justice require that the trial be conducted without a jury, the judge shall have regard to all the circumstances prevailing, including any or all of the following—

(a) the nature of the charges;

- (b) the complexity of the issues or matter to be determined, and any steps which might reasonably be taken to reduce the complexity of the trial;
- (c) the length of the trial, and any steps which might reasonably be taken to reduce the length of the trial;
- (d) the likelihood that, if a jury were selected, pre-trial publicity may influence its decision;
- (e) if there is any information tending to suggest that jury tampering may arise;
- (f) whether material witnesses are willing to give evidence before a jury; or
- (g) whether the case involves a criminal gang element and could be properly tried without a jury.

Procedure for applications under section 44

45. (1) An application under section 44 shall be made to the court within 28 days after the committal of the accused and served on all other parties.

(2) A party who wishes to oppose an application made under section 44 shall do so within 7 days of receiving a copy of that application and shall file with the court written representations, including a short explanation of the reasons for opposing such application and shall serve copies thereof on all other parties.

Determination of application

46. On receipt of an application under section 44, or if the judge of his own volition considers that the interests of justice may require that a trial take place without a jury, he shall appoint a day to hear representations from the parties to the trial, and after such parties have had full opportunity of being heard, make his determination thereon with written reasons for such decision.

Judge to have power of jury in trials without a jury

47. (1) Where a trial is conducted without a jury, the judge shall have all the powers, authority and jurisdiction which the court would have had if the trial had been conducted with a jury (including power to determine any question and to make any finding which would be required to be determined or made by a jury).

(2) Except where the context otherwise requires, any reference in any enactment to a jury, the verdict of a jury or the finding of a jury is to be read, in relation to a trial conducted without a jury, as a reference to the court, the verdict of the court or the finding of the court respectively.

Judge to give reasons for conviction or acquittal

48. (1) The Judge shall, as soon as reasonably practicable and in any event before the expiration of 14 days, deliver his decision and he shall give a written judgment stating his reasons therefor.

(2) The decision referred to in subsection (1) shall include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) Where a Judge fails to deliver his decision within the period specified in subsection (1) he shall convene the Court and inform the parties of the time required for the completion of the task.

PART 8

APPEALS BY THE ACCUSED

Appeals against a decision of the judge sitting alone

49. (1) An appeal shall lie to the Court of Appeal and if unsuccessful, to the Privy Council, at the instance of the accused person, from the decision of the judge given under section 48, convicting the accused person on any of the following grounds—

(a) without the leave of the Court of Appeal—

- (i) that the Court had no jurisdiction in the case,
- (ii) that the Court exceeded its jurisdiction in the case,
- (iii) that the Judge was personally interested in the case,
- (iv) that the Judge acted corruptly, maliciously or was biased in the case,
- (v) that the decision was obtained by fraud,
- (vi) that the case has been already heard or tried and decided by, or forms the subject of a hearing or trial pending before, some competent court,
- (vii) that legally admissible evidence substantially affecting the merits of the case was rejected by the Court,
- (viii) that legally inadmissible evidence was admitted by the Court and that there is not sufficient admissible evidence to sustain the decision after rejecting such inadmissible evidence, or
- (ix) that the decision was erroneous in some other point of law;

(b) with leave of the Court of Appeal—

- (i) that the decision is unreasonable or cannot be supported having regard to the evidence or the totality of the evidence, or
- (ii) that the judgment or sentence passed was based on a wrong principle or was such that a Court viewing the circumstances reasonably could not properly have so decided, or
- (iii) that the sentence imposed was unduly severe.

(2) In the determination of an appeal, the Court of Appeal shall, subject to this Act have all the powers of the Court of Appeal under the Eastern Caribbean Supreme Court (Anguilla) Act in relation to criminal appeals.

Appeals against a conviction by the jury

50. In relation to a trial on indictment by a judge sitting with a jury, the accused has the right of appeal as provided for by section 35 of the Eastern Caribbean Supreme Court (Anguilla) Act.

PART 9

PROSECUTION APPEALS GENERALLY

Right of appeal

51. (1) In relation to a trial on indictment (by judge with or without a jury), the prosecution is to have the rights of appeal for which provision is made by this Part.

(2) Notwithstanding subsection (1) the prosecution is to have no right of appeal under this Part in respect of—

- (a) a ruling that a jury be discharged; or
 - (b) a ruling from which an appeal lies to the Court of Appeal by virtue of any other enactment.
- (3) An appeal under this Part is to lie to the Court of Appeal.
- (4) Such an appeal may be brought only with the leave of the judge or the Court of Appeal.

Right of appeal in respect of terminating rulings

52. (1) This section applies where a judge makes a terminating ruling in relation to a trial on indictment at an applicable time and the ruling relates to one or more offences included in the indictment.

(2) The prosecution may appeal in respect of the ruling—

- (a) immediately after the judge makes a ruling; or
- (b) before the expiry of the next business day, where an adjournment is granted under subsection (5).

(3) The ruling is to have no effect whilst the prosecution is able to take any steps under subsection (4).

(4) The prosecution may not appeal in respect of the ruling unless—

- (a) following the making of the ruling, it—
 - (i) informs the court that it intends to appeal; or

- (ii) requests an adjournment to consider whether to appeal; and
 - (b) if such an adjournment is granted, it informs the court following the adjournment that it intends to appeal.
- (5) If the prosecution requests an adjournment under subsection (4)(a)(ii), the judge may grant such an adjournment.
- (6) Where the ruling relates to 2 or more offences—
- (a) any one or more of those offences may be the subject of the appeal; and
 - (b) if the prosecution informs the court in accordance with subsection (4) that it intends to appeal, it must at the same time inform the court of the offence or offences which are the subject of the appeal.
- (7) Where—
- (a) the ruling is a ruling that there is no case to answer; and
 - (b) the prosecution, at the same time that it informs the court in accordance with subsection (4) that it intends to appeal, nominates one or more other rulings which have been made by a judge in relation to the trial on indictment at an applicable time and which relate to the offence or offences which are the subject of the appeal, that other ruling, or those other rulings, are also to be treated as the subject of the appeal.
- (8) The prosecution may not inform the court in accordance with subsection (4) that it intends to appeal, unless, at or before that time, it informs the court that it agrees that, in respect of the offence or each offence which is the subject of the appeal, the accused in relation to that offence should be acquitted of that offence if either of the conditions mentioned in subsection (9) is fulfilled.
- (9) Those conditions are—
- (a) that leave to appeal to the Court of Appeal is refused by the Court of Appeal; and
 - (b) that the appeal is abandoned before it is determined by the Court of Appeal.
- (10) If the prosecution informs the court in accordance with subsection (4) that it intends to appeal, the ruling mentioned in subsection (1) is to continue to have no effect in relation to the offence or offences which are the subject of the appeal whilst the appeal is pursued.
- (11) If and to the extent that a ruling has no effect in accordance with this section—
- (a) any consequences of the ruling are also to have no effect;
 - (b) the judge may not take any steps in consequence of the ruling; and
 - (c) if he does so, any such steps are also to have no effect.
- (12) Where the prosecution has informed the court of its agreement under subsection (8) and either of the conditions mentioned in subsection (9) is fulfilled, the judge or the Court of Appeal

must order that the accused in relation to the offence or each offence concerned be acquitted of that offence.

(13) In this section “applicable time”, in relation to a trial on indictment, means any time (whether before or after the commencement of the trial) before the time when the judge starts his summing-up to the jury.

(14) For the purposes of this section a terminating ruling means a ruling that is formally terminating and those that are de facto terminating in the sense that they are so fatal to the prosecution case that, in the absence of a right of appeal, the prosecution would offer no or no further evidence.

(15) Terminating rulings include—

- (a) a no case to answer ruling;
- (b) a ruling by the judge that the prosecution was in abuse of process and that the proceedings must be permanently stayed.

Expedited and non-expedited appeals

53. (1) Where the prosecution informs the court in accordance with section 52(4) that it intends to appeal, the judge must decide whether or not the appeal should be expedited.

(2) If the judge decides that the appeal should be expedited, he may order an adjournment.

(3) If the judge decides that the appeal should not be expedited, he may—

- (a) order an adjournment; or
- (b) discharge the jury (if one has been sworn).

(4) If he decides that the appeal should be expedited, he or the Court of Appeal may subsequently reverse that decision and, if it is reversed, the judge may act as mentioned in subsection (3)(a) or (b).

Continuation of proceedings for offences not affected by ruling

54. (1) This section applies where the prosecution informs the court in accordance with section 53(4) that it intends to appeal.

(2) Proceedings may be continued in respect of any offence which is not the subject of the appeal.

Determination of appeal by Court of Appeal

55. (1) On an appeal under section 52, the Court of Appeal may affirm, reverse or vary any ruling to which the appeal relates.

(2) Subsections (3) to (5) apply where the appeal relates to a single ruling.

(3) Where the Court of Appeal affirms the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, order that the accused in relation to that offence be acquitted of that offence.

(4) Where the Court of Appeal reverses or varies the ruling, it must, in respect of the offence or each offence which is the subject of the appeal, do any of the following—

- (a) order that proceedings for that offence may be resumed in the High Court;
- (b) order that a fresh trial may take place in the High Court for that offence;
- (c) order that the accused in relation to that offence be acquitted of that offence.

(5) The Court of Appeal may not make an order under subsection (4)(c) in respect of an offence unless it considers that the accused could not receive a fair trial if an order were made under subsection (4)(a) or (b).

(6) Subsections (7) and (8) apply where the appeal relates to a ruling that there is no case to answer and one or more other rulings.

(7) Where the Court of Appeal affirms the ruling that there is no case to answer, it must, in respect of the offence or each offence which is the subject of the appeal, order that the accused in relation to that offence be acquitted of that offence.

(8) Where the Court of Appeal reverses or varies the ruling that there is no case to answer, it must in respect of the offence or each offence which is the subject of the appeal, make any of the orders mentioned in subsection (4)(a) to (c) (but subject to subsection (5)).

Reversal of rulings

56. The Court of Appeal may not reverse a ruling on an appeal under this Part unless it is satisfied that the ruling—

- (a) was wrong in law;
- (b) involved an error of law or principle; or
- (c) was a ruling that it was not reasonable for the judge to have made.

Interpretation

57. (1) In this Part—

“ruling” includes a decision, determination, direction, finding, notice, order, refusal, rejection or requirement.

(2) Any reference in this Part to a judge is a reference to a judge of the High Court.

(3) There is to be no right of appeal under this Part in respect of a ruling in relation to which the prosecution has previously informed the court of its intention to appeal under section 52(4).

(4) Where a ruling relates to two or more offences but not all of those offences are the subject of an appeal under this Part, nothing in this Part is to be regarded as affecting the ruling so far as it relates to any offence which is not the subject of the appeal.

(5) Where two or more accused are charged jointly with the same offence, the provisions of this Part are to apply as if the offence, so far as relating to each accused, were a separate offence (so that, for example, any reference in this Part to a ruling which relates to one or more offences includes a ruling which relates to one or more of those separate offences).

PART 10

CASE MANAGEMENT CONFERENCE

Duty of Trial Judge to hold a Case Management Conference

58. (1) Prior to the commencement of any trial, the Trial Judge shall hold a case-management conference.

(2) The objective of a Trial judge at a case management conference shall be to ensure that the case is dealt with efficiently and expeditiously by actively managing the case.

(3) Active case management includes—

- (a) the early identification of the real issues;
- (b) the early identification of the needs of witnesses;
- (c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
- (d) monitoring the progress of the case and compliance with directions;
- (e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
- (f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
- (g) encouraging the participants to co-operate in the progression of the case; and
- (h) making use of technology.

(4) The Trial Judge must actively manage the case by giving any direction appropriate to the needs of that case as early as possible.

(5) The parties must actively assist the court in fulfilling the objective in the subsection (2).

(6) Active assistance for the purposes of this rule includes—

- (a) at the beginning of the case, communication between the prosecutor and the accused at the first available opportunity and in any event no later than the beginning of the day of the first hearing;
- (b) after that, communication between the parties until the conclusion of the case;
- (c) by such communication establishing, among other things—
 - (i) whether the accused is likely to plead guilty or not guilty,
 - (ii) what is agreed and what is likely to be disputed,
 - (iii) what information, or other material, is required by one party of another, and why, and
 - (iv) what is to be done, by whom, and when (without or if necessary with a direction);
- (d) reporting on that communication to the court at the first hearing, and after that, as directed by the court.

(7) The Trial Judge must give a direction that only those witnesses in a matter who are really needed in relation to genuinely disputed, relevant issues should be required to attend.

(8) Before trial, all parties must carefully consider whether or not the contents of a witness deposition are agreed, in which case the physical attendance of a witness at trial will ordinarily be unnecessary.

PART 11

USE OF LIVE LINK FOR EVIDENCE OF WITNESSES IN CIVIL PROCEEDINGS

Interpretation

59. In this Part—

“civil proceedings” means any proceedings, other than proceedings in any criminal matter, before a court;

“court” means any civil court having jurisdiction pursuant to any Act of the Anguilla;

“court point” means the courtroom;

“live link” means facilities that enable audio and visual communication between persons at different places;

“remote point” means any place other than the courtroom.

Evidence of witness via live link

60. (1) A court may, having heard representation from the parties in any civil proceedings, direct that a witness may give evidence to the court by live link from any remote point if the requirements in section 61 are met.

(2) The court shall not make a direction under subsection (1) unless it is satisfied that the making of the direction is consistent with the interests of justice.

Requirements for use of live link

61. The requirements for a live link are as follows—

- (a) both the court point and the remote point are equipped with facilities that—
 - (i) enable all appropriate persons at the court point to see and hear the person appearing before the Court or giving the evidence from the remote point, and
 - (ii) enable all appropriate persons at the remote point to see and hear appropriate persons at the court point;
- (b) compliance with any requirements prescribed by rules of court for or with respect to—
 - (i) the form of live link,
 - (ii) the equipment, or class of equipment, used to establish the link,
 - (iii) the layout of cameras,
 - (iv) the standard or speed of transmission,
 - (v) the quality of communications,
 - (vi) any other matter relating to the link; and
- (c) compliance with any requirements imposed by the Chief Justice by Practice Direction.

PART 12

MISCELLANEOUS PROVISIONS

Depositions not in dispute and admissions to be read into evidence at trial

62. (1) The depositions of all witnesses whose attendance is not considered to be necessary by the Prosecution and who are not required by the accused to attend the trial shall be read into evidence at trial.

(2) Whenever possible, relevant parts from an agreed deposition should be distilled into a set of admissions, agreed between all parties and shall be read into evidence at trial.

Use of statements as evidence in preliminary inquiries into sexual offences

63. (1) This section applies where in a preliminary inquiry relating to a sexual offence, the complainant in respect of that offence is a witness in the proceedings.

(2) A special measures direction may be given under this section where the Magistrate—

- (a) is conducting a preliminary inquiry in relation to a sexual offence; and
- (b) is satisfied that all of the evidence of the complainant consists of written statements or video recorded statements, (with or without exhibits).

(3) Where subsection (2) applies, the Magistrate shall in accordance with Part 3, Division 2 of the Magistrate's Code of Procedure Act take the written statement or video recorded statement of the complainant as evidence of the complainant.

(4) Where the Magistrate, pursuant to subsection (3) takes the written statement or video recorded statement as evidence of the complainant, the complainant shall not be required to give evidence in person at a preliminary inquiry.

(5) For the avoidance of doubt, the complainant shall not be cross-examined for the purposes of the preliminary inquiry.

Issue of Practice Directions

64. The Chief Justice may issue Practice Directions governing—

- (a) how judgments with respect to verdicts are to be written; or
- (b) any matter of procedure under this Act generally.

Power to make Regulations and Rules

65. (1) The Governor in Council may, by regulation make different provision for different cases, circumstances or areas and may contain such incidental, supplemental, saving or transitional provisions as the Governor in Council considers appropriate.

(2) The power conferred on the Chief Justice to make rules of court under the Supreme Court Order shall be deemed to extend to permit the making of any rules of court mentioned within this Act and generally for carrying into effect the provisions of this Act.

(3) For the purposes of subsection (2) the Supreme Court Order means the West Indies Associated States Supreme Court Order, 1967 as amended by the Anguilla, Montserrat and Virgin Island (Supreme Court) Order 1983.

Application of this Act

66. (1) This Act shall apply to criminal proceedings pending on the commencement date of this Act and criminal proceedings instituted on or after the commencement of this Act and Part 11 shall apply accordingly to all civil proceedings after the commencement of this Act.

(2) For the purposes of this section, criminal proceedings are deemed to be pending once an accused person has been committed for trial in the High Court and an indictment has been laid against the accused person.

Conflict

67. In the event of an inconsistency between this Act and any relevant legislation, this Act prevails to the extent of the inconsistency.

Apparent age

68. (1) For the purposes of this Act the age of a person shall be taken to be that which it appears to the court to be after considering any available evidence.

(2) Subsection (1) is subject to section 1(5) of this Act.

Consequential amendment

69. The Eastern Caribbean Supreme Court (Anguilla) Act is amended by repealing section 35A “Right of appeal of the Attorney-General”.

Citation and commencement

70. (1) This Act may be cited as the Administration of Justice (Special Provisions) Act, 2024.

(2) This Act shall come into force on such day as the Governor may appoint by Notice published in the *Gazette*.

SCHEDULE 1

(Section 3(7))

RELEVANT OFFENCES FOR THE PURPOSES OF SECTION 3

Murder and manslaughter (Part 16 of Criminal Code)

1. Murder in a case where it is alleged that a firearm or knife was used to cause the death in question.
2. Manslaughter in a case where it is alleged that a firearm or knife was used to cause the death in question.
3. Murder or manslaughter in a case (other than a case falling within paragraph 1 or 2) where it is alleged that—
 - (a) the accused was carrying a firearm or knife at any time during the commission of the offence; and
 - (b) a person other than the accused knew or believed at any time during the commission of the offence that the accused was carrying a firearm or knife.
4. An offence under section 204 of the Criminal code (wounding with intent to cause grievous bodily harm etc.) in a case where it is alleged that a firearm or knife was used to cause the wound or harm in question.
5. An offence under section 205 of the Criminal code (malicious wounding) in a case where it is alleged that a firearm or knife was used to cause the wound or inflict the harm in question.
6. An offence under section 225(a) of the Criminal Code (assault with intent to resist arrest) in a case where it is alleged that a firearm or knife was used to carry out the assault in question.
7. An offence under section 223 of the Criminal Code (assault occasioning actual bodily harm) in a case where it is alleged that a firearm or knife was used to inflict the harm in question.
8. An offence under sections 204, 205, 225(a) or 223 in a case (other than a case falling within any of paragraphs 4 to 7) where it is alleged that—
 - (a) the accused was carrying a firearm or knife at any time during the commission of the offence; and
 - (b) a person other than the accused knew or believed at any time during the commission of the offence that the accused was carrying a firearm or knife.
9. An offence under section 88 of Criminal Code (having an offensive weapon in a public place).
10. An offence under section 20 of the Firearms Act (requirement of firearm certificate).
11. An offence under section 9 and 10 of the Firearms Act (business and other transactions with firearms and ammunition).
12. An offence under section 15 of the Firearms Act (Special restrictions on shortening firearms and converting imitation firearms into firearms).
13. An offence under section 24 of the Firearms Act (possession with intent to injure).
14. An offence under section 25 of the Firearms Act (use of firearm to resist arrest).
15. An offence under section 85 of the Criminal Code (possession of explosives and other things with intent to commit an offence).
16. An offence under section 21 of the Firearms Act (carrying firearm in a public place).
17. An offence under section 88 Criminal Code (having article with blade or point in public place).

General

18. A reference in any of paragraphs 1 to 8 to an offence (“offence A”) includes a reference to—
 - (a) an attempt to commit offence A in a case where it is alleged that it was attempted to commit offence A in the manner or circumstances described in that paragraph;

- (b) a conspiracy to commit offence A in a case where it is alleged that the conspiracy was to commit offence A in the manner or circumstances described in that paragraph;
 - (c) aiding, abetting, counselling or procuring the commission of offence A in a case where it is alleged that offence A was committed, or the act or omission charged in respect of offence A was done or made, in the manner or circumstances described in that paragraph.
19. A reference in any of paragraphs 9 to 17 to an offence ("offence A") includes a reference to—
- (a) an attempt to commit offence A;
 - (b) a conspiracy to commit offence A; and
 - (c) to aiding, abetting, counselling or procuring the commission of offence A.

Interpretation

20. In this Schedule "firearm" has the meaning given by section 1 of the Firearms Act.



Merrick Richardson
Deputy Speaker

Passed by the House of Assembly this 11th day of June, 2024.



Lenox J. Proctor
Clerk of the House of Assembly

EXPLANATORY NOTES
(These explanatory notes do not form part of the Bill)

The Bill for the Administration of Justice (Special Provisions) Act seeks to bring into force the following provisions:

PART 1

PRELIMINARY

Part 1 of the Bill deals with definitions and interpretation

Clause 1 (General interpretation)

This clause defines the key terms used in this Bill. Subclause (4) establishes that where there is uncertainty as to the age of a witness for the purposes of establishing whether he is an eligible witness pursuant to clause 2(1)(a), the child will be presumed to be under 18 years provided that there are reasons to believe that he is a child. Subclause (5) also establishes that the power of the court to exclude evidence or to prevent questions being asked is not restricted to or limited by the provisions of Part 2. Subclause (6) provides that an offence includes attempting, conspiring, aiding, abetting counselling, procuring or inciting the commission of that offence.

PART 2

SPECIAL MEASURES DIRECTIONS IN CASE OF
VULNERABLE AND INTIMIDATED WITNESSES

Part 2 of the Bill applies only to criminal proceedings. This Part makes provision for the granting of a special measures direction in the case of vulnerable and intimidated witnesses. A witness may be eligible under this Part for a special measures direction to be given in relation to him, where he falls within one of the categories defined in Clauses 2 (vulnerable witnesses) and 3 (intimidated witnesses). These clauses specifically provide that the special measures directions that may be granted under this Part are not available to the accused. Where the court is satisfied that a witness is eligible, the court will determine if a special measures direction will better improve the quality of the evidence given by the witness, and if so, which special measures direction would likely maximise, so far as practicable, the quality of such evidence.

Clauses 2 and 3 outline the grounds on which a witness may be eligible for a special measures direction.

Clause 2 (Witness eligible for assistance on grounds of age or vulnerability)

This clause provides that a witness may be eligible for a special measures direction under this clause if—

- (a) he is under 18 years at the time of the hearing; or
- (b) he suffers from a mental disorder or has a significant impairment of intelligence and social functioning; or
- (c) he has a physical disability or is suffering from a physical disorder.

A witness who is under 18 years (see (a) above) is automatically eligible for a special measures direction. In relation to persons referred to in (b) and (c) above, the court must make a determination

as to his eligibility to a special measures direction. In making such a determination the court will consider whether the quality of evidence given by the witness is likely to be diminished by reason of any circumstances outlined in (b) or (c).

Clause 3 (Witnesses eligible for assistance on grounds of fear or distress about testifying (intimidation))

This clause provides that a witness is also eligible for a special measures direction on grounds of fear or distress (intimidation). Under this clause, a witness' eligibility arises due to one of 2 circumstances—

- (a) Pursuant to a determination being made by the court, i.e. where the court is satisfied that the quality of the evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings; or
- (b) Automatic eligibility arising due to the witness being—
 - (i) a complainant in a sexual offence case or domestic violence case, or
 - (ii) a witness in proceedings for an offence listed in Schedule 1 (which lists offences, in relation to which witnesses to such offences may be intimidated and in fear of testifying);

Notwithstanding the witnesses' eligibility to a special measures direction under this Part, the witness' views will be sought by the court. The witness may inform the court that he wishes to give evidence without the protection or assistance of the special measures direction and the court has to consider the views expressed by the witness.

Clause 4 (Special measures available to eligible witnesses)

This clause makes provision for the types of special measures directions that are available to individual witnesses. In relation to vulnerable witness (referred to in clause 2) all of the special measures specified in clauses 10 to 17 are available to them. In relation to intimidated witnesses (referred to in clause 3) all of the special measures directions except 2, are available. The two special measures directions that are not available to intimidated witnesses are—

- (a) a clause 16 direction (Aids to communication); and
- (b) a clause 17 direction (Examination of witnesses through an intermediary).

This clause also makes provision for the Chief Justice to make regulations in relation to special measures directions covered in Part 2, which includes adding or removing a special measures direction that may be given.

Clauses 5 and 6 deal with consideration of the court when granting special measures directions and effects of such measures.

Clause 5 (Special measures direction relating to eligible witness)

This clause provides that a special measures direction may be given on an application being made to the court by a party to the proceedings in relation to vulnerable or intimidated witnesses. The court also reserves the power to give a direction under this Part, where the court is of the view that consideration should be given as to whether a direction should be granted in relation to a vulnerable

or intimidated witness. Where the court is satisfied that a witness is eligible, the court will then determine if a special measures direction will better improve the quality of the evidence given by the witness and if so which special measures direction would likely maximise, so far as practicable, the quality of such evidence. In making a determination as to whether to give a special measures direction, the court shall consider—

- (a) any views expressed by the witness; and
- (b) whether the measure or measures might inhibit such evidence being effectively tested by a party to the proceedings.

This clause provides that the general powers of the court to exercise its inherent jurisdiction in relation to witnesses (whether eligible under this Part or not) is not limited by the provisions in this Part. As such the court reserves the power to make any order or grant leave in relation to any witness, where same is needed for the good administration of justice (e.g. making an order permitting a foreign language interpreter to be used when necessary).

Clause 6 (Further provisions about directions: general)

Clause 6 provides that where a special measures direction is given, such measure has binding effect until the matter (in relation to every accused) has been completed/disposed of, either by acquittal, conviction or by abandonment of the matter. The special measures direction may, however, be varied or discharged where the court determines that it is in the interests of justice to do so. The court will only consider an application made by a party to the proceedings to vary or discharge a special measures direction where the party can demonstrate that there has been a material change of circumstances since the time when the direction was first given. Where the court makes its decision re varying or discharging the direction, the court shall state in open court its reasons for its decision. The Chief Justice along with two other judges may make rules for matters related to applications for special measures directions.

NB: A special measure direction application is made at the first hearing in the Magistrate Court or the first hearing in the High Court. This is dealt with as a preliminary matter, prior to the prosecution opening its case or first witness being called. The prosecution and defence must at these hearings consider and request which special measures direction they wish to be utilised in the trial and permission must be sought at the first hearing.

Clause 7 (Special provisions relating to child witnesses)

This clause deals with the special provisions that would apply to child witnesses. The primary rule is that where a video recording of an interview of the child witness was made in contemplation of it being admitted as evidence-in-chief in relation to the child witness, such video recording will be admitted as evidence-in-chief of the child witness. This clause applies to both child complainants and other child witnesses to a criminal offence. Additionally, this clause, provides that where any additional evidence must be given by the child whose video recording was admitted as evidence-in-chief, a live link will be used for the giving of such evidence. The child would not therefore be required to give oral evidence in court unless the court makes a determination under subclause (4) not to give a special measure direction. The court may make a decision, not to give a special measures direction in the following circumstances—

- (a) where the court believes that it is in the interests of justice to not allow the video recording to be admitted as evidence-in-chief (see clause 14(2)); or

- (b) where the child witness has communicated that he wants to give evidence in person (and not via video recording or live link) and the court determines that his evidence will not be diminished if the child gives evidence in person, without the protection afforded by the special measure directions (i.e. giving evidence by video recording or live link); or
- (c) Where the court determines that admitting the video recording as evidence-in-chief or requiring evidence to be given by live link would not likely maximise the quality of the witnesses' evidence. In these circumstances the court may however, determine that another special measures direction might better maximise the quality of the child witness' evidence and the court may give a direction for one or more special measures directions to be applied.

Where a child communicates that he wishes to give evidence in person pursuant to subclause (4)(b) the court shall (pursuant to subclause (5)) give a direction under clause 11, for a screen to be used when the child is giving evidence. Before giving this direction under subclause (5), the court has to consider the views of the witness and consider the usefulness of such special measures directions in maximising the quality of the child witness' evidence. The same considerations outlined in paragraph (b) and (c) above, that apply to the video recorded evidence and use of live link, will similarly apply to the use of screens by the witness.

When determining the weight to given to a child witness' views re the special measures directions referred to in subclauses (4)(b) or (6)(a), the court shall take into account a number of factors listed in subclause (7), including the age of the child and relationship of the child to the accused.

Subclauses (8) and 9 deal with treatment of child witnesses who are now adults at the time of the trial.

Subclause (8) provides that, if a court gives a special measures direction in respect of a child witness who was eligible for special measures on grounds of age only (i.e. witness is under 18), and the witness turns 18 before beginning to give evidence, the direction will no longer have effect and he will be required to give evidence without the special measures being applied.

This restriction is however, not applicable where subclause (9) applies i.e. where the special measures direction given relates to video recorded evidence (including evidence-in-chief and cross-examination) where such recordings were made at a time when the witness was under 18) (see subclause (9)). In this case, the video recorded evidence-in-chief and video recorded cross-examination will both be admissible notwithstanding the fact that at the time when such evidence is being admitted, the witness is now 18.

Subclause (8) of clause 7 also provides that if the witness turns 18 after beginning to give evidence, the special measures provided for him will continue to apply. As such all special measures of directions (ordered in relation to the witness under clauses 10 to 17) will continue to apply when he is giving evidence or is being cross examined, notwithstanding the fact that he is now 18 at the time of the trial).

Clause 8 (Extension of provisions of clause 7 to certain witnesses over 18 years)

This clause extends the protections given to child witnesses to certain witnesses who are over 18 years old).

Clause 8 extends some of the provisions of clause 7 (namely subclauses (2), (3), (4) and (7)) to witnesses who are over 18 at the beginning of the trial, where—

- (a) such witnesses made a video recording to take the place of their evidence-in-chief;

(b) the witness was under 18 at the time when the recording was done.

Pursuant to this clause, those witnesses will be eligible for the special measures specified in clause 7, in the same way that they would be, if the witness was under 18 years at the time when the trial began. In these circumstances, the same presumptions will apply to the witness (who is now an adult) as would apply to witnesses who are under 18 at the time of the trial. That includes being considered “in need of special protection” if they are giving evidence in a case involving sex, violence, neglect or abduction.

Under this clause, the special provisions relating to admissibility of the video recording as evidence-in-chief and utilisation of live link in instances where the witness is required to give further evidence, would apply to the witness who is now over 18 years old. The witness would however, still be required to be cross-examined in person. A special measures direction for video recorded cross-examination would not be permitted in relation to a witnesses who is now an adult unless the witness is otherwise eligible under clause 2(1)(b) or 3.

NB: The distinction between subclause 7(9) and clause 8—

In relation to subclause 7(9), the witness is under 18 when the application is made for the special measures direction. Subclause 7(9) permits both video recorded evidence-in-chief and video recorded cross-examination to be admitted into evidence, provided both recordings were made at a time when the witness is under 18.

Under clause 8, the witness is now an adult at the time when an application is being made for a special measure direction. Clause 8, unlike clause 7(9) only permits video recorded evidence to be admitted as evidence-in-chief. It does not include video recorded cross-examination. The video recorded evidence must have been recorded at a time when the witness was under 18. The other special measures directions that are otherwise available to the child would only be available to this witness (now over 18) if he is otherwise eligible under clause 2(1)(b) or clause 3.

Clause 9 (Special provisions relating to sexual offences where the complainant is over 18 years)

This clause applies to adult complainants in sexual offences. This clause provides that the prosecution may, in relation to an adult complainant of a sexual offence, make an application for a special measures direction to be given (subclause 4). When an application is made to the court, the court will determine whether the witness is vulnerable (pursuant to clause 2(1)(b) i.e. due to mental/physical reasons) or intimidated (pursuant to clause 3 i.e. fear or distressed about testifying) (subclause 5). When an application is made for a special measures direction the court must consider the following—

- (a) where a video recording of the interview of the complainant was made with a view to it being admitted into evidence-in-chief, the court must direct (pursuant to subclause (7) that this recording be admitted as evidence-in-chief under clause 14; (subclause 7)
- (b) where an application has been made by the defence for the exclusion of part or the entire video recording, the court may pursuant to clause 14(2), exclude some or part of the video recording from being admitted as evidence-in-chief, where the court considers it to be in the interests of justice to do so; (subclause 8)
- (c) a special measures direction to admit the video recording as evidence-in-chief, will only be given where the court is satisfied that it will maximise the quality of the complainant’s evidence. Where the court believes that admitting the video

recording will not improve the quality of the witness' evidence, it will not direct that the video recording be admitted. Where the court determines that other special measures directions (other than a clause 14 direction) would similarly or better maximise the quality of the complainant's evidence, the court may give an alternative special measures direction. (subclause 9 and clause 5(2))

Clause 10 (Screening witness from the accused)

This clause provides for the screening of witnesses from the accused whilst the witness is giving testimony or being sworn in court. The screen however, cannot prevent the witness from seeing or being seen by the magistrate, judge, jury (where relevant), at least one legal representative for each party and interpreters or others appointed by the court to assist. This special measures direction is available to both intimidated and vulnerable witnesses.

Clause 11 (Evidence by live link)

This clause provides for the giving of evidence by live link and the witness may be accompanied by a person specified by the court or requested by the witness. Where a live link direction is given the witness is not permitted to give evidence by any other means other than through a live link unless the court grants permission to do so. The court may permit evidence to be given other than through a live link where it determines that same is in the interests of justice. This decision may be made by the judge of his own volition or on the application by a party where circumstances have changed since the direction was first given by the judge. This special measures direction is available to both vulnerable and intimidated witness pursuant to clause 2 and 3 respectively.

Clause 12 (Evidence given in private)

This clause provides that the court may direct that persons be excluded from the court room whilst a vulnerable or intimidated witness is giving evidence. Persons who may not be excluded however, include the accused, the jury, legal representatives, interpreter or any other person appointed by the court to assist the witness. This special measure direction is only available to witnesses (child or adult) in relation to—

- (a) sexual offences;
- (b) domestic abuse offences; or
- (c) other persons who the court determines are intimidated and in fear of testifying in proceedings.

Notwithstanding the exclusion of persons under this clause, the case shall be nevertheless deemed to be held in public.

Clause 13 (Removal of gowns)

Under this clause the court may direct that persons in the court are not permitted to wear gowns in the proceedings, whilst the witness is giving his evidence. This special measures direction is available to both vulnerable and intimidated witness pursuant to clauses 2 and 3 respectively.

Clause 14 (Video recorded evidence-in-chief)

This clause provides that where an interview of a witness has been video recorded, this recording may be admitted as evidence-in-chief of the witness. The video recorded witness statement (or part of such video recording) may not however, be admitted by the court for the following reasons—

- (a) where the court deems it to be in the interests of justice, the court may direct that part of or the entire video recording shall not to be admitted as evidence-in-chief. When deciding if to exclude part of the video recording, the court shall consider whether any prejudice to accused that might result from that part being so admitted is outweighed by the desirability of showing the whole, or substantially the whole, of the recorded interview;
- (b) the court may also not admit the video recording if it appears to the court that the witness will not be available for cross-examination and the parties to the proceedings have not agreed that there is no need for the witness to be available;
- (c) the court may also exclude the video recording where rules of court requiring disclosure of the circumstances in which the recording was made was not complied with to the satisfaction of the court.

Where a video recording is admitted the witness will be called by the party tendering it unless—

- (a) a special measures direction has been given allowing for the pre recording of the cross-examination of such witness; or
- (b) all parties to the proceedings have not agreed that there is no need for the witness to be available for cross-examination.

Where the witness has given evidence by video recording, the witness is not allowed to give evidence by live link or in person in relation to any matter which has already been dealt with in the video recording, unless the court permits such evidence to be given. The court may permit evidence to be given in relation to a matter covered in the video recording where it considers it to be in the interests of justice. Where permission is granted the court may allow such evidence to be given by live link.

This special measures direction is available to both vulnerable and intimidated witness pursuant to clause 2 and 3 respectively.

Clause 15 (Video recorded cross-examination and re-examination)

Where an application is made for a clause 14 special measures direction to be given, the court may also direct that any cross-examination or re-examination of the witness shall also be video recorded and the recordings be admitted as evidence of the witness under cross-examination or re-examination. The video recording must be in the absence of the accused, but the magistrate/judge and legal representatives must be able to hear and see the examination of the witness and be able to communicate with the persons in whose presence the recording is made. Similarly, the accused must be able to see and hear any examination and communicate with any legal representative acting for him. A live link is used during the video recording to enable the accused to hear and see the examination, however the accused will not be in the view or sight of the witness (whether in person or via live link) whilst the video recording is being done for the purposes of cross or re-examination. Screens and other special measures directions will be used during the video recording to prevent the witness from seeing and hearing the accused whilst the recording is taking place.

A direction for the cross-examination and re-examination of the witness to be video recorded may however be rescinded in the following circumstances—

- (a) where the requirements outlined in subclause (2) are not satisfied, clause dealing with—
 - (i) who needs to be absent and present during the cross-examination and re-examination, and
 - (ii) who needs to be able to see and hear the cross-examination and re-examination;
or
- (b) where the rules of court of the special measures directions have not been complied with to the satisfaction of the court.

Where a witness is cross-examined or re-examined by video recording, the witness is shall not (without the courts permission) be further cross or re-examined in relation to any evidence given by the witness in the proceedings whether such evidence was given—

- (a) in evidence-in-chief (whether by video recording or by live link or otherwise); or
- (b) in any recording of the cross-examination or re-examination.

The court may permit the further cross-examination or re-examination of the witness by giving a special measures direction for a second video recording to be done for further cross or re-examination of the witness (subclause 5). The court may give a further direction however only where it appears to the court that—

- (a) the party seeking a further direction, has become aware of matter which at the time of the original recording;
- (b) new and relevant matters have arisen from cross-examination; or
- (b) it is in the interests of justice.

Clause 16 (Examination of witness through intermediary)

This clause provides that a special measures direction may provide for the examination of a witness through an intermediary which includes an interpreter or other person approved by the court. The interpreter referred to in this clause does not include a foreign language interpreter who will in all instances be appointed by the court when necessary; its availability is not subject to a witness qualifying as an eligible witness (i.e. a vulnerable or intimidated witness). The interpreter referred to here is a communications expert who e.g. advises on the types of questions that should be put to the witness because of the witness' vulnerabilities or disabilities. Usually this person has a psychology background and is typically required to assist vulnerable witnesses including children and other persons with learning difficulties or difficulties with communication. The requirements in relation to who can see and hear the examination of the witness through the intermediary also apply here (subclauses (3) and (4)). The intermediary is required to make a declaration prior to him acting as an intermediary, that he will faithfully perform his function as an intermediary. The intermediary is in no way connected to any party to the proceedings and his role is solely to facilitate the examination of the witness.

This special measures direction is only available to vulnerable witnesses.

Clause 17 (Aids to Communication)

A special measures direction may allow for a witness, while giving evidence, to be given an aid or device that the court considers appropriate to facilitate communication with the witness. Aids/devices that might be permitted under this clause include aids to ease any anxiety that the witness might be experiencing. E.g. use of fidget toys by a witness who is anxious or who is uncomfortable with eye contact, or use of cards that the witness can hold up when he needs a break.

This special measures direction is only available to vulnerable witnesses.

Clause 18 (Status of evidence given under Part 2)

This clause provides that any evidence that is given by a witness in accordance with a special measures direction is to be treated as if it was made by the witness in direct oral testimony of the court and as such—

- (a) is evidence of any facts stated in the testimony; and
- (b) is not capable of corroborating any other evidence given by the court.

The video recorded evidence-in-chief or cross or re-examination shall be admissible in the judicial proceedings even though such evidence was not made by the witness on oath. This clause also provides that where a statement is given in any proceeding which is not a judicial proceedings (i.e. when the video recordings are made outside of the proceedings), the proceedings during which such recordings were made shall be treated as part of the judicial proceedings. As such, where a person wilfully makes a false statement otherwise than on oath, in circumstances that, had such statement been given on oath, that person would have been guilty of perjury, that person shall for the purposes of the judicial proceedings be guilty of perjury.

Clause 19 (Warning to Jury)

This clause provides that the judge shall give the jury (where this is a jury) such warning as the judge deems necessary to ensure that the fact that a special measures direction was given in relation to the witness does not prejudice the accused.

PART 3

USE OF LIVE LINK FOR EVIDENCE OF CERTAIN ACCUSED PERSONS

Clause 20 (Live link directions)

This clause permits the use of a live link by the accused in specific circumstances. Firstly the court must be satisfied that the giving of the live link direction is in the interests of justice. Secondly the court must be satisfied that the accused fall within one of the below categories—

- (a) in the case where the accused is a child (under 18) the court must be satisfied that—
 - (i) his ability to participate effectively in the proceedings as a witness giving oral evidence in court is compromised by his level of intellectual ability or social functioning, and
 - (ii) use of a live link would enable him to participate more effectively in the proceedings as a witness (whether by improving the quality of his evidence or otherwise).

- (b) in the case where the accused is an adult the court must be satisfied that—
- (i) he suffers from a mental disorder or otherwise has a significant impairment of intelligence and social function,
 - (ii) he is for the reason specified in paragraph (a) unable to participate effectively in the proceedings as a witness giving oral evidence in court, and
 - (iii) use of a live link would enable him to participate more effectively in the proceedings as a witness whether by improving the quality of his evidence or otherwise.

Where a live link direction is given, the accused is not permitted to give oral evidence before the court in these proceedings otherwise than through a live link. The court may rescind (and later give another direction for) a live link direction if it is in the interests of justice.

Clause 21 (Warning to jury)

This clause provides that the judge may give the jury (if there is one) such direction as he thinks necessary, to ensure that the jury gives the same weight to the evidence as if it had been given by the accused in the courtroom or other place where the proceedings are held.

Clause 22 (Savings)

This clause provides that the court's powers to make any order of any discretion or to give permission to any witness including the accused is unaffected by this Part (which deals with directions that may be given specifically in relation to the accused).

PART 4

PROTECTION OF WITNESSES FROM CROSS-EXAMINATION BY
ACCUSED IN PERSON

Clause 23 (Complainants in proceedings for sexual offences)

This clause provides that no person who is charged with a sexual offence (i.e. the accused) may cross-examine a complainant who is a witness, either in connection with the sexual offence in or relation to any other offence with which the accused is also charged in the same proceedings. E.g. if the accused is charged with rape and burglary, the accused cannot cross-examine the witness in relation to the rape nor the burglary.

Clause 24 (Child complainants and other child witnesses)

This clause provides that the accused is prohibited from cross-examining a child who is a complainant or is a witness to a criminal offence that falls within one of the categories specified in subclause (3). This clause protects all child witnesses, including a witness who is charged in an offence in the proceedings.

Clause 25 (Direction prohibiting accused from cross-examining particular witnesses)

This clause provides protection for other witnesses who do not qualify for protection under clauses 27 or 28, that is, that person is not a child complainant or a witness or complainant in relation to a sexual offence matter. Under this clause the accused may be prohibited from cross-

examining an adult who is not a witness or complainant in a sexual offence matter, where the court is satisfied that—

- (a) the quality of the evidence of the witness is likely to be diminished if the accused is permitted to cross-examine the accused himself; (subclause 2(a)(i) and (ii) and
- (b) it would not be contrary to the interests of justice to prohibit the accused from cross examining the adult. (subclause 2(b))

When making a determination under subclause (2) the court shall consider a number of factors listed in subclause (3) including the views of the adult witness and any relationship that the witness has with the accused.

A witness in this clause however, only refers to witnesses who are not charged with an offence in the proceedings. Consequently, a co-accused in the same proceedings can cross-examine another adult co-accused.

Clause 26 (Further provisions about directions under clause 25)

This clause provides that where a direction prohibiting an accused from cross-examining an adult witness is given pursuant to clause 29, this order is binding until the witness to whom it applies is discharged. The court may rescind the direction however, if it appears to be in the interests of justice. An application may be made by a party to the proceedings to rescind the direction or the court may of its own volition rescind the direction.

Clause 27 (Defence representation for purposes of cross-examination)

This clause provides that where an accused is prohibited from cross-examining a witness pursuant to clauses 23, 24 or 25 the court shall inform the accused of his right to arrange for legal representation. Where the accused has no legal representation, the court shall, if it deems it to be in the interests of justice, appoint a legal representative to represent the accused. The person appointed by the court however shall not be responsible to the accused and shall be appointed solely for the purposes of conducting the cross-examination of persons referred to in clauses 23 to 25.

Clause 28 (Warning to the jury)

This clause provides that where a direction or appointment has been given or made under clauses 23 to 27 the judge shall give the jury such warning considered necessary by the judge to ensure that the accused is not prejudiced by any inferences that might be drawn from the fact that—

- (a) the accused was prohibited from cross examining a witness; or
- (b) the cross-examination was carried out by a legal representative appointed by court, where such an appointment was made.

PART 5

PROTECTION OF COMPLAINANTS IN PROCEEDINGS FOR SEXUAL OFFENCES

Clause 29 (Restriction on evidence or questions about complainant's sexual history)

This clause provides that evidence or questions may not be admitted about a complainant's sexual history unless leave to do so is given by the court.

Clause 30 (Conditions for admissibility)

Clause 30 provides that the court will only grant leave for questions to be asked or evidence of to be adduced about complainant's sexual history where it is satisfied that—

- (a) the purpose for which the evidence is being adduced is not to support an inference that because of such conduct, the complainant is—
 - (i) more likely to have consented to the sexual conduct at issue in the trial, and
 - (ii) less worthy of belief as a witness;
- (b) the evidence is relevant to an issue at trial;
- (c) the evidence is of specific instances of sexual activity; and
- (d) the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Subclause (2) of clause 30 lists a number of additional factors that the court will consider when determining an application for the adducing of evidence about the sexual history of the complainant which include—

- (i) the interests of justice, including the right of the accused to make a full answer and defence, and
- (ii) the potential prejudice to the complainant's personal dignity and right of privacy.

The court also has the discretion to consider any other factors that the judge considers relevant for the purposes of his determination (subclause (2)(h)).

Subclause (3) provides examples of the types of sexual history evidence that may be admitted under this clause. Questions may be asked and evidence may be adduced in circumstances outlined in subclause (3)—

- (a) subclause (3)(a) provides that the court may permit evidence to be adduced for the purposes of proving that a person other than the accused caused the physical consequences of the rape that is alleged by the prosecution. In this scenario, the relevant issue in the case is not one of consent, i.e. the purpose for which the question is being asked or the evidence is being adduced about the complainant's sexual history is not to prove whether or not she consented to having sex with the accused:

Where the relevant issue in the case is not one of consent as is contemplated in subclause (3)(a), questions or evidence about a complainant's sexual history may be allowed to support the defence's case that the accused didn't have sex with the complainant on the night in question. To this end, the accused may be permitted to adduce evidence of the complainant's sexual history to prove the physical consequences of the rape alleged by the prosecution were caused by a person other than the accused. E.g. the defence's case might be that he has a twin brother or a family member who has similar features to the accused; and the accused may wish to adduce evidence to demonstrate that the complainant on a previous occasion had

consensual sex with that family member and could possibly be mistaken re the identity of attacker;

- (b) subclause (3)(b) provides that the court may permit sexual history evidence of the complainant to be adduced where such evidence is being adduced for the purposes of proving that the complainant was biased or had motive to lie about the sexual encounter which allegedly took place between the complainant and the accused. E.g. Where the complainant is married, the accused's defence may be that the complainant is lying about the rape because she does not wish for her husband to discover that she is cheating. The accused may wish to adduce evidence of a prior consensual encounter between the complainant and the accused to support his case that the complainant is lying about this sexual encounter and that she did consent to the sexual act;
- (c) subclause (3)(c) provides that prior sexual conduct of the complainant, known to the accused at the time of the act which gave rise to the charge, may be adduced by the accused where the purpose of such evidence is to prove that the accused believed that the complainant was consenting to the act charged;
- (d) subclause (4) provides that where the accused is seeking to adduce evidence under subclause (3)(c) the accused must demonstrate some proximity in time between—
 - (i) the complainant's sexual conduct that made the accused believe that the complainant was consenting, and
 - (ii) the conduct that is the subject matter of the charge;

E.g. An example of such prior sexual conduct of the complainant might have been oral sex initiated and given by the complainant to the accused immediately before the sexual encounter which is the subject matter of the charge. The defence may wish to adduce evidence of this prior sexual act of oral sex (which took place immediately before the sexual act which gave rise to the offence), and rely on same as the basis on which the accused believed that the complainant was consenting to the sexual act which gave rise to the offence.

- (e) subclause (3)(d) provides that the accused may be permitted to adduce sexual history evidence of the complainant that took place on a previous occasion or occasions that is so similar to the sexual behaviour of the complainant that gave rise to the offence that the similarity cannot be explained as a coincidence.

Under this subclause the accused may seek to adduce evidence or ask questions to demonstrate that the complainant likes to have sex in a particular manner, or has a particular kink, or does something which is specific to the complainant and how the complainant has sex. The sexual behaviour on a previous occasion when she consented (e.g. the kink) is so similar to the complainant's behaviour on the occasion which gave rise to the charge, that such similarity cannot be explained as a coincidence and should be admitted as evidence which gives rise to reasonable belief by the accused that the complainant was consenting on the occasion that is the subject matter of the offence.

- (f) subclause (3)(e) provides that evidence of the complainant's sexual history may be permitted for the purposes of rebutting proof introduced by the prosecution regarding the complainant's sexual conduct.

Subclause (3)(e) might be utilised by the accused where the complainant is a young person and the prosecution adduces evidence of the sexual history of the child complainant to prove the assault (complainant's account and rape kit). The prosecution may argue that child's account of the sexual encounter is so detailed that the child must have experienced the sexual act which gave rise to the charge; this explains the child's knowledge of such intimate sexual details and the physical consequences of the rape. In this scenario the accused might be permitted to ask questions or adduce evidence to provide another explanation for physical consequences of the rape (as evidenced by the rape kit) or this child's sexual knowledge. E.g. the defence may be permitted to produce evidence to demonstrate that the child was sexually abused by a person other than the accused, or for example was exposed to pornography by a person other than the accused.

Clause 31 (Procedure on applications under clause 30)

This clause establishes the procedure for persons who wish to make an application for evidence to be adduced or questions to be asked about a complainant's sexual history. It provides that an application for leave must be heard in camera and in the absence of the complainant. The judge must state in open court (but in the absence of the jury if there is one) the reasons for any decision made under this Part and outline the extent to which evidence about the sexual history of the complainant may be adduced if same is permitted.

Clause 32 (Warning to the jury)

Clause 32 provides that where sexual history evidence of the complainant is adduced under this Part, the judge must warn the jury against inferring from such conduct that the complainant—

- (a) might have consented to the act alleged; or
- (b) is less worthy of belief as a witness.

NB: The constitutionality of these provisions have been upheld by the Canadian Supreme Court in a trilogy of cases testing its application; *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3; *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579; *R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237.

PART 6

WITNESS ANONYMITY ORDERS

Part 6 deals with witness anonymity orders. These orders are often used for undercover police officers who are e.g. undertaking drug operations, infiltrating gangs or pretending to be sex workers offering children to individual. In these cases if the public and the accused were to know the identities of the officers there may be repercussions and it would compromise their future ability to work as undercover officers. These orders are also available to witnesses in e.g. organised crime cases, where there is a real risk to person testifying in such cases. Witness anonymity orders however, are more difficult to obtain in relation to these witnesses due to credibility reasons, i.e. if the accused does not know the identity of the witness that is giving against him, the accused is unable to properly test the credibility of the witness.

Clause 33 (Witness anonymity orders)

This clause provides that the court may issue a witness anonymity order which stipulates the specific measure or measures that the court deems necessary to ensure that the identity of the witness not disclosed. The measures that may be required to be taken in relation to the witness include withholding or removing the name or any other identifying detail from materials disclosed to any party to the proceedings. This clause specifies that where the measure requires screens to be used in relation to the witness, the screen must not prevent the witness from being seen by the judge/jury or other members of the court.

Clause 34 (Applications)

This clause details the procedure for applying for a witness anonymity order. An application for an anonymity order may be made by either the prosecutor or the accused. Where the prosecutor makes the application, the prosecution is required to inform the court of the identity of the witness in relation to whom the anonymity order is sought. The court however, may require that the identity of the witness need not be revealed to the court. Where an anonymity order is sought by prosecution, the identity of the witness is not disclosed to the accused nor his legal representatives. However, where an application is made by the accused, the accused is required to inform both the court of the identity of the witness and where the court directs, the accused is also required to disclose to the prosecutor of the identity of the witness but he is not required to disclose the identity to the other accused or the other accused's legal representative in cases where more than one person is charged in the same proceedings. When an application is made for an order under this Part, the court must give each party the opportunity to be heard. When an application is being made in the presence of both parties, any information which is being adduced in support of the application shall be disclosed in accordance with subclause (2)(a) or (3)(a) (which deals with revealing the identity of the witness to the court). In circumstances where the court deems it appropriate, the court may permit the prosecution to make an application for an order under this part in the absence of the accused. Similarly, where the accused is making an application and there is another person charged in the proceedings, the court may require that one accused make the application in the absence of the co-accused or the co-accused's legal representatives.

Clause 35 (Conditions for making order)

This clause sets out the conditions under which the court may grant a witness anonymity order. The conditions are as follows—

- (a) Condition A - the proposed order is necessary for the protection of a person or for public interest reasons;
- (b) Condition B - the proposed order won't prevent the accused from receiving a fair trial;
- (c) Condition C - looks at the importance of the witness' testimony and the likelihood of the witness being willing to testify if an order was not made.

Clause 36 (Relevant consideration)

This clause sets out the relevant consideration of the court when considering whether conditions A to C are met for the purposes of the application. These conditions include among other factors, the credibility of the witness, and whether the evidence of that particular witness is the sole or decisive evidence implicating the accused.

Clause 37 (Warning to jury)

This clause provides that where an order is given, the judge must give the jury such warning as the court considers appropriate to ensure that the fact that the order was made in relation to a witness does not prejudice the accused.

Clauses 38 (Discharge or variation of order)

This clause details the grounds and procedure for the discharge or variation of an order. An application to discharge or vary the witness anonymity order may be made by either party to the proceedings or by the court of its own motion. The court will vary the order where it considers such variation appropriate and will consider such variation where there has been a material change in circumstances since the time when the order was first made.

Clause 39 (Discharge or variation after proceedings)

This clause details the grounds and procedure for discharging or varying an order after proceedings have come to an end. An application may be made under this clause by a party to the old proceedings or by the witness himself. In relation to both applications there must be a material change of circumstances since the time when the application was made. The court may vary or discharge the order where the court deems it to be appropriate.

Clause 40 (Discharge or variation by the Court of Appeal)

This clause provides that where the accused appeals a decision of the court (referred to in subclause (1)(b)), the court may vary or discharge a witness anonymity order where it considers it appropriate to do so (in view of clauses 35 and 36 and other matters deemed relevant).

Clause 41 (Public interest immunity)

This clause provides that the common law rules permitting the court to withhold information on the grounds of public interest immunity apply.

Clause 42 (Interpretation of this Part)

This clause defines terms used in this Part.

PART 7

JUDGE ONLY TRIALS

Clause 43 (Application of this Part)

This clause provides that a judge only trial may be considered in relation to criminal offences including sexual offences under Part 14 of the Criminal Code.

Clause 44 (Application for trial to be conducted without a jury)

This clause provides that the judge may order a trial to be conducted without a jury if he is satisfied that it is in the interests of justice to do so. An order under this Part may be made on the application of a party to the proceedings or by the judge of his own volition.

Subclause (3) details the factors considered by the court in making a determination under this Part.

Clause 45 (Procedure for applications under clause 44)

This clause sets out the timeframe for the making of an application by either party. The prosecution or accused who wishes to have a judge only trial shall make an application to the court within 28 days after the accused is committed. It also sets out the timeframe within which the other side may oppose an application for a judge only trial. (i.e. 7 days after receiving a copy of the application for the judge only trial).

Clause 46 (Determination of application)

Clause 46 provides that the judge shall hear representations from all parties to the trial before making its determination. The requirement to hear representations from all parties apply in instances—

- (a) where an application is made by a party to the proceedings; and
- (b) where the court of its own volition determines that a judge only trial is in the interests of justice.

The judge is also required to give written reasons for his decision.

Clause 47 (Judge to have power of jury in trials without a jury)

This clause provides that the judge has all the powers, authority and jurisdiction that the court has where a trial is conducted with a jury. It further provides that where any enactment makes a reference to a jury, the verdict of a jury or the finding of a jury, this reference is to be read as including a reference to court, the verdict of the court or the finding of the court, (in instances where the judge sits alone in criminal proceedings).

Clause 48 (Judge to give reasons for conviction or acquittal)

This clause provides that, in a judge only trial, where the judge convicts or acquits an accused, the judge shall give written reasons for his decision.

PART 8

APPEALS BY THE ACCUSED

Clause 49 (Appeals against a decision of the judge sitting alone)

The clause provides that where a judge sitting alone convicts an accused, an appeal against such conviction shall lie to the Court of Appeal and if unsuccessful, to the Privy Council. This clause also details the grounds on which leave of the Court of Appeal is not required (subclause (1)(a)) and grounds on which leave of the Court of Appeal is required (subclause (1)(b)).

Clause 50 (Appeals against a decision of the jury)

This clause provides that where a judge sits with a jury, the accused has a right of appeal in accordance with clause 35 of the Eastern Caribbean Supreme Court (Anguilla) Act.

PART 9

PROSECUTION APPEALS GENERALLY

Clause 51 (Right of appeal)

This clause sets out certain basic criteria for a prosecution appeal under this Part of the Act. The right of appeal arises only in trials on indictment and lies to the Court of Appeal.

Subclause (2) sets out two further limitations on appeals under this Part. It prohibits the prosecution from appealing rulings on discharge of the jury and those rulings that may be appealed by the prosecution under other legislation, for example, appeals from preparatory hearings against rulings on admissibility of evidence and other points of law.

Subclause (4) provides that the prosecution must obtain leave to appeal, either from the judge or the Court of Appeal.

Clause 52 (Right of appeal in respect of terminating rulings)

This clause sets out the procedure that must be followed when the prosecution wishes to appeal against a terminating ruling. The clause covers both rulings that are formally terminating and those that are de facto terminating in the sense that they are so fatal to the prosecution case that, in the absence of a right of appeal, the prosecution would offer no evidence or no further evidence. It applies to rulings made at an applicable time during a trial (which is defined as any time before the start of the judge's summing up to the jury).

Subclause (2) provides that the prosecution must indicate its intention to appeal either immediately after the judge makes a ruling or before the next business day ends (in instances where the court adjourns the matter for the prosecution to make a decision as to whether or not they wish to appeal the terminating ruling). The prosecution is required to make a decision as a matter of urgency so as to avoid undue delays. Following the ruling, the prosecution must either inform the court that it intends to appeal or request an adjournment to consider whether to appeal (subclause (4)(a)).

If such an adjournment is requested, the judge has the discretion to grant it (subclause (5)).

Following such an adjournment the prosecution must advise the court whether or not it intends to appeal (subclause (4)(b)).

Under subclause (6), a ruling which affects more than one offence need not be appealed against insofar as it affects all the offences. It can be appealed against, if the prosecutor wishes, only insofar as it affects one or more of the offences.

Subclauses (3), (10) and (11) provide that the judge's ruling has no effect while the prosecution follows the procedure in subclause (4) in order to consider whether to appeal or is pursuing an appeal.

It is only possible for the prosecutor to appeal under this clause against a single ruling. However, under subclause (7), where the ruling that is the subject of the appeal is a ruling of no case to answer the prosecutor may nominate other rulings that relate to the offence that is the subject of the appeal, for the Court of Appeal to consider at the same time. These rulings will also be regarded as the subject of the appeal.

Where the prosecution fails to obtain leave to appeal or abandons the appeal, the prosecution must agree that an acquittal follow by virtue of subclauses (8) and (9).

Clause 53 (Expedited and non-expedited appeals)

This clause provides two alternative appeal routes, an expedited (fast) route and a non-expedited (slower) route.

The judge must determine which route the appeal will follow (subclause (1)). In the case of an expedited appeal the trial may be adjourned (subclause (2)). If the judge decides that the appeal should follow the non-expedited route he may either adjourn the proceedings or discharge the jury, if one has been sworn (subclause (3)).

Subclause (4) gives both the judge and the Court of Appeal power to reverse a decision to expedite an appeal, thus transferring the case to the slower non-expedited route. If a decision is reversed under this subclause, the jury may be discharged.

Clause 54 (Continuation of proceedings for offences not affected by ruling)

This provision deals with cases where the trial involves more than one offence but the appeal does not apply to all of those offences.

Subclause (2) enables proceedings to continue in relation to any offence to which the appeal does not apply. A ruling may affect several offences and several accused, but the prosecutor may only wish to appeal against the ruling insofar as it affects one or more of those offences or accused. This clause enables proceedings to continue, at the discretion of the trial judge, against any offences affected by the ruling but not by the appeal.

Clause 55 (Determination of appeal by Court of Appeal)

This clause sets out the powers of the Court of Appeal when determining a prosecution appeal. This needs to be read in conjunction with clause 56 (Reversal of rulings).

Subclause (1) authorises the Court of Appeal to affirm, reverse or vary a ruling appealed against. The clause is drafted to ensure that, after the Court of Appeal has ordered one or other of these disposals, it must then always make it clear what is to happen next in the case.

When the Court of Appeal confirms a ruling, subclause (3) and (7) provide that it must then order the acquittal of the accused for the offence(s), which are the subject of the appeal.

When the Court of Appeal reverses or varies a ruling, subclauses (4) and (8) provide that it must either order a resumption of the High Court proceedings or a fresh trial, or order the acquittal of the accused for the offence(s) under appeal.

By virtue of subclauses (5) and (8), the Court of Appeal will only order the resumption of the High Court proceedings or a fresh trial where it considers it necessary in the interests of justice to do so.

Clause 56 (Reversal of rulings)

This clause sets out the criteria that have to be satisfied before the Court of Appeal can overturn a judge's ruling. This applies to both the general right of appeal and appeals against evidentiary rulings.

Clause 57 (Interpretation)

This clause sets out the interpretation provisions for this Part.

Subclause (3) prevents the same ruling from being appealed against more than once. Subclause (4) provides that where a ruling relates to more than one offence any appeal does not affect the ruling in relation to an offence that is not the subject of the appeal. Subclause (5) provides that two accused

charged jointly with the same offence are to be treated as charged with separate offences. This, will mean that an appeal will be possible against a ruling so far as it relates to only one of the accused.

PART 10

CASE MANAGEMENT CONFERENCE

Clause 58 (Duty of Trial Judge to hold a Case Management Conference)

This clause provides that prior to commencement of any trial, the trial judge shall be required to hold a case-management conference.

Subclause (3) details the issues that are to be addressed at case management. It also details how parties are required to assist the court in the case management.

PART 11

USE OF LIVE LINK FOR EVIDENCE OF WITNESSES IN CIVIL PROCEEDINGS

Clause 59 (Interpretation)

Clause 59 defines the terms used in this Part.

Clause 60 (Evidence of witnesses via live link)

Clause 60 provides that the court, if satisfied that it is in the interests of justice, may give a direction for a live link to be used in civil proceedings.

Clause 61 (Requirements for use of live link)

Clause 61 specifies the requirements that must be met in order for a live link direction to be given. These provisions provide that all appropriate persons to the proceedings must be able to hear and see each other. It also establishes the need for compliance with any requirements prescribed by rules made by the Chief Justice and 2 other judges in the Supreme Court as it relates to live links.

PART 12

MISCELLANEOUS PROVISIONS

Clause 62 (Depositions not in dispute and admissions to be read into evidence at trial)

This clause provides where the prosecution and the accused agree that a particular witness is not required to be at trial, the depositions of those witnesses shall be read into evidence at trial.

Clause 63 (Use of statements as evidence in preliminary inquiries into sexual offences)

Where the Magistrate is conducting a preliminary inquiry into a sexual offence matter, this clause provides that a special measures direction might be given to allow for video recorded evidence or written statements of the complainant to be entered into evidence. Where this direction is given the complainant shall not be required to give evidence in person at the preliminary inquiry.

Clause 64 (Issue of Practice Directions)

This clause provides that the Chief Justice may issue Practice Directions governing—

- (a) how judgments with respect to verdicts are to be written; or
- (b) any matter of procedure under this Act.

Clause 65 (Power to make Regulations and Rules)

This clause vests in—

- (a) the Governor in Council the power to make regulations; and
- (b) in the Chief Justice and 2 judges of the Supreme Court, the power to make rules;

for the purposes of this Act.

Clause 66 (Application of this Act)

This clause provides that his Act shall apply to criminal proceedings pending on the commencement date of this Act and criminal proceedings instituted on or after the commencement of this Act for the duration of the period identified in clause 1(2).

Subclause (2) further provides that for the purposes of this clause, criminal proceedings are deemed to be pending once an accused person has been committed for trial in the High Court and an indictment has been laid against the accused person.

Clause 67 (Conflict)

This clause provides that in the event of an inconsistency between this Act and any relevant legislation, this Act prevails to the extent of the inconsistency.

Clause 68 (Apparent age)

This clause provides that for the purposes of this Act the age of a person shall be taken to be that which it appears to the court to be after considering any available evidence.

Subclause (2) is to read in conjunction with clause 1(5) of this Act.

Clause 69 (Consequential amendment)

This clause amends the Eastern Caribbean Supreme Court (Anguilla) Act by repealing section 35A “Right of appeal of the Attorney-General”.

Clause 70 (Citation and commencement)

This clause deals with the citation and commencement of this Act.