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## STATUTORY INSTRUMENTS

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# 1999 No. 2789 (N.I. 8)

## The Criminal Evidence (Northern Ireland) Order 1999

- - - - - 12th October 1999

### Modifications etc. (not altering text)

- C1** Order: transfer of functions from Secretary of State to Department of Justice (12.4.2010) by [Northern Ireland Act 1998 \(Devolution of Policing and Justice Functions\) Order 2010 \(S.I. 2010/976\)](#), arts. 1(2), 4(1)(2), [Sch. 1](#) (with arts. 28-31); S.I. 2010/977, [art. 1\(2\)](#)
- C2** Order: transfer of functions from Lord Chancellor to Department of Justice (12.4.2010) by [Northern Ireland Act 1998 \(Devolution of Policing and Justice Functions\) Order 2010 \(S.I. 2010/976\)](#), arts. 1(2), 15(1), [Sch. 17 para. 51](#) (with arts. 15(6), 28-31); S.I. 2010/977, [art. 1\(2\)](#)

## PART I

### INTRODUCTORY

#### Title and commencement

- 1.—(1) This Order may be cited as the Criminal Evidence (Northern Ireland) Order 1999.
- (2) This Order shall come into operation on such day or days as the Secretary of State may by order appoint.

### Subordinate Legislation Made

- P1** [Art. 1\(2\)](#) power partly exercised: 1.6.2000 appointed for specified provisions by [S.R. 2000/211, art. 2](#); 14.6.2000 appointed for specified provisions by [S.R. 2000/218, art. 2](#); 30.6.2003 appointed for specified provisions by [S.R. 2003/323, art. 2, Sch.](#); 1.12.2003 appointed for specified provisions by [S.R. 2003/476, arts. 2, 3, 4](#); 8.11.2004 appointed for specified provisions by [S.R. 2004/468, art. 2](#); 21.12.2004 appointed for specified provisions by [S.R. 2004/531, art. 2](#); 1.3.2007 appointed for specified provision by [S.R. 2007/176, art. 2](#); 1.8.2009 appointed for specified provision by [S.R. 2009/275, art. 2](#); 4.5.2010 appointed for specified provisions by [S.R. 2010/142, art. 2, Sch.](#)

#### Interpretation

- 2.—(1) The Interpretation Act (Northern Ireland) 1954 shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.
- (2) In this Order—

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“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 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;

“judge” includes, in relation to a magistrates' court, the resident magistrate<sup>F1</sup> . . . ;

“picture” includes a likeness however produced;

“the prosecutor” means any person acting as prosecutor, whether an individual or body;

“rules of court” means Crown Court rules, magistrates' courts rules, county court rules or rules made under section 55 of the Judicature (Northern Ireland) Act 1978;

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

(3) Nothing in this Order 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 Order.

**F1** 2002 c. 26

### Meaning of “sexual offence” and other references to offences

3.—(1) In this Order “sexual offence” means—

- (a) rape or burglary with intent to rape;
- (b) any offence under any of the following provisions of the Offences against the Person Act 1861—
  - (i) section 52 (indecent assault on a female);
  - (ii) section 53 so far as it relates to the abduction of a woman against her will;  
*Heads (iii), (iv) rep. by 2003 NI 13*
- (c) any offence under any of the following provisions of the Criminal Law Amendment Act 1885—
  - (i) section 3 (procuring unlawful carnal knowledge of a woman by threats, false pretences or administering drugs);
  - (ii) section 4 (unlawful carnal knowledge, or attempted unlawful carnal knowledge, of a girl under 14);
  - (iii) section 5 (unlawful carnal knowledge of a girl under 17);
- (d) any offence under any of the following provisions of the Punishment of Incest Act 1908—
  - (i) section 1 (incest, attempted incest by males);
  - (ii) section 2 (incest by females over 16);
- (e) any offence under section 22 of the Children and Young Persons Act (Northern Ireland) 1968 (indecent conduct towards child);
- (f) any offence under Article 9 of the Criminal Justice (Northern Ireland) Order 1980 (inciting girl under 16 to have incestuous sexual intercourse);
- (g) any offence under Article 123 of the Mental Health (Northern Ireland) Order 1986 (unlawful sexual intercourse by hospital staff, etc. with a person receiving treatment for mental disorder).

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[<sup>F2</sup>(gg) any offence under the following provisions of the Criminal Justice (Northern Ireland) Order 2003—

- (i) Article 19 (buggery);
- (ii) Article 20 (assault with intent to commit buggery);
- (iii) Article 21 (indecent assault on a male).]

[<sup>F3</sup>(ga) any offence under any of sections 15 to 21, 47 to 53, 57 to 59, 66, 67, and 70 to 72 of the Sexual Offences Act 2003.]

(2) In this Order any reference (including a reference having effect by virtue of this paragraph) 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.

**F2** 2003 NI 13

**F3** 2003 c. 42

**Modifications etc. (not altering text)**

**C3** Art. 3(2) modified (1.10.2008) by Serious Crime Act 2007 (c. 27), ss. 63(1), 94(1), **Sch. 6 para. 38** (with Sch. 13 para. 5); S.I. 2008/2504, **art. 2(a)**

## PART II

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

**Modifications etc. (not altering text)**

**C4** Pt. II applied (with modifications) (18.9.2006) by Anti-social Behaviour (Northern Ireland) Order 2004 (S.I. 2004/1988 (N.I. 12)), art. 6C(2)(3)(4) (as inserted by Criminal Justice (Northern Ireland) Order 2005 (S.I. 2005/1965 (N.I. 15)), arts. 1(2)(a), 6); S.R. 2006/368, **art. 2(a)**

#### *Preliminary*

#### **Witnesses eligible for assistance on grounds of age or incapacity**

4.—(1) For the purposes of this Part a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this Article—

- (a) if under the age of 17 at the time of the hearing; or
- (b) if the court considers that the quality of evidence given by the witness is likely to be diminished by reason of any circumstances falling within paragraph (2).

(2) The circumstances falling within this paragraph are—

- (a) that the witness—
  - (i) suffers from mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986, or
  - (ii) otherwise has a significant impairment of intelligence and social functioning;
- (b) that the witness has a physical disability or is suffering from a physical disorder.

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(3) In paragraph (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 Article 7(2) in relation to the witness.

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

(5) In this Part references to the quality of a witness's evidence are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness's 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**

5.—(1) For the purposes of this Part a witness in criminal proceedings (other than the accused) is eligible for assistance by virtue of this paragraph 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 falls within paragraph (1) the court must take into account, in particular—

- (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 that question the court must in addition consider any views expressed by the witness.

(4) Where the complainant in respect of a sexual offence is a witness in proceedings relating to that offence (or to that offence and any other offences), the witness is eligible for assistance in relation to those proceedings by virtue of this paragraph unless the witness has informed the court of the witness's wish not to be so eligible by virtue of this paragraph.

### **Special measures available to eligible witnesses**

6.—(1) For the purposes of this Part—

- (a) the provision which may be made by a special measures direction by virtue of each of Articles 11 to 18 is a special measure available in relation to a witness eligible for assistance by virtue of Article 4; and
- (b) the provision which may be made by such a direction by virtue of each of Articles 11 to 16 is a special measure available in relation to a witness eligible for assistance by virtue of Article 5;

but this paragraph has effect subject to paragraph (2).

(2) Where (apart from this paragraph) a special measure would, in accordance with paragraph (1) (a) or (b), be available in relation to a witness in any proceedings, it shall not be taken by a court to be available in relation to the witness unless—

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- (a) the court has been notified by the Secretary of State that relevant arrangements may be made available in the district in which it appears to the court that the proceedings will take place, and
  - (b) the notice has not been withdrawn.
- (3) In paragraph (2) “relevant arrangements” means arrangements for implementing the measure in question which cover the witness and the proceedings in question.
- (4) The withdrawal of a notice under that paragraph relating to a special measure shall not affect the availability of that measure in relation to a witness if a special measures direction providing for that measure to apply to the witness's evidence has been made by the court before the notice is withdrawn.
- (5) The Secretary of State may by order make such amendments of this Part as he considers appropriate for altering the special measures which, in accordance with paragraph (1)(a) or (b), are available in relation to a witness eligible for assistance by virtue of Article 4 or (as the case may be) Article 5, whether—
- (a) by modifying the provisions relating to any measure for the time being available in relation to such a witness,
  - (b) by the addition—
    - (i) (with or without modifications) of any measure which is for the time being available in relation to a witness eligible for assistance by virtue of the other of those Articles, or
    - (ii) of any new measure, or
  - (c) by the removal of any measure.

#### *Special measures directions*

#### **Special measures direction relating to eligible witness**

- 7.—(1) This Article applies where in any criminal proceedings—
- (a) a party to the proceedings makes an application for the court to give a direction under this Article in relation to a witness in the proceedings other than the accused, 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 Article 4 or 5, the court must then—
- (a) determine whether any of the special measures available in relation to the witness (or any combination of them) 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 them) would, in its opinion, be likely to maximise so far as practicable the quality of such evidence; and
    - (ii) give a direction under this Article providing for the measure or measures so determined to apply to evidence given by the witness.
- (3) In determining for the purposes of this Part whether any special measure or measures would or would not be likely to improve, or to maximise so far as practicable, the quality of evidence given by the witness, the court must consider all the circumstances of the case, including in particular—
- (a) any views expressed by the witness; and

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- (b) whether the measure or measures might tend to inhibit such evidence being effectively tested by a party to the proceedings.
- (4) A special measures direction must specify particulars of the provision made by the direction in respect of each special measure which is to apply to the witness's evidence.
- (5) In this Part “special measures direction” means a direction under this Article.
- (6) Nothing in this Part is to be regarded as affecting any power of a court to make an order or give leave of any description (in the exercise of its inherent jurisdiction or otherwise)—
  - (a) in relation to a witness who is not an eligible witness, or
  - (b) in relation to 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**

8.—(1) Subject to paragraph (2) and Article 9(8), a special measures direction has binding effect from the time it is made until the proceedings for the purposes of which it is made are either—

- (a) determined (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) The court may discharge or vary (or further 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 paragraph (2) “the relevant time” means—

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

(4) Nothing in Article 12(2) and (3), 15(4) to (7) or 16(4) to (6) is to be regarded as affecting the power of the court to vary or discharge a special measures direction under paragraph (2).

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

- (a) giving or varying,
- (b) refusing an application for, or for the variation or discharge of, or
- (c) discharging,

a special measures direction and, if it is a magistrates' court, must cause them to be entered in the Order Book.

(6) Rules of court may make provision—

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

## Special provisions relating to child witnesses

9.—(1) For the purposes of this Article—

- (a) a witness in criminal proceedings is a “child witness” if he is an eligible witness by reason of Article 4(1)(a) (whether or not he is an eligible witness by reason of any other provision of Article 4 or 5);
- (b) a child witness is “in need of special protection” if the offence (or any of the offences) to which the proceedings relate is—
  - (i) an offence falling within Article 23(3)(a) (sexual offences), or
  - (ii) an offence falling within Article 23(3)(b), (c) or (d) (kidnapping, assaults etc.); and
- (c) 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 the witness.

(2) Where the court, in making a determination for the purposes of Article 7(2), determines that a witness in criminal proceedings is a child witness, the court must—

- (a) first have regard to paragraphs (3) to (7); and
- (b) then have regard to Article 7(2);

and for the purposes of Article 7(2), as it then applies to the witness, any special measures required to be applied in relation to him by virtue of this Article shall be treated as if they were measures determined by the court, pursuant to Article 7(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 Article 15 (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 Article 12.

(4) The primary rule is subject to the following limitations—

- (a) the requirement contained in paragraph (3)(a) or (b) has effect subject to the availability (within the meaning of Article 6(2)) of the special measure in question in relation to the witness;
- (b) the requirement contained in paragraph (3)(a) also has effect subject to Article 15(2); and
- (c) the rule does not apply to the extent that the court is satisfied that compliance with it would not be likely to maximise the quality of the witness's evidence so far as practicable (whether because the application to that evidence of one or more other special measures available in relation to the witness would have that result or for any other reason).

(5) However, paragraph (4)(c) does not apply in relation to a child witness in need of special protection.

(6) Where a child witness is in need of special protection by virtue of paragraph (1)(b)(i), any special measures direction given by the court which complies with the requirement contained in paragraph (3)(a) must in addition provide for the special measure available under Article 16 (video recorded cross-examination or re-examination) to apply in relation to—

- (a) any cross-examination of the witness otherwise than by the accused in person, and
- (b) any subsequent re-examination.

(7) The requirement contained in paragraph (6) has effect subject to the following limitations—

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- (a) it has effect subject to the availability (within the meaning of Article 6(2)) of that special measure in relation to the witness; and
  - (b) it does not apply if the witness has informed the court that he does not want that special measure to apply in relation to him.
- (8) Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of Article 4(1)(a), then—
- (a) subject to paragraph (9), and
  - (b) except where the witness has already begun to give evidence in the proceedings,
- the direction shall cease to have effect at the time when the witness attains the age of 17.
- (9) Where a special measures direction is given in relation to a child witness who is an eligible witness by reason only of Article 4(1)(a) and—
- (a) the direction provides—
    - (i) for any relevant recording to be admitted under Article 15 as evidence in chief of the witness, or
    - (ii) for the special measure available under Article 16 to apply in relation to the witness, and
  - (b) if it provides for that special measure to so apply, the witness is still under the age of 17 when the video recording is made for the purposes of Article 16,
- then, so far as it provides as mentioned in sub-paragraph (a)(i) or (ii), the direction shall continue to have effect in accordance with Article 8(1) even though the witness subsequently attains that age.

### **Extension of provisions of Article 9 to certain witnesses over 17**

- 10.**—(1) For the purposes of this Article—
- (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 Article 4(3)), but
    - (ii) was under the age of 17 when a relevant recording was made;
  - (b) a qualifying witness is “in need of special protection” if the offence (or any of the offences) to which the proceedings relate is—
    - (i) an offence falling within Article 23(3)(a) (sexual offences), or
    - (ii) an offence falling within Article 23(3)(b), (c) or (d) (kidnapping, assaults etc.); and
  - (c) 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) Paragraphs (2) to (7) of Article 9 shall apply as follows in relation to a qualifying witness—
- (a) paragraphs (2) to (4), so far as relating to the giving of a direction complying with the requirement contained in paragraph (3)(a), shall apply to a qualifying witness in respect of the relevant recording as they apply to a child witness (within the meaning of that Article);
  - (b) paragraph (5), so far as relating to the giving of such a direction, shall apply to a qualifying witness in need of special protection as it applies to a child witness in need of special protection (within the meaning of that Article); and
  - (c) paragraphs (6) and (7) shall apply to a qualifying witness in need of special protection by virtue of paragraph (1)(b)(i) as they apply to such a child witness as is mentioned in paragraph (6).



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[<sup>F4</sup>Special provisions relating to sexual offences

**10A.**—(1) This Article applies where in criminal proceedings relating to a sexual offence (or to a sexual offence and other offences) the complainant in respect of that offence is a witness in the proceedings.

(2) This Article does not apply if the place of trial is a magistrates' court.

(3) This Article does not apply if the complainant is an eligible witness by reason of Article 4(1)(a) (whether or not the complainant is an eligible witness by reason of any other provision of Article 4 or 5).

(4) If a party to the proceedings makes an application under Article 7(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 under Article 15 (video recorded evidence in chief).

(5) Paragraph (6) applies if—

- (a) a party to the proceedings makes a request under paragraph (4) with respect to the complainant; and
- (b) the court determines for the purposes of Article 7(2) that the complainant is eligible for assistance by virtue of Article 4(1)(b) or 5.

(6) The court must—

- (a) first have regard to paragraphs (7) to (9); and
- (b) then have regard to Article 7(2);

and for the purposes of Article 7(2), as it then applies to the complainant, any special measure required to be applied in relation to the complainant by virtue of this Article is to be treated as if it were a measure determined by the court, pursuant to Article 7(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.

(7) The court must give a special measures direction in relation to the complainant that provides for any relevant recording to be admitted under Article 15.

(8) The requirement in paragraph (7) has effect subject to Article 15(2).

(9) The requirement in paragraph (7) does not apply to the extent that 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 (whether because the application to that evidence of one or more other special measures available in relation to the complainant would have that result or for any other reason).

(10) In this Article “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.]

**F4** Art. 10A inserted (1.1.2012) by Justice Act (Northern Ireland) 2011 (c. 24), ss. 9, 111(3) (with s. 106(4), Sch. 6 para. 2); S.R. 2011/370, art. 3(a)

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## *Special measures*

### **Screening witness from accused**

**11.—**(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) But the screen or other arrangement must not prevent the witness from being able to see, and to be seen by—

- (a) the judge 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, paragraph (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**

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

(2) 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.

(3) The court may give permission for the purposes of paragraph (2) 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.

(4) In paragraph (3) “the relevant time” means—

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

(5) Where in proceedings before a magistrates' court—

- (a) evidence is to be given by means of a live link in accordance with a special measures direction, but
- (b) suitable facilities for receiving such evidence are not available at any court-house in which that court can (apart from this paragraph) lawfully sit,

the court may sit for the purposes of the whole or any part of those proceedings at a place designated by the Lord Chancellor<sup>F5</sup>, after consultation with the Lord Chief Justice,] as a place having facilities to receive evidence given through a live link.

(6) In this Part “live link” means a live television link or other arrangement whereby a witness, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the persons specified in Article 11(2)(a) to (c).

**F5** Words in art. 12(5) inserted (3.4.2006) by Constitutional Reform Act 2005 (c. 4), ss. 15(2), 148(1), Sch. 5 para. 114; S.I. 2006/1014, art. 2(a), Sch. 1 paras. 10, 12(b)

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### **Evidence given in private**

**13.**—(1) A special measures direction may provide for the exclusion from the court, during the giving of the witness's 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) legal representatives acting in the proceedings, or
- (c) 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 so excluded shall be expressed not to apply to one named person who—

- (a) is a representative of such an 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 Article where—

- (a) the proceedings relate to a sexual offence; 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 Article (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 any privilege or exemption from liability available in respect of fair, accurate and contemporaneous reports of legal proceedings held in public.

### **Removal of wigs and gowns**

**14.** A special measures direction may provide for the wearing of wigs or gowns to be dispensed with during the giving of the witness's evidence.

### **Video recorded evidence in chief**

**15.**—(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 under this Article 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 paragraph (2) whether any part of a recording should not be admitted under this Article, the court must 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 under this Article, 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 in the ordinary way or in accordance with any such direction), and

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- (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 under this Article—
- (a) the witness must be called by the party tendering it in evidence, unless—
    - (i) a special measures direction provides for the witness's evidence on cross-examination to be given otherwise than by testimony in court, or
    - (ii) the parties to the proceedings have agreed as mentioned in paragraph (4)(a)(ii); and
  - (b) the witness may not give evidence in chief otherwise than by means of the recording—
    - (i) as to any matter which, in the opinion of the court, has been dealt with adequately in the witness's recorded testimony, or
    - (ii) without the permission of the court, as to any other matter which, in the opinion of the court, is dealt with in that testimony.
- (6) Where in accordance with paragraph (2) a special measures direction provides for part only of a recording to be admitted under this Article, references in paragraphs (4) and (5) to the recording or to the witness's 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 paragraph (5)(b)(ii) 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.
- (8) In paragraph (7) “the relevant time” means—
- (a) the time when the direction was given, or
  - (b) if a previous application has been made under that paragraph, the time when the application (or last application) was made.
- (9) The court may, in giving permission for the purposes of paragraph (5)(b)(ii), direct that the evidence in question is to be given by the witness by means of a live link; and, if the court so directs, paragraph (5) of Article 12 shall apply in relation to that evidence as it applies in relation to evidence which is to be given in accordance with a special measures direction.
- (10) A magistrates' court conducting a preliminary investigation or preliminary inquiry may consider any video recording in relation to which it is proposed to apply for a special measures direction providing for it to be admitted at the trial in accordance with this Article.
- (11) Nothing in this Article affects the admissibility of any video recording which would be admissible apart from this Article.

#### **Commencement Information**

- II** [Art. 15](#) partly in operation; [art. 15](#) not in operation at date of making see [art. 1\(2\)](#); [art. 15](#) in operation for certain purposes at 1.6.2000 by [S.R. 2000/211](#), [art. 2](#); [art. 15](#) in operation for certain purposes at 30.6.2003 by [S.R. 2003/323](#), [art. 2](#), [Sch.](#); [art. 15](#) in operation for certain purposes at 1.12.2003 by [S.R. 2003/476](#), [art. 2](#); [art. 15](#) in operation for certain purposes at 1.8.2009 by [S.R. 2009/275](#), [art. 2](#)

## **Video recorded cross-examination or re-examination**

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

- (a) for any cross-examination of the witness, and any re-examination, to be recorded by means of a video recording; and
- (b) for 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) Such a recording must be made in the presence of such persons as rules of court or the direction may provide and in the absence of the accused, but in circumstances in which—

- (a) the judge 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
- (b) 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, paragraph (2)(a) and (b) are 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 Article, the court may nevertheless subsequently direct that it is not to be so admitted if any requirement of paragraph (2) or rules of court or the direction has not been complied with to the satisfaction of the court.

(5) Where in pursuance of paragraph (1) a recording has been made of any 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 in any recording admissible under Article 15 or this Article or otherwise than in such a recording) unless the court gives a further special measures direction making such provision as is mentioned in paragraph (1)(a) and (b) in relation to any subsequent cross-examination, and re-examination, of the witness.

(6) The court may only give such a further direction if it appears to the court—

- (a) that 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 paragraph (1), of a matter which that party could not with reasonable diligence have ascertained by then, or
- (b) that for any other reason it is in the interests of justice to give the further direction.

(7) Nothing in this Article 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**

17.—(1) A special measures direction may provide for any examination of the witness (however and wherever conducted) to be conducted through an interpreter or other person approved by the court for the purposes of this Article (“an intermediary”).

(2) The function of an intermediary is to communicate—

- (a) to the witness, questions put to the witness, and
- (b) to any person asking such questions, the answers given by the witness in reply to them,

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and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.

(3) Any examination of the witness in pursuance of paragraph (1) must take place in the presence of such persons as rules of court or the direction may provide, but in circumstances in which—

- (a) the judge 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
- (b) (except in the case of a video recorded examination) the jury (if there is one) are 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, paragraph (3)(a) 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 may not act as an intermediary in a particular case except after making a declaration, in such form as may be prescribed by rules of court, that he will faithfully perform his function as intermediary.

(6) Paragraph (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 Article 15 if the interview was conducted through an intermediary and—

- (a) that person complied with paragraph (5) before the interview began, and
- (b) the court's approval for the purposes of this Article is given before the direction is given.

(7) Article 3 of the Perjury (Northern Ireland) Order 1979 (perjury) 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 Article, that proceeding shall be taken to be part of the judicial proceeding in which the witness's evidence is given.

### **Aids to communication**

**18.** 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 with a view to enabling questions or answers to be communicated to or by the witness despite any disability or disorder or other impairment which the witness has or suffers from.

### *Supplementary*

#### **Status of evidence given under this Part**

**19.—**(1) Paragraphs (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's evidence in those proceedings.

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

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

(3) Paragraph (2) applies to a statement admitted under Article 15 or 16 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.

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(4) In estimating the weight (if any) to be attached to the statement, the court must 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 paragraph (3)) 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 Article 3 of the Perjury (Northern Ireland) Order 1979 (perjury) is received in evidence in pursuance of a special measures direction, that proceeding shall be taken for the purposes of that Article 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 that Order—

- (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 under Article 35(2) (giving of false unsworn evidence in criminal proceedings).

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

### **Warning to jury**

**20.** Where on a trial on indictment evidence has been given in accordance with a special measures direction, the judge must give the jury (if there is one) 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.

### **Interpretation etc. of Part II**

**21.—**(1) In this Part—

“eligible witness” means a witness eligible for assistance by virtue of Article 4 or 5;

“live link” has the meaning given by Article 12(6);

“quality”, in relation to the evidence of a witness, shall be construed in accordance with Article 4(5);

“special measures direction” means (in accordance with Article 7(5)) a direction under Article 7.

(2) In this Part references to the special measures available in relation to a witness shall be construed in accordance with Article 6.

(3) In this Part 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.

(4) In the case of any proceedings in which there is more than one accused—

- (a) any reference to the accused in Articles 11 to 16 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, and
- (b) any such direction may be given on the basis of any such determination.

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VALID FROM 02/02/2009

## [<sup>F6</sup>PART 2A

### USE OF LIVE LINK FOR EVIDENCE OF CERTAIN ACCUSED PERSONS

**F6** Pt. 2A (arts. 21A-21C) inserted (2.2.2009) by [Criminal Justice \(Northern Ireland\) Order 2008 \(S.I. 2008/1216 \(N.I. 1\)\)](#), arts. 1(4), **82(2)**; S.R. 2008/472, **art. 2(4)**, Sch. Pt. IV

#### Live link directions

**21A.**—(1) This Article applies to any proceedings (whether in a magistrates' court or before the Crown Court) against a person for an offence.

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

- (a) that the conditions in paragraph (4) or, as the case may be, paragraph (5) are met in relation to the accused; and
- (b) that 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 that time, the conditions are that—

- (a) he suffers from a mental disorder (within the meaning of the Mental Health (Northern Ireland) Order 1986 (NI 4)) or otherwise has a significant impairment of intelligence and social function;
- (b) he is for that reason 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 discharge 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).

The court may exercise this power of its own motion or on an application by a party.

(8) The court must state in open court its reasons for—

- (a) giving or discharging a live link direction, or
- (b) refusing an application for or for the discharge of a live link direction,

and, if it is a magistrates' court, it must cause those reasons to be entered in the Order Book.



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#### **Meaning and effect of live link.**

**21B.**—(1) In Article 21A “live link” means an arrangement by which the accused, while absent from the place where the proceedings are being held, is able—

- (a) to see and hear a person there; and
- (b) to be seen and heard by the persons mentioned in paragraph (2);

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

(2) The persons are—

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

#### **Saving**

**21C.** 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 III**

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

#### *General prohibitions*

#### **Complainants in proceedings for sexual offences**

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

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

#### **Child complainants and other child witnesses**

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

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

(2) For the purposes of paragraph (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 Article applies, and

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- (b) either is a child or falls to be cross-examined after giving evidence in chief (whether wholly or in part)—
  - (i) by means of a video recording made (for the purposes of Article 15) at a time when the witness was a child, or
  - (ii) in any other way at any such time.
- (3) The offences to which this Article applies are—
  - (a) a sexual offence within the meaning of the Criminal Justice (Children) (Northern Ireland) Order 1998;
  - (b) a violent offence within the meaning of that Order;
  - (c) kidnapping, false imprisonment, or an offence under<sup>[F7]</sup> Article 3 or 4 of the Child Abduction (Northern Ireland) Order 1985];;
  - <sup>[F8]</sup>(cc) any offence under any of sections 15 to 21, 47 to 53, 57 to 59, 66 to 72 of the Sexual Offences Act 2003;]
  - (d) any offence (not within any of the preceding sub-paragraphs) which involves an assault on, or injury or a threat of injury to, any person.
- (4) In this Article “child” means—
  - (a) where the offence falls within paragraph (3)(a)<sup>[F8]</sup> or (cc)], a person under the age of 17; or
  - (b) where the offence falls within paragraph (3)(b), (c) or (d), a person under the age of 14.
- (5) For the purposes of this Article “witness” includes a witness who is charged with an offence in the proceedings.

<b>F7</b>	2003 NI 13
<b>F8</b>	2003 c. 42

#### *Prohibition imposed by court*

#### **Direction prohibiting accused from cross-examining particular witness**

- 24.**—(1) This Article applies where, in a case where neither of Articles 22 and 23 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 Article 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 be likely to be improved if a direction were given under this Article, 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 paragraph (2)(a) applies in the case of a witness the court must have regard, in particular, to—

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- (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 Article 23 applies, and (if so) whether Article 22 or 23 operates or would have operated to prevent that person from cross-examining the witness in person;
  - (f) any direction under Article 7 which the court has given, or proposes to give, in relation to the witness.
- (4) For the purposes of this Article—
- (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's evidence shall be construed in accordance with Article 4(5).

#### **Further provisions about directions under Article 24**

**25.**—(1) Subject to paragraph (2), a direction has binding effect from the time it is made until the witness to whom it applies is discharged.

In this Article “direction” means a direction under Article 24.

(2) The court may discharge 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 paragraph (2) “the relevant time” means—

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

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

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

a direction and, if it is a magistrates' court, must cause them to be entered in the Order Book.

(5) Rules of court may make provision—

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

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- (d) 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, a party to the proceedings.

*Cross-examination on behalf of accused*

**Defence representation for purposes of cross-examination**

**26.**—(1) This Article applies where an accused is prevented from cross-examining a witness in person by virtue of Article 22, 23 or 24.

- (2) Where it appears to the court that this Article applies, it must—
  - (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 paragraph (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 must 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 must 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.

[<sup>F9</sup>(5A) The Secretary of State shall pay such amount as appears to him to be reasonable in respect of—

- (a) costs of any person so appointed (including a fee); and
- (b) any expenses properly incurred in providing him with evidence or other material in connection with his appointment.]
- (6) Rules of court may make provision—
  - (a) as to the time when, and the manner in which, paragraph (2) is to be complied with;
  - (b) in connection with the appointment of a legal representative under paragraph (4), and in particular for securing that a person so appointed is provided with evidence or other material relating to the proceedings.

(7) Rules made in pursuance of paragraph (6)(b) may make provision for the application, with such modifications as are specified in the rules, of any of the provisions of Part I of the Criminal Procedure and Investigations Act 1996 (disclosure of material in connection with criminal proceedings).

- (8) For the purposes of this Article—
  - (a) any reference to cross-examination includes (in a case where a direction is given under Article 24 after the accused has begun cross-examining the witness) a reference to further cross-examination;
  - (b) “qualified legal representative” means a legal representative who has a right of audience in relation to the proceedings before the court.

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F9 2003 NI 13

### **Warning to jury**

27.—(1) Where on a trial on indictment an accused is prevented from cross-examining a witness in person by virtue of Article 22, 23 or 24, the judge must give the jury (if there is one) such warning (if any) as the judge considers necessary to ensure that the accused is not prejudiced—

- (a) by any inferences that might be drawn from the fact that the accused has been prevented from cross-examining the witness in person;
- (b) where the witness has been cross-examined by a legal representative appointed under Article 26(4), by the fact that the cross-examination was carried out by such a legal representative and not by a person acting as the accused's own legal representative.

(2) Paragraph (8)(a) of Article 26 applies for the purposes of this Article as it applies for the purposes of Article 26.

## **PART IV**

### **PROTECTION OF COMPLAINANTS IN PROCEEDINGS FOR SEXUAL OFFENCES**

#### **Restriction on evidence or questions about complainant's sexual history**

28.—(1) If at a trial a person is charged with a sexual offence, then, except with the leave of the court—

- (a) no evidence may be adduced, and
- (b) no question may be asked in cross-examination,

by or on behalf of any accused at the trial about any sexual behaviour of the complainant.

(2) The court may give leave in relation to any evidence or question only on an application made by or on behalf of an accused, and may not give such leave unless it is satisfied—

- (a) that paragraph (3) or (5) applies, and
- (b) that a refusal of leave might have the result of rendering unsafe a conclusion of the jury or (as the case may be) the court on any relevant issue in the case.

(3) This paragraph applies if the evidence or question relates to a relevant issue in the case and either—

- (a) that issue is not an issue of consent; or
- (b) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have taken place at or about the same time as the event which is the subject matter of the charge against the accused; or
- (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar—

- (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused, or
- (ii) to any other sexual behaviour of the complaint which (according to such evidence) took place at or about the same time as that event,

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that the similarity cannot reasonably be explained as a coincidence.

(4) For the purposes of paragraph (3) no evidence or question shall be regarded as relating to a relevant issue in the case if it appears to the court to be reasonable to assume that the purpose (or main purpose) for which it would be adduced or asked is to establish or elicit material for impugning the credibility of the complainant as a witness.

(5) This paragraph applies if the evidence or question—

- (a) relates to any evidence adduced by the prosecution about any sexual behaviour of the complainant; and
- (b) in the opinion of the court, would go no further than is necessary to enable the evidence adduced by the prosecution to be rebutted or explained by or on behalf of the accused.

(6) For the purposes of paragraphs (3) and (5) the evidence or question must relate to a specific instance (or specific instances) of alleged sexual behaviour on the part of the complainant (and accordingly nothing in those paragraphs is capable of applying in relation to the evidence or question to the extent that it does not so relate).

(7) Where this Article 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—

- (a) it shall 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) it shall not cease to do so in the event of that person or those persons pleading guilty to, or being convicted of, that charge.

(8) Nothing in this Article authorises any evidence to be adduced or any question to be asked which cannot be adduced or asked apart from this Article.

### **Interpretation and application of Article 28**

**29.**—(1) In Article 28—

- (a) “relevant issue in the case” means any issue falling to be proved by the prosecution or defence in the trial of the accused;
- (b) “issue of consent” means any issue whether the complainant in fact consented to the conduct constituting the offence with which the accused is charged (and accordingly does not include any issue as to the belief of the accused that the complainant so consented);
- (c) “sexual behaviour” means any sexual behaviour or other sexual experience, whether or not involving any accused or other person, but excluding (except in Article 28(3)(c)(i) and (5)(a)) anything alleged to have taken place as part of the event which is the subject matter of the charge against the accused; and
- (d) subject to any order made under paragraph (2), “sexual offence” shall be construed in accordance with Article 3.

(2) The Secretary of State may by order make such provision as he considers appropriate for adding or removing, for the purposes of Article 28, any offence to or from the offences which are sexual offences for the purposes of this Order by virtue of Article 3.

(3) Article 28 applies in relation to the following proceedings as it applies to a trial, namely—

- (a) proceedings before a magistrates' court conducting a preliminary investigation or preliminary inquiry into an offence,
- (b) the hearing of an application under paragraph 4(1) of Schedule 1 to the Children's Evidence (Northern Ireland) Order 1995 (application to dismiss charge following notice of transfer of case to Crown Court),

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- (c) any hearing held, between conviction and sentencing, for the purpose of determining matters relevant to the court's decision as to how the accused is to be dealt with, and
- (d) the hearing of an appeal,

and references (in Article 28 or this Article) to a person charged with an offence accordingly include a person convicted of an offence.

### **Procedure on applications under Article 28**

**30.**—(1) An application for leave shall be heard in private and in the absence of the complainant. In this Article “leave” means leave under Article 28.

(2) Where such an application has been determined, the court must state in open court (but in the absence of the jury, if there is one)—

- (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, must cause those matters to be entered in the Order Book.

(3) Rules of court may make provision—

- (a) requiring applications for leave to specify, in relation to each item of evidence or question to which they relate, particulars of the grounds on which it is asserted that leave should be given by virtue of paragraph (3) or (5) of Article 28;
- (b) 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;
- (c) 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.

VALID FROM 04/05/2010

## **PART V**

### **COMPETENCE OF WITNESSES AND CAPACITY TO BE SWORN**

#### *Competence of witnesses*

#### **Competence of witnesses to give evidence**

**31.**—(1) At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence.

(2) Paragraph (1) has effect subject to paragraphs (3) and (4).

(3) A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who is able to—

- (a) understand questions put to him as a witness, and
- (b) give answers to them which can be understood.

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(4) A person charged in criminal proceedings is not competent to give evidence in the proceedings for the prosecution (whether he is the only person, or is one of two or more persons, charged in the proceedings).

(5) In paragraph (4) the reference to a person charged in criminal proceedings does not include a person who is not, or is no longer, liable to be convicted of any offence in the proceedings (whether as a result of pleading guilty or for any other reason).

### **Determining competence of witnesses**

**32.—**(1) Any question whether a witness in criminal proceedings is competent to give evidence in the proceedings, whether raised—

- (a) by a party to the proceedings, or
- (b) by the court of its own motion,

shall be determined by the court in accordance with this Article.

(2) It is for the party calling the witness to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings.

(3) In determining the question mentioned in paragraph (1) the court shall treat the witness as having the benefit of any directions under Article 7 which the court has given, or proposes to give, in relation to the witness.

(4) Any proceedings held for the determination of the question shall take place in the absence of the jury (if there is one).

(5) Expert evidence may be received on the question.

(6) Any questioning of the witness (where the court considers that necessary) shall be conducted by the court in the presence of the parties.

### *Giving of sworn or unsworn evidence*

### **Determining whether witness to be sworn**

**33.—**(1) Any question whether a witness in criminal proceedings may be sworn for the purpose of giving evidence on oath, whether raised—

- (a) by a party to the proceedings, or
- (b) by the court of its own motion,

shall be determined by the court in accordance with this Article.

(2) The witness may not be sworn for that purpose unless—

- (a) he has attained the age of 14, and
- (b) he has a sufficient appreciation of the solemnity of the occasion and of the particular responsibility to tell the truth which is involved in taking an oath.

(3) The witness shall, if he is able to give intelligible testimony, be presumed to have a sufficient appreciation of those matters if no evidence tending to show the contrary is adduced (by any party).

(4) If any such evidence is adduced, it is for the party seeking to have the witness sworn to satisfy the court that, on a balance of probabilities, the witness has attained the age of 14 and has a sufficient appreciation of the matters mentioned in paragraph (2)(b).

(5) Any proceedings held for the determination of the question mentioned in paragraph (1) shall take place in the absence of the jury (if there is one).



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(6) Expert evidence may be received on the question.

(7) Any questioning of the witness (where the court considers that necessary) shall be conducted by the court in the presence of the parties.

(8) For the purposes of this Article a person is able to give intelligible testimony if he is able to—

- (a) understand questions put to him as a witness, and
- (b) give answers to them which can be understood.

#### **Reception of unsworn evidence**

**34.—**(1) Paragraphs (2) and (3) apply to a person (of any age) who—

- (a) is competent to give evidence in criminal proceedings, but
- (b) (by virtue of Article 33(2)) is not permitted to be sworn for the purpose of giving evidence on oath in such proceedings.

(2) The evidence in criminal proceedings of a person to whom this paragraph applies shall be given unsworn.

(3) A deposition of unsworn evidence given by a person to whom this paragraph applies may be taken for the purposes of criminal proceedings as if that evidence had been given on oath.

(4) A court in criminal proceedings shall accordingly receive in evidence any evidence given unsworn in pursuance of paragraph (2) or (3).

(5) Where a person ( “the witness”) who is competent to give evidence in criminal proceedings gives evidence in such proceedings unsworn, no conviction, verdict or finding in those proceedings shall be taken to be unsafe for the purposes of any of sections 2(1), 12(2) and 13A(3) of the Criminal Appeal (Northern Ireland) Act 1980 (grounds for allowing appeals) by reason only that it appears to the Court of Appeal that the witness was a person falling within Article 33(2) (and should accordingly have given his evidence on oath).

#### **Penalty for giving false unsworn evidence**

**35.—**(1) This Article applies where a person gives unsworn evidence in criminal proceedings in pursuance of Article 34(2) or (3).

(2) If such a person wilfully gives false evidence in such circumstances that, had the evidence been given on oath, he would have been guilty of perjury, he shall be guilty of an offence and liable on summary conviction to—

- (a) imprisonment for a term not exceeding 6 months, or
- (b) a fine not exceeding level 3 on the standard scale,

or both.

(3) In relation to a person under the age of 14, paragraph (2) shall have effect as if for the words following “on summary conviction” there were substituted “to a fine not exceeding level 1 on the standard scale”.

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## PART VI

### RESTRICTIONS ON USE OF EVIDENCE

#### **Inferences from silence not permissible where no prior access to legal advice**

**36.**—(1) The Criminal Evidence (Northern Ireland) Order 1988 shall be amended as follows.

(2) In Article 2 (interpretation and savings), in paragraph (2) there shall be inserted at the appropriate place—

““authorised place of detention” means—

- (a) a police station; or
- (b) any other place prescribed for the purposes of this Order by order made by the Secretary of State;

and an order made under this paragraph shall be subject to annulment in pursuance of a resolution of either House of Parliament in like manner as a statutory instrument and section 5 of the Statutory Instruments Act 1946 shall apply accordingly.”

(3) In Article 3 (circumstances in which inferences may be drawn from accused's failure to mention particular facts when questioned or charged), after paragraph (2) there shall be inserted—

“(2A) Where the accused was at an authorised place of detention at the time of the failure, paragraphs (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in paragraph (1).”

(4) In Article 5 (inferences from failure or refusal to account for objects, marks, etc.), after paragraph (4) there shall be inserted—

“(4A) Where the accused was at an authorised place of detention at the time of the failure or refusal, paragraphs (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.”

(5) In Article 6 (inferences from failure or refusal to account for presence at a particular place), after paragraph (3) there shall be inserted—

“(3A) Where the accused was at an authorised place of detention at the time of the failure or refusal, paragraphs (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.”

#### **Removal of restriction on use of evidence from computer records**

**37.** Article 68 of the Police and Criminal Evidence (Northern Ireland) Order 1989 (evidence from computer records inadmissible unless conditions relating to proper use and operation of computer shown to be satisfied) shall cease to have effect.

## PART VII

### FINAL PROVISIONS

#### **Orders**

**38.**—(1) An order made under Article 6(5) or 29(2) shall be subject to annulment in pursuance of a resolution of either House of Parliament in like manner as a statutory instrument and section 5 of the Statutory Instruments Act 1946 shall apply accordingly.

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(2) Any order made by the Secretary of State under this Order may contain such incidental, supplemental, saving or transitional provisions as the Secretary of State thinks fit.

### General supplementary provisions

**39.**—(1) Rules of court may make such provision as appears to the authority making them to be necessary or expedient for the purposes of this Order (and nothing in this Order shall be taken to affect the generality of any statutory provision conferring power to make such rules).

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

### Minor and consequential amendments, transitional provisions and repeals

#### *Para. (1)—Amendments*

(2) The transitional provisions and savings in Schedule 2 shall have effect.

#### *Para. (3)—Repeals*

#### **Commencement Information**

**I2** [Art. 40](#) partly in operation; [art. 40](#) not in operation at date of making see [art. 1\(2\)](#); [art. 40](#) in operation for specified purposes at 30.6.2003 by [S.R. 2003/323](#), [art. 2](#), [Sch.](#); [art. 40](#) in operation for certain purposes at 1.12.2003 by [S.R. 2003/476](#), [art. 2](#); [art. 40\(1\)](#) in operation for certain purposes at 8.11.2004 by [S.R. 2004/486](#), [art. 2](#); [art. 40\(1\)](#) in operation for certain purposes at 21.12.2004 by [S.R. 2004/531](#), [art. 2](#); [art. 40](#) in operation for specified purposes at 4.5.2010 by [S.R. 2010/142](#), [art. 2](#), [Sch.](#)

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## SCHEDULES

### *Schedule 1—Amendments*

#### SCHEDULE 2

Article 40(2).

#### TRANSITIONAL PROVISIONS AND SAVINGS

##### *Interpretation*

1.—(1) In this Schedule—

“the 1989 Order” means the Police and Criminal Evidence (Northern Ireland) Order 1989;

“commencement date”, in relation to any provisions of this Order and proceedings of any description, means the date on which those provisions come into operation in relation to such proceedings;

“continuing proceedings” (except in paragraph 2) means proceedings instituted before the commencement date;

“existing special measures power” means any power of the court to make an order or give leave, in the exercise of its inherent jurisdiction, for the taking of measures in relation to a witness which are similar to those which could be provided for by a special measures direction.

(2) For the purposes of this Schedule—

(a) proceedings other than proceedings on appeal are to be taken to be instituted—

(i) where a justice of the peace issues a summons under Article 20 of the Magistrates' Courts (Northern Ireland) Order 1981, when the complaint for the offence is made;

(ii) where a justice of the peace issues a warrant for the arrest of any person under that Article, when the complaint for the offence is made;

(iii) where a person is charged with the offence after being taken into custody without a warrant, when he is informed of the particulars of the charge;

(iv) where an indictment is presented under the authority of section 2(2)(c), (d), (e) or (f) of the Grand Jury (Abolition) Act (Northern Ireland) 1969, when the indictment is presented to the court;

and where the application of this head would result in there being more than one time for the institution of the proceedings, they shall be taken to have been instituted at the earliest of those times; and

(b) proceedings on appeal are to be taken to be instituted at the time when the notice of appeal is given or (as the case may be) the reference under section 10 or 12 of the Criminal Appeal Act 1995 is made.

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### *Special measures under Part II*

2.—(1) A special measures direction may be given in relation to a witness in continuing proceedings unless the court has before the specified date—

- (a) given leave in relation to the witness in connection with those proceedings under Article 81 (evidence through television links) or Article 81A (video recordings of testimony of child witnesses) of the 1989 Order, or
- (b) exercised any existing special measures power in relation to the witness in connection with those proceedings.

(2) The repeals made by this Order shall not affect the continued operation in relation to a witness in continuing proceedings of Article 81 or 81A of the 1989 Order where before the specified date leave was given in relation to the witness in connection with those proceedings by virtue of Article 81 or Article 81A, as the case may be.

(3) Nothing in this Order affects the continued operation in relation to a witness in continuing proceedings of any order made or leave given under any existing special measures power exercised by the court before the specified date in relation to the witness in connection with those proceedings.

(4) In this paragraph—

- (a) “continuing proceedings” means proceedings instituted before the specified date;
- (b) “the specified date”, in relation to a witness in any proceedings, means such date as may be specified by the Secretary of State in a notice given to the court in question under Article 6(2), where the date is expressed to apply—
  - (i) for the purposes of this paragraph, and
  - (ii) in relation to any description of witnesses and proceedings within which the witness and the proceedings fall.

### *Protection of witnesses from cross-examination by accused in person*

3. Nothing in Part III applies in relation to proceedings instituted before the commencement date for that Part.

### *Protection of complainants in proceedings for sexual offences*

4.—(1) Nothing in Part IV applies in relation to continuing proceedings in which leave has been given before the commencement date for that Part—

- (a) under Article 4 of the Sexual Offences (Northern Ireland) Order 1978, or
- (b) (in the case of proceedings to which Article 4 does not apply) in the exercise of any similar power of the court exercisable by virtue of its inherent jurisdiction.

(2) Nothing in this Order affects the continued operation of any leave so given in relation to any such proceedings.

VALID FROM 04/05/2010

### *Competence of witnesses and capacity to be sworn*

5. Nothing in Part V applies in relation to proceedings instituted before the commencement date for that Part.

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### *Inferences from silence*

6. The amendments made by Article 36—
  - (a) apply only to proceedings instituted on or after the commencement date for that Article; but
  - (b) so apply whether the relevant failure or refusal on the part of the accused took place before or after that date.

### *Schedule 3—Repeals*

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